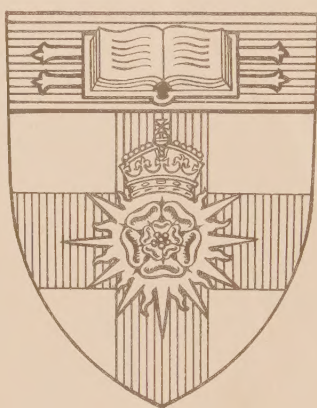


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The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

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ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, THIRD EDITION

The reference 15 ENCY. FORMS. & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

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CORRIGENDA

[1956] 2 All E.R.

- p. 834. *B.P. REFINERY (KENT), LTD. v. KENT RIVER BOARD.* Line D.4: for "when the rate was made" read "when the amount of the assessment was adopted for the purposes of fixing the annual value on which the rate was subsequently based."

[1956] 3 All E.R.

- pp. 97 *LYCETT-GREEN v. LYCETT-GREEN.* Counsel and Solicitors: *C. Sleeman*, instructed by and 99. *Ashurst, Morris Crisp & Co.*, appeared for the co-respondent, not for the wife.
p. 241. *GILL v. GILL.* Line 1.6: for "husband's solicitor" read "wife's solicitor".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
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JOHN RIGBY (HAULAGE), LTD. v. RELIANCE MARINE
INSURANCE CO., LTD.

D [COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 14, 15, 16,
June 18, 19, 1956.]

*Carriage of Goods—Sub-contractor—Goods delivered by order of contractors to
vehicle apparently that of sub-contractor—Theft of goods—Whether goods
entrusted to contractors.*

E *Insurance—Liability insurance—Goods—Insurance of haulage contractors against
liability for loss of goods in transit carried by sub-contractors—Goods delivered
by the contractors' order to vehicle apparently that of sub-contractors—Theft
of goods—Whether goods held by contractors "in trust" within policy.*

The plaintiffs were road transport contractors and having only one lorry
most of their work was performed through sub-contractors. They were in-
sured by the defendants under a policy which provided that the subject-
matter of the policy was "The legal liability of the assured for loss of or
damage to . . . general merchandise of every description belonging to the
assured or held by the assured in trust for which the assured are them-
selves responsible whilst in transit per road conveyances" in the United
Kingdom. On the defendants' proposal form, in answer to the question
"Registration numbers of all vehicles to be insured" the plaintiffs had
written in "one vehicle, registration number BTB 807, otherwise sub-
contracted".

In April, 1955, the plaintiffs orally agreed with D.R. & Co. to carry for
reward to consignees in Birmingham a consignment of copper ingots then
lying at Liverpool docks in the custody of D.R. & Co. On Apr. 18, 1955,
X presented himself at the plaintiffs' offices and informed the plaintiffs'
manager that he was a lorry driver employed by S. & Co. (one of the
plaintiffs' sub-contractors), and that his lorry was available to take a load
to Birmingham. The plaintiffs' manager gave X a collection order in the
name of S. & Co., in respect of 440 copper ingots, and wrote in the registra-
tion number of X's lorry. X then proceeded to the docks where he handed
the collection order to D.R. & Co.'s representative who loaded the copper
on to the lorry and gave X a delivery note which bore the names of D.R.
& Co., and the consignees, the place where the goods were to be delivered
and the registration number of the lorry. The goods were never delivered
to the consignees, and it was subsequently discovered that X was not
employed by S. & Co. and that the lorry he was driving bore false number
plates. D.R. & Co. claimed the value of the goods (£3,338 3s. 8d.) from the
plaintiffs who admitted liability. The plaintiffs claimed under the policy
the amount of the loss from the defendants.

Held: the collection order was an offer by the plaintiffs to D.R. & Co. to carry the copper to Birmingham through a sub-contractor in an identified lorry which was accepted by D.R. & Co.; on the copper being loaded on the lorry and delivered to X, the plaintiffs became legally liable to carry the copper safely, the copper was "held in trust" by them within the meaning of those words in the policy, and they were entitled to recover from the defendants under the policy the amount of the loss (£3,338 3s. 8d.).

Lake v. Simmons ([1927] A.C. 487) considered and distinguished.
Appeal allowed.

[**Editorial Note.** Reference was made in argument to the proposal form for the purpose of limiting or defining the risk to which the policy extended (compare, generally, as regards the use of a proposal form to define the risk, 18 HALSBURY'S LAWS (2nd Edn.) 544, para. 864, text and notes (o)-(t)). In the present case the answer given to the material question, which was that stated towards the beginning of the headnote, did not have the effect of limiting the risk defined by the policy, but it was intimated that the contents of the proposal form would only be relevant to limit the scope of the risk specified in the policy on proceedings for rectification (see p. 12, letter A, post; but compare p. 6, letter C, post, and p. 11, letter G, post).]

As to transfer of possession obtained by the transferee by deceit, see 2 HALSBURY'S LAWS (3rd Edn.) 94, para. 190, note (e).

As to the scope of liability insurance, see 18 HALSBURY'S LAWS (2nd Edn.) 543, para. 864; and as to the person with whom a carrier contracts, see 4 HALSBURY'S LAWS (3rd Edn.) 192, para. 472.]

Cases referred to:

- (1) *Lake v. Simmons*, [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233; 35 Digest 97, 64.
- (2) *Waters v. Monarch Life Assurance Co.*, (1856), 5 E. & B. 870; 25 L.J.Q.B. 102; 26 L.T.O.S. 217; 119 E.R. 705; 29 Digest 311, 2568.
- (3) *Griffiths v. Fleming*, [1909] 1 K.B. 805; 78 L.J.K.B. 567; 100 L.T. 765; 29 Digest 349, 2826.

Appeal.

The plaintiffs appealed from an order of BARRY, J., dated Dec. 16, 1955, whereby he held that the defendants were not liable under a policy of insurance made between them and the plaintiffs for a loss by the plaintiffs.

The facts appear in the judgment of SINGLETON, L.J.

F. W. Beney, Q.C., and *Andrew Rankin* for the plaintiffs.

H. I. Nelson, Q.C., and *J. M. Davies* for the defendants.

SINGLETON, L.J.: The plaintiffs, John Rigby (Haulage), Ltd., are road transport contractors. They have only one lorry, and the main part of their business is done through sub-contractors. They have the names of a number of sub-contractors on their books, and it frequently happens that a lorry driver of one of the sub-contractors who has taken a load to Liverpool calls at their office in Canning Place to ask if there is a load for his return journey. One of the companies with whom the plaintiffs sub-contracted was the Shenstone Transport Co., Ltd., of Birmingham. In April, 1955, there was lying at No. 1 South Canada Dock, Liverpool, a considerable part of a large consignment of copper ingot bars ex the s.s. Samanco. The copper bars were in the custody of David Rees & Co., Ltd., general shipping agents, who in the documents before us are described as "the principals". The goods, the ingot bars, had to be transported to Metal Sales, Ltd., a subsidiary company of Imperial Chemical Industries, Ltd., at Perry Barr, Birmingham. The plaintiffs entered into an oral contract or arrangement with the principals that they would carry for reward such quantities of the ingot bars for the carriage of which they had available from time to time sufficient transport.

A There is an agreed statement of facts, para. 9 of which reads:

“ During the morning of Apr. 18, 1955, a person (hereinafter referred to as ‘X’) who was not personally known to [the temporary manager of the plaintiffs, a man called Newton] called at the plaintiffs’ said office and saw the said Newton who was in charge of the office in the absence of [the manager]. X informed Newton that he was a driver employed by Shenstone Transport Co., Ltd., of Birmingham; that he was the driver of a ten ton Bedford articulated lorry; and that after delivering the load of goods that was then on his lorry he was returning to Birmingham and was available to take a load of goods on his return journey. X was not employed by the Shenstone Transport Co., Ltd. 10. When Newton commenced his employment with the plaintiffs on Apr. 18, 1955, he was aware of the contract with the principals and that there was still a quantity of ingot bars to be carried to Birmingham. In view of the information given to him by X which Newton believed Newton inspected the loading book and ascertained that Shenstone Transport Co., Ltd. were a firm to whom the plaintiffs sub-contracted their work. He thereupon issued to X a collection order (Document ‘A’) in respect of 440 of the aforesaid quantity of ingot bars putting on the collection order the name of Shenstone Transport Co., Ltd., and the lorry registration number given to him by X, namely JOF 745. 11. Later on the said day X went to the dock shed at No. 1 South Canada Dock Liverpool where a quantity of the said goods were then lying. There was a representative of the principals present at the shed and X handed to him the collection order. 440 ingot bars from the said quantity were then loaded on to the lorry driven by X in sets of 22 under the supervision of the said representative of the principals and a dock checker. The load was then sheeted by X who was then given a delivery note (Document ‘B’—specimen) in duplicate by the said representative of the principals. 12. The said lorry did carry number plates bearing the registration JOF 745 but the same were false in that the said registration was that of a private motor car registered in the City of Birmingham. 13. The value of the said 440 ingot bars is £3,338 3s. 8d. and the total weight of the same was 9 tons 19 cwt. 1 qr. 26 lb. 14. The said delivery notes bore the name and description of the principals and contained inter alia the name and description of the consignees; the place where the goods were to be delivered; and the registration number of the lorry carrying the load in respect of which the notes were issued together with the name of the driver of the same. 15. Upon delivery of the load of goods carried by his lorry the driver of the same should give both delivery notes to the consignees or their representative who retains one and returns the other to the driver after signing it so as to acknowledge receipt of the goods described in the same. The latter delivery note is then given by the driver of the lorry to his employers who in turn despatch it to the firm on whose behalf they carried the goods described in the delivery note. 16. The aforesaid dock checker after checking the load at the dock shed and being satisfied that only 440 ingot bars had been loaded on to the lorry JOF 745 issued to X a document which acknowledged the fact that the load on the said lorry had been checked by the said dock checker and which document X was required to hand to the police officer who was on duty at the material time at the gates of No. 1 South Canada Dock Liverpool aforesaid. The said document was given to the said police officer by X as he left the said dock. 17. X did not deliver the ingot bars loaded on to his lorry as hereinbefore appears to the consignees whose address was given in the delivery notes handed to him by the representative of the principals nor have the same been re-delivered to either the plaintiffs or the said principals. 18. The whereabouts of X and the said ingot bars are not known to the plaintiffs or the defendants or the said principals

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despite extensive inquiries by the police who were informed on or about Apr. 23, 1955, of the fact that the said ingot bars had not been delivered pursuant to the instructions contained in the said delivery notes."

That is a sufficient statement of the facts for the purposes of this case. The lorry, the driver of the lorry, and some ten tons of copper ingot bars worth over £3,300, disappeared and no trace has been found of any of them.

In due course a claim was made against the plaintiffs on behalf of the owners of the goods. On June 3, 1955, David Rees & Co., Ltd., the principals, wrote to the plaintiffs in this action:

"s.s. Samanco, Liverpool, March, 1955. With reference to the 440 copper ingot bars ex the above and lost by you in transit to Messrs. I.C.I., Ltd., Birmingham. Kindly note, our principals Messrs. Metal Sales Co., Ltd., would be obliged if you will let them have a settlement of their claim on you for £3,338 3s. 8d. in respect of this loss as they are anxious to finalise their figures for the steamer. In view of this we shall be obliged if you will give the matter your immediate attention."

On June 7, Messrs. Layton & Co., solicitors for the plaintiffs in this action, wrote to David Rees & Co., Ltd.:

"Dear Sirs. John Rigby (Haulage), Ltd. and Yourselfs. Copper ex s.s. Samanco. Your letter of the 3rd instant addressed to John Rigby (Haulage), Ltd. has been passed to us and we are the solicitors for that company. Despite this we are unfortunately not in a position to deal with your request for settlement of the claim of £3,338 3s. 8d. This is due to a difficult question which has arisen between our clients and their insurers, Reliance Marine Insurance Co., Ltd. Our clients were under the impression that they were fully covered against risks of this nature, and having studied their policy we share their opinion. However, there is now apparently a danger that the Reliance Marine Insurance Co., Ltd. will repudiate liability, although upon what grounds we do not know. Should this happen we shall be acting for John Rigby (Haulage), Ltd. in connection with your claim. On the other hand, if, as we hope, the insurance company agree that they are liable under the terms of the policy then the claim will be handled by the insurance company's solicitors, and we as a firm will have no further interest in the matter. You will, therefore, see the difficulty in which we are placed, and the reason why we cannot at the moment assist you. Naturally if liability is accepted under the policy we are not in a position to say what action the insurance company's solicitors will take regarding your claim, i.e., whether or not it will be admitted. You may rest assured that we and our clients are doing everything possible to expedite a definite decision in the matter."

The plaintiffs had given all the information they were asked to give. The defendants then had been considering the matter for some weeks, and they went on considering it for some further time. It appears to me that the plaintiffs had no answer to the claim which was made against them. They had entered into a contract with David Rees & Co., Ltd. They had given them authority to hand the goods to the man whom they sent with the lorry, the number of which they gave. They were responsible in damages for breach of contract, or perhaps in an action of detainue. As the second letter I read shows, the plaintiffs considered that they were insured against the risk; but, as the defendants did not pay, they commenced this action against them on Aug. 11, 1955. Points of claim were delivered on Oct. 7, 1955. Therein the plaintiffs set out the facts to which I have referred, and they plead in para. 7:

"By reason of the premises the plaintiffs are legally liable to pay to Metal Sales Co., Ltd. the said sum of £3,338 3s. 8d. in respect of the loss of the said goods. 8. Further by reason of the premises the defendants

A are liable under the said policy to pay to the plaintiffs the said sum of £3,338 3s. 8d. but the defendants have failed and neglected to pay to the plaintiffs the said sum or any part thereof. And the plaintiffs claim:—(i) a declaration that they were insured by and that they are entitled to be indemnified in the sum of £3,338 3s. 8d. by the defendants against the
B said loss by virtue of the provisions of the said policy; (ii) an order for payment of the said sum of £3,338 3s. 8d. due from the defendants to the plaintiffs under the said policy in respect of the said loss.”

Points of defence were delivered on Nov. 16, 1955, and I will read them:

“ 1. The defendants admit the making of the policy of insurance referred to in para. 1 of the points of claim and they will refer to the said policy for the full terms and effect thereof. 2. The defendants further admit the making of the agreement referred to in para. 4 of the points of claim [that is the oral agreement between the plaintiffs and David Rees & Co., Ltd.] and they admit that the plaintiffs issued a collection order to the person referred to in para. 5 of the points of claim and thereby purported to make a sub-contract with Shenstone Transport, Ltd. It was an implied term of the said agreement that the plaintiffs might enter into sub-contracts for the carriage of the said ingot bars. 3. The defendants deny that the plaintiffs are responsible for the alleged loss (which is not admitted) or that they are legally liable to the said David Rees & Co., Ltd., and/or Metal Sales, Ltd. in the said sum or at all. 4. If (which is denied) the plaintiffs are responsible for loss of the said ingot bars the defendants further deny that they are liable under the said policy to pay to the plaintiffs the said or any sum. The alleged loss was not a loss in transit and the said ingot bars were not held in trust by the plaintiffs. 5. The defendants deny that the plaintiffs are entitled to the relief claimed or to any relief.”

I thought it right to refer to the points of defence because of a question which was raised on the hearing before this court. Counsel for the defendants
F took a point arising on the proposal form; and I will deal with that point now, in order to get it out of the way. The proposal form, document “C” in the case, is on the form of the Guardian Assurance Co., Ltd. We were told that the Reliance Marine Insurance Co., Ltd., the defendants, is a subsidiary company of the Guardian Assurance Co., Ltd. However, the proposal which is put before us is addressed to the Guardian Assurance Co. It is headed “Goods-in-transit Insurance”; the name of the proposer is sought and given, and likewise
G the address and the occupation. The next information desired, and the one on which this point arises, is:

“ 1. State (a) kinds of goods generally carried—(Answer): General merchandise; (b) Radius of transit—(Answer): Great Britain. (c) Whether A, B or C licence—(Answer): All; (d), [the important one,] Registration
H number of all vehicles to be insured.”

From that it rather looks as though the proposal form was a form intended to be used in regard to the insurance of vehicles. The answer to (d) is: “One vehicle, registration number BTB 807, otherwise sub-contracted”. The insurance which was proposed was insurance against third-party risks; against claims, that is, made on the plaintiffs in respect of goods which were lost or damaged
I while in transit from one place to another, the plaintiffs being contracting carriers. The answer “otherwise sub-contracted” appears at first sight to be no more and no less than an explanation given by the plaintiffs to the insurers of how it was that the plaintiffs only had one lorry to carry goods of the value stated later in the proposal. Counsel for the defendants submitted that, in view of a footnote to the proposal form that the proposal is to be “the basis of the contract”, and in view of some words on the top line of the policy itself, the defendants were only covering claims which arose out of the goods lost

or damaged from, or in, the one vehicle belonging to the plaintiffs or other vehicles in respect of which there was a definite sub-contract. He placed reliance on the words "otherwise sub-contracted". I wondered at the time whether that submission was covered by the pleading to which I have referred. It is not mentioned in the judgment. Counsel for the plaintiffs does not remember its being argued in the court below, though he accepts it from counsel for the defendants that the point was taken by him. It rather appears that not much importance was attached to it, if and so far as it was understood to be a separate point.

I do not think it is right to say that, by reason of that answer in the proposal form, the policy covers only goods carried in vehicles which are the subject-matter of a sub-contract. I do not see that that follows. The information required was as to the registration numbers of vehicles to be insured. The assured quite rightly disclosed the fact that the greater part of their haulage work was done by sub-contracting. The liability of the insurance company on this policy depends on the policy itself. In my judgment, the answer in the proposal to which I have referred is of no importance, nor does it limit the rights of the plaintiffs. I do not think it is pleaded, as it should have been if the point was seriously taken. It is, however, one of the agreed facts stated in para. 19 of the agreed statement of facts that in pursuance of the proposal form and declaration made to them by the plaintiffs the defendants issued to the plaintiffs the policy on which this action is brought. In view of that admission or agreement, I need say no more on the fact that there was no proposal to the defendants. The proposal was to the Guardian Assurance Co., Ltd. It may be that the admission or agreement would not have been in the same terms if the point taken by counsel had appeared in the points of defence as an issue between the parties.

Now I come to the policy itself on which the appeal falls to be determined. The first clause is:

"Whereas it hath been proposed to the Reliance Marine Insurance Co., Ltd. by John Rigby (Haulage), Ltd., [the premium is stated, the value of the goods under risk and the period is stated,] And it is also agreed and declared that the subject-matter of this policy as between the insured and the said company so far as concerns this policy shall be and is as follows upon: The legal liability of the assured for loss of or damage to timber, oil, machinery and general merchandise of every description belonging to the assured or held by the assured in trust for which the assured are themselves responsible whilst in transit per road conveyances within England, Scotland or Wales. Risk to commence from the time the goods are put in motion at the point of departure preparatory to the transit and to continue until arrival at destination and during loading and unloading. Subject to conditions as attached."

That is the policy issued by the Reliance Marine Insurance Co., Ltd. and bearing the signature of its chairman. It was under the last clause in the policy which I have read that the plaintiffs put their case. They claimed that they were under a legal liability to meet the claim in respect of the missing goods. The defendants disputed the claim made against them and said that the goods did not belong to the assured, nor were they held by them in trust, even if it could be said that they (the plaintiffs) were responsible in damages for the loss.

The claim came before BARRY, J., and on Dec. 16, 1955, the learned judge gave judgment in favour of the defendants. He said:

"Looking at the facts set out in para. 5 of the memorandum, it is, I think, difficult to envisage any contractual obligations which flowed from the oral agreement made between the plaintiffs and Rees & Co., Ltd. in the terms described in that paragraph. It is, I think, much more probable that no binding contract was formed until the plaintiffs proffered a lorry at the docks

A and this lorry was loaded with ingots belonging to Metal Sales, Ltd. When that had been done, then a binding contract for the carriage of those goods, on the terms of the over-all arrangement described in para. 5, would, of course, be constituted."

B That is in accordance with the argument submitted by counsel on behalf of the plaintiffs. I think counsel for the defendants was not prepared to admit that there was a contract. The learned judge, in another passage, said:

C "It is true that the relevant words of the policy refer to 'the legal liability of the assured', but this liability, as I construe the policy, is only a liability for loss or damage to merchandise belonging to the assured or held by the assured in trust, for which the assured are themselves responsible. In my judgment, the plaintiffs, in order to recover, must establish that in truth these goods were held by them in trust, and this, I think, they have failed to do. The goods were stolen from Metal Sales, Ltd. or their agents, in Liverpool and never came into the plaintiffs' possession. The defendants are not, as I see it, affected by any estoppel which may arise between the plaintiffs and their customers, David Rees, or Metal Sales, Ltd. The defendants are, I think, entitled to insist that, on the true facts, this loss must be shown to fall within the policy. Any other construction would, I think, involve the substitution of the words 'held in trust or deemed to be held in trust' for the existing language of the policy . . . In these circumstances, and, as I say, with some regret, in that I do feel that the plaintiffs are placed in a position of very considerable hardship, or may be placed in a position of very considerable hardship as a result of the dishonesty of this man, none the less I have come to the conclusion that this claim must fail and that there must be judgment for the defendants."

E The plaintiffs appeal against the judgment of BARRY, J.

However much sympathy one may feel for the plaintiffs, and however much one may regret the position in which they have been placed by the repudiation F by the defendants of their claim, it must be realised that the court is solely concerned with the question of liability. Counsel for the defendants submitted that X was a thief and that the plaintiffs could not be said to have received the goods or to have held them in trust. He said that X stole the collection order. That is not in accord with the definition of "larceny" in the Larceny Act, 1916, for X did not take the collection order without the consent or against G the will of the true owners, nor did he intend to deprive the owners permanently of it. He did with it just that which he was expected to do.

The question whether the goods were held in trust by the assured is of greater difficulty. We were referred to *Lake v. Simmons* (1) ([1927] A.C. 487), and in particular to the speeches of VISCOUNT HALDANE and VISCOUNT SUMNER. In that case, the plaintiff, a jeweller, was insured under a Lloyd's policy against loss H or damage to jewels by (inter alia) theft. The policy contained a clause exempting the insurers from liability in the case of

"loss by theft or dishonesty committed by . . . any customer or broker or broker's customer in respect of goods entrusted to them by the assured."

I A woman, E.E., who had previously bought some articles at the plaintiff's shop, induced the plaintiff to let her have possession of two pearl necklets by fraudulently representing that she was the wife of a certain person and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval with a view to purchase by them. E.E. disposed of the necklets for her own benefit. In an action on the policy to recover the value of the necklets the insurers pleaded the exemption clause. The trial judge found that E.E.'s conduct was fraudulent throughout, and held that she was guilty of larceny by a trick, and the House of Lords accepted these

conclusions. It was held, first, that the plaintiff had not entrusted the necklets to E.E., because there was no real consent by him to her obtaining possession of them, and, secondly, that quoad the particular goods, E.E. was not a customer within the meaning of the clause. The decision of the majority of the Court of Appeal was set aside and the judgment of the judge of first instance restored. I do not consider that great help is given by the decision in that case to the solution of the question before the court. The facts are wholly different. There was in that case no third party who gave any instruction. There was no document such as the collection order.

The question in the present case seems to me to depend on the documents, coupled with the usual course of business in a case in which sub-contracting forms an essential feature, to the knowledge of the insurance company. The words "in trust" in the policy do not mean that the goods are held under some form of legal trust. I would draw attention to words used in the judgments in *Waters v. Monarch Life Assurance Co.* (2) ((1856), 5 E. & B. 870). The plaintiff in that case made with the defendants a policy of insurance against fire, in which the plaintiff was described as a corn and flour factor; the policy was, amongst other things, on goods in his warehouses, and on "goods in trust or on commission therein". The defendants covenanted to make good any damage by fire to the property insured. The plaintiff was a wharfinger and warehouseman: he had in his warehouses goods belonging to his customers, which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance; nor were they informed of the existence of the policy. The plaintiff's warehouse was consumed by fire, with all the goods in it. The defendants paid the value of the plaintiff's own goods, and the amount of his lien on his customers' goods; but refused to pay the value of the customers' interest in the value of the goods beyond the lien. It was held that the goods of the customers were in trust, within the meaning of the policy; and that the plaintiff was entitled to recover the entire value. The court had to consider the meaning of the words "in trust" as used in that policy. I propose to read no more than a few words from the judgments. LORD CAMPBELL, C.J., said (*ibid.*, at p. 880):

"What in meant in those policies by the words 'goods in trust'? I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense, so held that there was only an equitable obligation on the assured enforceable by a subpoena in Chancery, but goods with which they were entrusted in the ordinary sense of the word."

WIGHTMAN, J., said (*ibid.*, at p. 881):

"There are two questions. The first, whether the goods destroyed were covered at all by the policies. The policies are on various descriptions of goods; and, amongst others, on goods 'in trust'. It seems clear to me that the goods in question were in trust. The plaintiffs are warehousemen and wharfingers; and the goods were in their warehouse; they had a lien on them, subject to which they were accountable to the owners who had entrusted them with the goods. So the goods lost were goods in trust."

CROMPTON, J., said (*ibid.*, at p. 882):

"The parties meant to insure those goods with which the plaintiffs were entrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to their bailors."

We ought to approach the question in this case with the judgments in that case in mind. Counsel, in opening the appeal, claimed that there was a contract between the plaintiffs and David Rees & Co., Ltd. when the collection order

- A was handed by X to David Rees & Co., Ltd., the principals, and was accepted by the principals' representative by the loading of the copper on the lorry. Thereby, he submitted, there was a contract between the plaintiffs and David Rees & Co., Ltd., the principals, that the plaintiffs would carry on the lorry which they had sent to the South Canada Dock those goods, 440 ingot bars, to their destination at Birmingham. I am satisfied that there was a contract
- B between the plaintiffs and David Rees & Co., Ltd. That came about from their oral arrangement, followed by the collection order which was handed to X by the plaintiffs, to be handed, and which was handed, to David Rees & Co., Ltd., and by the latter's acceptance of it by taking the collection order, handing over the goods to X, and giving to him a delivery order with the destination of the goods on it. The collection order, Apr. 18, 1955, is addressed to the
- C master porter, s.s. Samanco, Canada Dock:

"Please receive in good order and condition 440 copper ingots, 9 tons 18 cwt. 3 qrs. 2 lb., Shenstone Transport, JOF 745, [the number on the plate borne by the lorry,] account David Rees."

- D The document was signed by the acting manager of the plaintiffs, and it has on it "No. 5226", which is the plaintiffs' file number. X, having presented the document, received the goods. They were checked. He was given a delivery note, which is the next document on the file, document "B". It refers to goods from Samanco, Canada Dock. It reads:

- E "Received from David Rees & Co., Ltd. in good order and condition the undermentioned goods:—Mark, Quantity. Destination: Messrs. Imperial Chemical Industries Ltd., Metals Division, Holford Casting Department, Perry Barr, Birmingham 20."

- The goods are described, and the weight is given. The one to which I refer is not the actual one, or one of the actual two, which have not been seen since.
- F It is a specimen. When one looks at those two documents, it becomes clear what the usual course of business was, and what was done in this particular case. There was an offer by the plaintiffs to take, on a numbered lorry, 440 bars for transport to Birmingham. That offer was accepted and the goods were loaded on the faith of the collection order, and the driver was given the delivery order with the destination of the goods on it. The loss fell on the
- G plaintiffs because they sent a man and lorry to receive the goods and they gave him an authority to receive them on their behalf. The man was handed the goods on the authority of the plaintiffs, and he signed for them on the delivery order to Metal Sales, Ltd. Thus, the goods were entrusted to the man whom the plaintiffs sent in order that the plaintiffs could carry out their contract to convey. In other words, they were entrusted to the plaintiffs. This is the only
- H question in the case; and I believe that it should be resolved in favour of the plaintiffs. If I authorise (a) my wine merchant to deliver goods to X on my behalf and (b) X to receive the goods on my behalf and, following on the authority, the wine is delivered to X, that is delivery to me, and it matters not that X is dishonest. The same applies in a case where similar authority is given when the goods are required by me for the purpose of fulfilling a contract. It arises
- I from the authority which is given and the terms of which may vary from time to time. In my view, the goods were held in trust, within the meaning of those words in the clause in the policy. BARRY, J., was quite right in saying that there was a contract between the plaintiffs and David Rees & Co., Ltd. It appears to me that it follows from that contract, coupled with the documents and course of business, that the goods were delivered to the plaintiffs and were held by them. They were under contract to carry them to Metal Sales, Ltd. at Birmingham. I am in favour of allowing the appeal and of ordering that judgment be entered for the plaintiffs for the agreed amount.

JENKINS, L.J.: I am of the same opinion. I think it is clear that there was no contract as between the plaintiffs and the Shenstone Transport Co., Ltd. in regard to the carriage of the 440 copper ingots, for X, the thief with whom Mr. Newton dealt, in fact had nothing whatever to do with that company. I think it is also clear that as between the plaintiffs and X there was no contract in regard to such carriage, for Mr. Newton dealt with X simply in his pretended capacity as a driver employed by the Shenstone Transport Co., Ltd. Again I think it is clear that as between the plaintiffs and X there was no valid appointment of X as the plaintiffs' agent to collect and transport the goods on the plaintiffs' behalf. I think that appears from the speeches in the House of Lords in *Lake v. Simmons* (1) ([1927] A.C. 487), to which my Lord has already referred. But Mr. Newton did make out and sign a collection order nominating the Shenstone Transport Co., Ltd. as the plaintiffs' sub-contractors who were to receive and transport the goods and specifying the lorry JOF 745 as the vehicle on which they were to be transported. This document Mr. Newton gave to X with the intention that X should present it to the consignees' agents at the docks and thereby procure delivery of the goods, which X in fact did. Inasmuch as Mr. Newton gave this document to X in the belief that X was a driver employed by the Shenstone Transport Co., Ltd. as he fraudulently pretended to be, I think that it must be held that as between the plaintiffs and X this document was wholly invalid as an authority to X to collect the goods on the plaintiffs' behalf. That again I think follows from the speeches in *Lake v. Simmons* (1). Counsel for the defendants submits that in these circumstances there was no entrusting of the goods to the plaintiffs within the meaning of the words "held by the assured in trust" in the policy (which he agrees should be understood in the wide sense indicated in *Waters v. Monarch Life Assurance Co.* (2) (1856), 5 E. & B. 870), but a mere handing over of the goods to a fraudulent stranger who had possessed himself by a trick of a collection order purporting to authorise him to receive them. It follows, in counsel's submission, that there was no loss to which the policy was applicable, and that the plaintiffs' claim against the defendants under the policy must consequently fail, any liability incurred by the plaintiffs to the consignees by estoppel based on the fact that the plaintiffs, by issuing the collection order, purported to authorise X to receive the goods being for this purpose irrelevant.

The case is, I think, a difficult one; but, on the whole, I am for rejecting counsel's argument. The collection order, as I see it, performed two functions. It was a purported, but as between the plaintiffs and X an invalid, authority to X to receive the goods, but it was also an offer by the plaintiffs to the persons for whom the goods were to be carried (whom I will call "the owners") to undertake the carriage of the goods to their destination in Birmingham, with an intimation that the work would be carried out by the Shenstone Transport Co., Ltd. as the plaintiffs' sub-contractors who would use for that purpose lorry No. JOF 745. This offer the owners accepted by the delivery of the goods to X, the loading of them on the lorry with their concurrence, and the issue to X of the delivery note. The plaintiffs thus became liable to the owners under the contract of carriage so concluded between themselves and the owners for the safe carriage of the goods. The theft of the goods was a loss for which the plaintiffs were liable under this contract, and it would have been no answer to a claim by the owners in respect of such loss for the plaintiffs to say that they had been misled by X into believing that X was a driver employed by the Shenstone Transport Co., Ltd. and that lorry No. JOF 745 was one of that company's lorries, whereas in fact X was a thief driving a stolen lorry falsely numbered JOF 745. The question remains: Was there, in these circumstances, an entrusting of the goods to the plaintiffs within the meaning of the policy? I think there was. Inasmuch as the policy admittedly extended to goods carried by the plaintiffs' sub-contractors, and inasmuch as practically all the plaintiffs' business was, to the

- A knowledge of the defendants, done through sub-contractors, it seems impossible to hold that "entrusting" to the plaintiffs is limited to cases in which the plaintiffs come into actual physical possession of the goods. In the ordinary case where a genuine sub-contractor is employed, the transaction is, I understand, carried out in the same way as the transaction now in question; that is to say, the plaintiffs give the sub-contractors' representative a collection order
- B serving the double purpose of an authority to the sub-contractors to receive the goods and an offer to the owners to undertake the carriage of the goods. The owners accept the offer by delivering the goods to the sub-contractor designated by the plaintiffs. There is no privity of contract between the owners and the sub-contractors, whose bona fides and identity are exclusively the concern of the plaintiffs, by whom they are selected. In the ordinary transaction, as I
- C have described it, I think the owners entrust the goods to the plaintiffs and not to the sub-contractors, albeit that physical possession of the goods is given to the sub-contractors direct at the request of the plaintiffs instead of being given in the first instance to the plaintiffs and by them to the sub-contractors. If this is right, what difference can it make that the plaintiffs, by an innocent mistake, nominated sub-contractors with whom in fact they had not contracted, because a thief
- D with a stolen lorry had falsely misrepresented himself as an employee of those sub-contractors and purported to undertake the work on their behalf? So far as I can see, none. The collection order clearly designated a particular lorry, JOF 745, represented by the plaintiffs (albeit mistakenly) as being the lorry of Shenstone Transport Co., Ltd., as the vehicle in which the goods were to be carried by the company designated by the plaintiffs (albeit mistakenly) as their
- E sub-contractors. I think that in handing over the goods to the driver of the designated lorry in accordance with the plaintiffs' request, the owners were entrusting them to the plaintiffs just as much as if X had in truth been the employee of and the designated lorry had in truth been the lorry of the Shenstone Transport Co., Ltd.

- Accordingly, I think that the loss occasioned by the theft of the goods is
- F covered by the terms of the policy. I agree with my Lord that counsel's alternative submission, to the effect that the policy only extended to goods carried in the plaintiffs' own lorries or on lorries subject to sub-contracts with them, cannot be supported. I do not think the policy, which contains no such limitation, should be construed as being so limited by reference to the answer to question 1 (d) of the proposal form. That question asks for the registration numbers of all
- G vehicles to be insured, and it is answered in the words "One vehicle registration No. BTB 807, otherwise sub-contracted". This relates simply to registration numbers and has nothing to do with the limitation suggested by counsel. Moreover, even if it was relevant to counsel's contention, it would not, I think, be admissible for the purpose of construing the policy (see *Griffiths v. Fleming* (3), [1909] 1 K.B. 805, the particular passage being in the judgment of FARWELL
- H and KENNEDY, L.JJ., at p. 817).

Accordingly, for the reasons given by my Lord and such reasons as I have been able to add, I agree that this appeal should be allowed.

HODSON, L.J.: I agree. On the question of construction put forward as a separate point by counsel for the defendants, there would be no difficulty in his way if he were right in saying that this policy was limited to goods carried on the

I plaintiffs' own lorry or on sub-contractors' lorries. There is no such provision in the policy itself. The risk insured against is contained in the subject-matter of the policy, which has to do with

"The legal liability of the assured for loss of or damage to timber, oil, machinery and general merchandise of every description belonging to the assured or held by the assured in trust for which the assured are themselves responsible whilst in transit per road conveyances within England, Scotland or Wales."

There has been no application to rectify the policy and, as has already been pointed out by my Lords, it could only be on such an application that the contents of the proposal form could be relevant. Nevertheless, the statement of agreed facts having set out that the policy was based on a particular proposal form, the point has been argued in this court on the footing that one can look at the proposal form in order to see whether the words of the policy are limited. I am clearly of opinion that, even so, the words of the policy are not limited in the manner suggested and cannot be so limited, as counsel has sought to establish. The material answer which was given in the proposal form (which, incidentally, was made to another company) is the answer to question 1 (d), which asked the proposed assured for the registration numbers of all vehicles to be insured. The answer was "One vehicle", with a registration number given, "otherwise sub-contracted". The insurance policy did not cover vehicles to be insured. It covered the merchandise on the vehicles. The answer was a perfectly truthful one, and the words "otherwise sub-contracted", in my view, indicate an explanation added as a footnote by the person who filled in the form, explaining why he was only giving one number of a motor vehicle.

So far as the main question argued on this appeal is concerned, the learned judge came to the conclusion that although the plaintiffs were under obligation to David Rees & Co., Ltd., the agents for Metal Sales, Ltd., and that there was a binding contract between them for the carriage of goods, nevertheless the goods were not held in trust by the plaintiffs within the terms of the policy. He held that the plaintiffs were liable to David Rees & Co., Ltd., for the loss, that the contract was made when the note was handed by X to the dock checker, and David Rees & Co., Ltd. accepted the offer by loading the cargo on to the lorry. In any event, in my view, that is a correct conclusion from the agreed facts. It is submitted by counsel for the plaintiffs that it follows from that conclusion that they were held in trust by his clients. That, if they were held at all, they were held in trust, I think there can be no doubt. The argument of counsel for the defendants, as I understand it, is that they were never held at all. The words "in trust" are not used in these cases as terms of art, as the authorities to which reference has been made clearly show. *Lake v. Simmons* (1) ([1927] A.C. 487) was not dealing with the words "in trust". It was dealing with the word "entrust", which has the same effect in an insurance policy; and it was pointed out by the speeches in that case that the word "entrust" is a simple word which may well mean, in its context, such an everyday transaction as a handing over of an umbrella by a man to a bystander while he puts on a coat. The context here of the words "held in trust" is the context which I have already read,

"held by the assured in trust for which the assured are themselves responsible whilst in transit."

Coming back to counsel's submission, it is that they were never held by the plaintiffs at all, that the goods were held by a thief. I agree with JENKINS, L.J., that, in the somewhat difficult question which we have to consider, it does not necessarily follow that there must be physical possession on behalf of the plaintiffs for them to hold the goods, because if, in the ordinary course of business, the work had been done by genuine sub-contractors, it could not be strictly said that the goods were held by the plaintiffs; yet it would not, I think, be contended that the plaintiffs were not covered under this policy. That they must be held in some way under the plaintiffs' direction I think is clear. I take the view that the plaintiffs were in a position to exercise control, although the thief had got a collection order and collected the copper ingots from the docks. At any time, if they found out he was a thief, they could have intervened, turned him from the driving seat and put another driver in. Notwithstanding any protest that David Rees & Co., Ltd. might have made, they were in control of the operation. The position would have remained the same if the thief, being frightened, had continued on his journey to his proper destination and been overcome and

A robbed by a rival gang of thieves. At all material times the goods were held in trust by the plaintiffs within the sense of the contract.

Lake v. Simmons (1) was very strongly relied on by counsel for the defendants. Indeed, I think he regarded it as the main support of his argument. I would point out that that was a case in which the plaintiff, a jeweller, was insured under a Lloyd's policy against loss or damage to jewels by theft. The policy

B contained a clause exempting the insurers from liability in the case of
"loss by theft or dishonesty committed by . . . any customer or broker or broker's customer in respect of goods entrusted to them by the assured."

The question in that case was whether goods had in fact been entrusted by the jeweller to a thief. The thief in that case was a woman who had previously

C bought articles at the jeweller's shop and induced him to let her have possession of two pearl necklets by fraudulently representing that she was the wife of a certain man (a man called Van der Borgh) and that she wanted them for the purpose of showing them to her husband and to a purely fictitious person for their approval with a view to purchase. She made away with the necklets. The point which was decided by the House which is material to this case was that the

D plaintiff, the jeweller, had never entrusted the necklaces or necklets to the thief, because there was no real consent by him to her obtaining possession of them. The question, I emphasise, was whether or not there had been any entrusting to the thief, not whether there had been any entrusting to Van der Borgh, the husband, or the other man who was mentioned, who turned out to be a fictitious person. That that possible situation was envisaged appears from the speech of

E VISCOUNT SUMNER ([1927] A.C. at p. 508). Referring to the thief, he said (*ibid.*):

"She was not the person who was to approve or to buy or return them [the necklets]—that was Mr. Van der Borgh or Commander Digby. If there was entrusting, it was to one of them. One of these persons was imaginary. The other was not a customer and he was not, in fact, aware of what was being done or concerned in it in any way";

F so that the question of entrusting seems to me to have arisen there in entirely different circumstances from the way in which it arises in this case. The question is not, in this case, whether there was an entrusting to the thief. The question is whether there was an entrusting to the plaintiffs; and I do not find that the argument which counsel has put forward is supported by the speeches in *Lake v. Simmons* (1), although it is true to say that it throws light on the position of the

G thief himself and supports the argument (which, in my view, does not advance this case) that there was no validity in the appointment or supposed appointment of X as the agent of the plaintiffs. Counsel further supported his argument that this transaction could never produce any legal result at all, in view of the character of the thief X, by saying that the collection order was itself stolen from the plaintiffs by the thief. I do not accept that view. There was no question of the

H thief endeavouring to get this document against the consent of the owner or with the intention of depriving him of it permanently; and the position would have been exactly the same if the collection order had been sent by post, or, indeed, I would suggest, if an order had been given over the telephone. The authority was not given to the thief; the authority was given by the plaintiffs to David Rees & Co., Ltd. to have these goods loaded on the lorry named and

I identified in the collection order. For these reasons, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Layton & Co.* (for the plaintiffs); *Thomas Cooper & Co.*, agents for *Batesons & Co.*, Liverpool (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

VERNON AND OTHERS (TRUSTEES OF THE EMPLOYEES A
FUND OF WILLIAM VERNON & SONS, LTD.) v. INLAND
REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), May 1, 2, 3, 1956.]

Estoppel—Charitable trusts—Scheme sanctioned by court, the Attorney-General being a party, for establishing charitable trusts—Trusts established not in fact charitable—Whether Crown estopped from denying that trusts charitable for the purposes of assessment to income tax. B

Charity—Validation of imperfect trust provision—Scheme for administration of fund for benefit of employees of company—Charitable Trusts (Validation) Act, 1954 (2 & 3 Eliz. 2 c. 58), s. 1 (1), (2), s. 2 (1).

A testator bequeathed by will certain shares in a partnership to legatees subject to a condition that they should pay twenty per cent. of all moneys received to some organisation or charity for the benefit of the firm's employees. On his death in 1919, an originating summons for the construction of the will, to which the Attorney-General was joined as a defendant, was compromised on terms sanctioned by the court; and the court ordered a scheme to be settled for the administration of the fund with objects limited to charitable purposes. In 1920 the trustees purchased Heathbank Estate for use as a club and recreation ground. In 1921 the court sanctioned a scheme that had been prepared. Each of the orders of 1919 and of 1921 sanctioning the compromise and the scheme recited: "the Attorney-General by his counsel not objecting to the order . . ." The scheme provided in effect that Heathbank Estate should be maintained as a recreation ground and club house for the use of employees and such other persons as might be authorised by the trustees, and that the income of the fund should be applied for the maintenance of the ground and club house or for the benefit (by pensions or grants, etc.) of employees, former employees and their dependants who from ill-health, age or other causes should be unable to maintain themselves. The trustees were assessed to income tax in respect of the fund for 1951-52 and 1952-53. They conceded that the trusts declared by the scheme were not charitable, but claimed, by virtue of estoppel or the operation of the Charitable Trusts (Validation) Act, 1954, the exemption conferred by s. 447 and s. 448 of the Income Tax Act, 1952, in favour of charities. C D E F

Held: the trustees were not entitled to exemption from assessment to income tax because G

(i) the fact that the Attorney-General had been a party to the orders of 1919 and 1921 created no estoppel against the Crown from denying that the scheme, as drawn, did not establish trusts that were charitable, since there had been no lis or issue whether the trusts of the scheme were charitable, although the Attorney-General as representing residue of the estate was estopped by the order of 1919 from denying that the fund was to be established on valid charitable trusts; and H

(ii) the trusts of the scheme were not validated by the Charitable Trusts (Validation) Act, 1954, as the scheme was not an "imperfect trust provision" as defined in s. 1 (1)*, since the trusts applicable to Heathbank Estate were primarily trusts for the benefit of the employees of a company (which was not a charitable purpose) and the fact that the trustees had discretionary power to admit other persons did not render the trusts charitable, and therefore Heathbank Estate could not be "used exclusively for charitable purposes" within s. 1 (1). I

Appeal dismissed.

[**Editorial Note.** Though it has been said that the Crown is not bound by estoppel by deed, estoppel in pais or equitable estoppel respectively may bind or

* The sub-section is printed at p. 20, letter I, to p. 21, letter A, post.

A does bind the Crown; see 7 HALSBURY'S LAWS (3rd Edn.) 247, cf. *Inland Revenue Comrs. v. Sneath*, [1932] 2 K.B. 363, 382, on the absence of any lis on which to found an estoppel where the question is one of assessment; 15 HALSBURY'S LAWS (3rd Edn.) 182, note (d).

The consequence of the imperfection of the trusts declared by the scheme having been indicated, was that the trustees and the Attorney-General had the right, or were under the duty, of bringing the matter before the court with a view to the trusts being amended (see p. 20, letters E and G, post).

As to the alteration of charity schemes sanctioned by the court, see 4 HALSBURY'S LAWS (3rd Edn.) 316, para. 650; and for cases on the subject, see 8 DIGEST (Repl.) 456-458, 1550-1578.

For the Charitable Trusts (Validation) Act, 1954, s. 1, s. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 68, 69.

For the Income Tax Act, 1952, s. 447, s. 448, see 31 HALSBURY'S STATUTES (2nd Edn.) 427, 429.]

Cases referred to:

- (1) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, 55.
- (2) *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.
- (3) *Re Koenigsberg, Public Trustee v. Koenigsberg*, [1949] 1 All E.R. 804; [1949] Ch. 348; [1949] L.J.R. 1098; 2nd Digest Supp.
- (4) *A.-G. v. Buller*, (1822), Jac. 407; 37 E.R. 904; 8 Digest (Repl.) 457, 1556.
- (5) *A.-G. v. Worcester (Bp.)*, (1851), 9 Hare, 328; 21 L.J.Ch. 25; 18 L.T.O.S. 86; 15 J.P. 831; 68 E.R. 530; 8 Digest (Repl.) 456, 1550.
- (6) *National Anti-Vivisection Society v. Inland Revenue Comrs.*, [1947] 2 All E.R. 217; [1948] A.C. 31; [1947] L.J.R. 1112; 177 L.T. 226; sub nom. *Inland Revenue Comrs. v. National Anti-Vivisection Society*, 28 Tax Cas. 311; 8 Digest (Repl.) 313, 3.

Case Stated.

This was an appeal by the trustees of the Employees Fund of William Vernon & Sons, Ltd., from a decision of the Special Commissioners of Income Tax affirming a refusal of the Commissioners of Inland Revenue to grant exemption from income tax in respect of the property (including land) subject to the trusts of the fund, which was established by virtue of the will of Thomas Thornycroft Vernon (who is referred to herein as "the testator"). The exemption was claimed pursuant to s. 447 and s. 448 of the Income Tax Act, 1952, which gave exemption from income tax to charities in proper cases. The relevant years of assessment were the years 1951-52 and 1952-53, but the law applicable to the earlier years of assessment by virtue of the Income Tax Act, 1918, was similar to that applicable under the Act of 1952.

The testator, who was a partner in the firm of William Vernon & Sons, made his will on Mar. 3, 1913. By it he gave and bequeathed certain shares in the firm to four legatees, subject to certain conditions including the following:

"This condition is imposed on each of the above four beneficiaries—that they shall pay twenty per cent. of all moneys received to some organisation or charity at their discretion for the benefit of the employees of the firm of William Vernon & Sons in reward of long or meritorious service with the firm or for an institute or other object for the recreation of the employees at the discretion of the several beneficiaries to the separate amount of twenty per cent. of their share."

The testator further provided:

"Any residual balance of money left after all above has been satisfied I leave to any charities my executors may agree to distribute it amongst."

The testator died on Jan. 24, 1919. Doubts having arisen concerning the validity of the condition set out above, which would be invalid unless it were charitable, and concerning the destination of the moneys subject to the condition if it was not charitable, the trustees of the testator's will applied to the court by originating summons dated May 20, 1919, for the determination of this and other questions. The Attorney-General was a defendant to the summons. A compromise was sanctioned by PETERSON, J., on Dec. 11, 1919, before the summons had been decided. The order was prefaced by the usual words:

"the Attorney-General by his counsel not objecting to the order hereby made and the other parties consenting this court doth sanction the compromise upon the terms set forth in the schedule hereto."

The order provided that a scheme for the administration and management of an employees' fund, to be constituted as provided by cl. 2 of terms of compromise set out in the schedule to the order, should be prepared by the four legatees in accordance with the provisions of cl. 3 of that schedule, and that the scheme should be settled by the judge. The schedule contained a number of terms and provided that certain payments were to be made by each of the four legatees. So far as relevant the terms in the schedule to the order were as follows:

"2. Out of each payment to be received by the defendants [who were named] the four legatees of the said shares in the said partnership from William Vernon & Sons in respect of the said capital sum of £150,000 or any interest thereon twenty per cent. thereof is to be set aside as a fund (hereinafter referred to as 'the employees fund') for complying with and in full satisfaction of the condition in the said will contained which is referred to in questions 3, 4 and 5 in the within mentioned originating summons.

"3. A scheme to be prepared by the said four legatees for administration of the said employees fund is to be settled and approved by the judge in this action. The objects of the scheme are to be limited to charitable purposes which are primarily to be for the benefit of the persons hereinafter designated under (1) and (2) and may include the provision of a recreation ground and/or a working men's club. (1) Persons for the time being and from time to time in the employ of William Vernon & Sons or any company which may take over and carry on the business of the said firm and/or their wives children or other dependants. (2) Any person who at any time has been or shall have been in the employ of the said firm or any such company as aforesaid and/or wives children or other dependants of any such past employees or of any deceased employees."

In 1920 the business of the firm of William Vernon & Sons was sold to the company, William Vernon & Sons, Ltd., which was incorporated on Feb. 10, 1920. Before the scheme which was prepared had been approved by the court, the persons who had been proposed as the original trustees acquired property, known as the Heathbank Estate, in Cheshire, for use as a club and recreation ground, the purchase price being advanced by the company for the purposes of the fund, and a club was formed in accordance with the terms of the schedule to the order of Dec. 11, 1919.

On Jan. 23, 1921, an order was made by EVE, J., sanctioning the scheme. After reciting that Heathbank had been purchased, the order was in these terms:

"... the court being satisfied ... that the lands authorised to be purchased by the scheme hereby sanctioned are required for actual occupation for the purposes of the charity thereby constituted. And the Attorney-General by his counsel not objecting to the order hereby made and the other parties by their counsel consenting. The judge doth approve and sanction the scheme for the administration and management of the said employees fund which is set forth in the schedule hereto and doth order that the said scheme be carried into effect and that the trustees of the said scheme be at liberty not-

A withstanding s. 5 of the Mortmain and Charitable Uses Act, 1891, to retain the lands by the said scheme authorised to be purchased for the purposes thereof."

The clauses of the scheme, so far as relevant to the present case, provided as follows:

B "2. The capital moneys constituting the employees fund shall be paid by the said four legatees to the trustees (whose receipt shall be a good discharge for the same) and shall be applied by the trustees in manner following:—
 (A) £7,600 part of the capital moneys shall be retained by the trustees in recoupment to them of moneys already expended by them in the purchase of the freehold lands and hereditaments called 'Heath Bank' containing 8½ acres or thereabouts situate at Liscard in the county of Chester (which have
 C been acquired by them for the purposes of a club house and recreation ground for the benefit of the employees at the Liverpool branch (which includes mills at Birkenhead and Wallasey) of the company's business) which lands and hereditaments shall forthwith be vested in the Official Trustee of Charity Lands, to be held by him upon the trusts of this scheme . . .

D "3. The trustees shall so far as the income of the employees fund shall be sufficient and available maintain and keep in good order and condition the recreation grounds* and the club houses* and may make any alterations in or additions thereto respectively as they shall from time to time think fit and may employ such keepers gardeners ground men labourers caretakers and others as they shall deem to be necessary or expedient.

E "4. The trustees shall hold the recreation grounds and club houses upon trust to permit all or any of the employees† or such of them as shall from time to time be authorised by the trustees or by any committee elected as to two-thirds by the employees and as to one-third by the trustees to whom the trustees shall by regulations hereunder delegate this authority and such
 F other persons as shall from time to time be authorised by the trustees or by any such committee to enter upon use and enjoy the same respectively or such part or parts thereof as the trustees may determine for all or any of the purposes aforesaid as the trustees or any such committee as aforesaid shall from time to time sanction and subject to such regulations as the trustees with the approval of the Charity Commissioners shall prescribe.

G "8. The trustees shall apply the income of the employees fund for all or any of the purposes following as they may from time to time think fit: (1) the upkeep maintenance and carrying on of the recreation grounds*; (2) the upkeep maintenance and carrying on of the club house*; (3) the provision of pensions temporary allowances or special grants for employees‡ former employees† and/or dependants of employees who from age ill-health accident

H * By cl. 1 of the scheme the terms "the recreation grounds" and the "club house" were defined as follows:—"The recreation grounds" means any land and hereditaments purchased or leased or acquired by the trustees under any of the provisions hereof which shall be laid out or adapted for any athletic pursuits as hereinafter defined. 'Club house' means any house or other erection hall or rooms which shall be built purchased or leased by the trustees and fitted and adapted for use as a club house or reading or billiard room for use by the employees for social or educational purposes. 'Athletic pursuits' means and includes the playing practising or use of any sports games or exercises calculated to improve and maintain the health and physique and improve the conditions generally of the persons entitled to the benefit of this charity."

I † "The employees" were defined as including "all or any of the persons for the time being and from time to time in the employ of the company," which was defined as meaning "W. Vernon & Sons, Ltd.," and also as including "any other company . . . which may . . . take over or carry on the said business, whether under the said title of 'W. Vernon & Sons' or any other title." "Former employees" were defined as meaning and including "all or any of the persons who were formerly in the employ of the late firm of W. Vernon & Sons or may at any time have been in the employ of the company and who by reason of old age accident ill-health or infirmity of body or mind or from any reason other than his or her own wilful misconduct or refusal may in the opinion of the trustees be unable to earn a decent and comfortable livelihood."

infirmity or other cause shall for the time being be wholly or in part unable to maintain themselves by their own exertions or in the case of dependants of employees shall be under the age of sixteen years."

In 1927 the company's business was acquired by Spillers, Ltd., and the benefits of the fund thereupon became available to its employees. Although no grants had been made to needy employees or their dependants during the years under appeal, the fund and the income thereof had been employed for the purposes of the scheme only.

At the time of the hearing, the total value of the property subject to the trusts was about £35,000 of which £17,000 consisted of Exchequer bonds representing war damage payments received when a recreation ground provided for employees of the London branch of the company was damaged by enemy action. The premises at Heathbank were still retained. It was not disputed before the court in the present case that the object of the scheme directed to be prepared by the order of Dec. 11, 1919, was for charitable purposes only. It was common ground in the present case that all parties, when the scheme was sanctioned, thought that a valid charitable trust was thereby constituted, but it was conceded for the purposes of the present case that the trusts declared by the scheme were not such as by law were now considered valid charitable trusts. The question before the Special Commissioners was whether or not the Commissioners of Inland Revenue were estopped from denying that the objects of the scheme were charitable by reason of the orders of the court.

The trustees contended that the Commissioners of Inland Revenue, being a department of the Crown, were estopped from denying that the objects of the fund were limited to charitable purposes, because the proposition that such objects were wholly charitable was fundamental to the two orders made by the High Court in proceedings to which the Attorney-General representing the Crown was a party, and that such estoppel enured for the benefit of the trustees as the privies in estate of the original legatees of the fund who were also parties to those proceedings, and that, accordingly, the fund was entitled to repayment of income tax under the exemptions granted by s. 447 and s. 448 of the Income Tax Act, 1952, for the two years 1951-52 and 1952-53.

The Crown contended (i) that, as the orders of 1919 and 1921 were judgments inter partes, they were not binding on the Commissioners of Inland Revenue; (ii) that an estoppel did not arise because the parties to this appeal were not the same parties nor in the same capacities as the parties to the originating summons; (iii) that the question decided by the court in 1919 and 1921 was not the same question as that under appeal; and that, therefore, the fund was not entitled to exemption from income tax.

The Special Commissioners held that estoppel did not arise because (a) the subject-matter of the dispute was not the same as that which was in dispute in the Chancery action and the parties to the appeal did not appear in the same capacities as in the Chancery action; (b) the effect of the orders sanctioning a negotiated compromise was not that of a judgment that the fund was a charitable fund; (c) if there was a decision of the court that the objects of the fund were charitable only, the issue before the commissioners was not the same as the issue in the Chancery action; and (d) the Crown, represented by the Attorney-General, appeared as *parens patriae* in the Chancery action but in a different capacity in this appeal; and that, therefore, the claim to exemption from income tax failed. The trustees appealed. At the hearing of the appeal, they raised the further question whether, if estoppel did not arise, the trusts were validated by the Charitable Trusts (Validation) Act, 1954.

A *Sir Lynn Ungood-Thomas, Q.C.*, and *E. G. Wright* for the taxpayers, the trustees of the fund.

J. G. Foster, Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown.
Denys B. Buckley appeared as *amicus curiae*.

UPJOHN, J., stated the facts, and said: It is common ground that, in
B sanctioning the scheme, all parties thought that a valid charitable trust was
thereby constituted, although it is perhaps a little surprising that it was drawn
in terms which were so wide. It is, however, now conceded that the trusts as
declared by the scheme are not valid charitable trusts, and the reason is this.
C Thirty years ago it was not always appreciated that in order to constitute a
valid charitable trust it must be a public trust, and that, if a trust is limited to
the employees of a company, the personal nexus constituted by that common
employment does not satisfy the necessary test of the character of publicity.
D That is now well established, and it was established in a line of authorities after
the last war culminating in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (1)
([1951] 1 All E.R. 31), in the House of Lords. Therefore, it is common ground
that the scheme does not constitute valid charitable trusts unless those trusts
are validated by the Charitable Trusts (Validation) Act, 1954. If it is not, the
question then is whether the order of PETERSON, J., or the order of EVE, J.,
estopped the Commissioners of Inland Revenue from alleging that the trusts are
not valid charitable trusts. As a first step in that argument, it is necessary to
show that the Attorney-General himself is so estopped. If he is estopped, then
the further question arises whether that estoppel binds and affects the Commis-
sioners of Inland Revenue.

E With regard to the order of PETERSON, J., I do not think that there can be any
real doubt on the matter. That order by way of compromise decided that a
certain fund, to be called "the employees fund", was to be held on charitable
trusts, and it seems to me to be quite clear that the legatees and the Attorney-
General, at any rate in his capacity as representing the residue of the estate, would
F be estopped for ever after from denying that that fund was to be established on
valid charitable trusts. That, however, in my view, does not determine the
matter. The court, pursuant to the directions of PETERSON, J., subsequently
was asked to sanction and did sanction a particular scheme. That was an
intended implementation of the directions of PETERSON, J. I think the cardinal
point in this case is whether the trustees can say that, because of the order of
G PETERSON, J., the Attorney-General is bound and that concludes the matter,
or whether they have to take the matter a step further and contend successfully
that the order of EVE, J., sanctioning the trusts also estops the Attorney-General.
I think that they have to establish the second point. It cannot, in my judgment,
be denied that the trusts on which the property is now held are the trusts of a
scheme sanctioned by EVE, J. Those trusts, admittedly, are not charitable.
H The trustees must, therefore, show that the Attorney-General is estopped from
taking the point that the trusts declared by the scheme are not charitable. In
my judgment, it is not sufficient for them to show that the trusts which PETERSON,
J., intended should be charitable estop the Attorney-General.

I To constitute estoppel by *res judicata*, it is clear that there must be a lis, or
issue, and there must be a decision. It does not matter whether the decision is
after argument or whether it is by consent or whether it is by default, although
in the last of those alternatives one must have regard to the observations in
New Brunswick Ry. Co. v. British & French Trust Corp., Ltd. (2) ([1938] 4 All
E.R. 747). It is, at all events, essential that there should be a lis or an issue, and
if the decision on that lis or issue involves a finding, whether or not after argu-
ment, that finding cannot again be litigated. As was stated by SOMERVELL, L.J.,
in *Re Koenigsberg, Public Trustee v. Koenigsberg* (3) ([1949] 1 All E.R. 804 at
p. 809):

"If an order made by the court necessarily involves a finding (whether

there was argument or not) on the point which is later sought to be litigated, the authorities lay down that that point cannot be raised . . . ”

In the present case, however, so far as the scheme sanctioned by EVE, J., was concerned, the question whether the trusts were or were not charitable was never in issue. There may have been arguments and negotiations, either in court or out of court, during the preparation of the scheme on some particular clauses or provisions, but it is clear that, after the order by PETERSON, J., there never was any lis or issue with regard to the question whether the scheme was to be charitable. The whole underlying assumption was that it was to be charitable in order to carry out the compromise sanctioned by PETERSON, J.

In my judgment, the situation is this, that the scheme must be considered on its fair construction. It is conceded on that construction, in the light of the law as we now know it, that it does not constitute a valid charitable trust. I cannot see how any estoppel arises. The court has never construed the scheme; there was no decision that the scheme constituted a valid charitable trust. The court intended to carry out the directions of PETERSON, J., and, exercising its administrative jurisdiction over charities, sanctioned a scheme which, per incuriam, was not charitable. That sometimes happens. There may be some failure in point of draftsmanship, some failure, as in this case, to appreciate the true law affecting the matter, or there may be some other mistake, but, in my judgment, there is no estoppel for there was no lis or issue relative to the only matter, that is, whether or not the scheme was charitable.

In my judgment, the Attorney-General, far from being estopped in these circumstances, has the power—it may also be the duty—to come to the court to point out the error which has crept in, and to ask for the scheme to be amended to conform to the overriding direction of PETERSON, J., namely, that a charitable scheme was to be constituted. If that be right, as I think it is, then in my judgment there can be no question that the Attorney-General is estopped from challenging the terms or the effect of the scheme. It is quite clear that, where a scheme is erroneous—that is to say, it does not carry out as nearly as may be the wishes of the testator or the settlor—the scheme may be amended, even many years later. That appears from *A.-G. v. Buller* (4) ((1822), Jac. 407). It is clear from the well known authority of *A.-G. v. Bishop of Worcester* (5) ((1851), 9 Hare, 328), that there is nothing necessarily permanent or irrevocable about a scheme once constituted. Circumstances may change and render it impracticable or not so useful as before, and the court has a jurisdiction, to be exercised carefully and sparingly, to alter and vary trusts so that the testators' true charitable intentions may be carried out in the circumstances then arising. It is clear, too, that not only the Attorney-General but also the trustees of the charity have that right, that power—and, indeed, it may be, duty—to bring the matter to the attention of the court and seek some amendment. That appears clearly from the speech of LORD SIMONDS in *National Anti-Vivisection Society v. Inland Revenue Comrs.* (6) ([1947] 2 All E.R. 217 at p. 238). Those principles seem to me to apply precisely where, per incuriam, the court has sanctioned a scheme which does not, in fact, carry out the original intentions. Accordingly, in my judgment, the trustees in the present case do not establish the first step in their contention that the Attorney-General is estopped from raising the question of the validity of the trusts declared by the scheme. It is, therefore, unnecessary for me to consider the interesting points which were argued on the question whether, had he been so estopped, that would have precluded the Commissioners of Inland Revenue from challenging the claim to exemption from tax many years later, in 1951 and 1952.

There is, however, the second point to which I must now turn, and that is whether the trusts, not being charitable, have been validated by the Charitable Trusts (Validation) Act, 1954. Section 1 of the Act is in these terms:

“(1) In this Act, ‘imperfect trust provision’ means any provision declaring the objects for which property is to be held or applied, and so

A describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable. (2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before Dec. 16, 1952, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and (b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes.”

C In this appeal I am concerned only with the period before the commencement of the Act, which was July 30, 1954.

The first question, therefore, which I have to consider is whether the scheme constituted an “ imperfect trust provision ” as defined in s. 1 (1) of the Act. I have to see whether “ consistently with the terms of the provision, the property ”—

D and that, as counsel for the trustees conceded, must mean the whole property subject to the trusts—“ could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.” The last condition is fulfilled, and the question is whether the whole property could, consistently with the terms of the provision, be used “ exclusively for charitable purposes ”. If the only property were the sum of Exchequer bonds held by the trustees, I should have thought that the scheme fell within the definition of an

E “ imperfect trust provision ”, for the reason that the whole of the income could, consistently with the terms of cl. 8 of the scheme, be applied in the manner set out in para. (3) of the clause*. The Crown have not challenged the view that cl. 8 (3), taken in isolation, would constitute a valid charitable provision. But the matter does not end there, because a large part of the property is Heathbank, held on the trusts set out in cl. 4 of the scheme†. To put it briefly, those trusts

F permit the employees “ and such other persons as shall from time to time be authorised by the trustees ” to “ use and enjoy ” the recreation grounds and the club “ or such part or parts thereof as the trustees may determine for all or any of the purposes aforesaid . . . ” It is common ground that the “ purposes aforesaid ” refer back to cl. 2 (A), which has reference to “ the purposes of a club house and recreation ground for the benefit of the employees at the Liverpool branch . . . ”

G Counsel for the trustees very properly concedes that, in so far as a trust is formed for the employees of the company, it is not a charitable trust, but he relies on the words in cl. 4 whereby the trustees may permit others to use and enjoy the recreation ground facilities and the club house facilities. He says that the trustees could, consistently with that provision, invite the whole of the village or the inhabitants of some defined area to enjoy those privileges, and then that would be a charitable trust because it would be for a defined section of the public. I cannot accept that argument. The primary trust is for the benefit of the employees of the company. The trustees may admit others, but that, in itself, does not constitute a public trust. The persons to be admitted are those who are to be determined by the trustees, who have a complete discretion in the matter.

H I do not consider that that confers on the scheme the necessary character of being a public trust. Accordingly, it seems to me that, as the Heathbank property cannot be used exclusively for charitable purposes, the scheme is not an imperfect trust provision and, therefore, it is not validated by the Act of 1954.

There is, however, another point with which I must deal. Section 2 (1) of the Act says that the Act

* See p. 17, letter G, and p. 18, letter A, ante.

† See p. 17, letter E, ante.

"applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision . . . where apart from this Act the disposition or covenant is invalid under the law of England and Wales . . ."

I have to ask myself: Even assuming this to be an imperfect trust provision, would it be invalid under the law of England and Wales? The sub-section is plainly pointing to invalidity under the rule against perpetuities, or on the ground of uncertainty or on some similar ground. I think that the answer given by counsel for the Crown is correct. This scheme is not invalid at all. All that is necessary is that, the imperfect quality of the trusts having been pointed out to the court, the court must amend them to conform with the original directions of PETERSON, J. Therefore, there is no invalidity about the scheme. Accordingly, it seems to me that, even if the scheme were an imperfect trust provision, it would fail to satisfy s. 2 (1) of the Charitable Trusts (Validation) Act, 1954. For these reasons, it seems to me that the Special Commissioners reached a correct conclusion on the matter, and I must therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.*, agents for *Weightman, Pedder & Co.*, Liverpool (for the taxpayers); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

GOVERNMENT OF GIBRALTAR v. KENNEY AND ANOTHER.

[QUEEN'S BENCH DIVISION (Sellers, J.), June 28, 29, 1956.]

Arbitration—Dispute within scope of clause—Contract for services—Claim on a quantum meruit and under the Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6 c. 40)—Whether claims "arising out of" or "under" the contract.

Declaration—Arbitration—Scope of reference—Whether declaration granted where injunction refused.

The first defendant had been employed by the plaintiffs as a quantity surveyor under an agreement which specified the remuneration which he was to receive and provided by cl. 9 that if any dispute or difference should occur between the parties in relation to any thing or matter arising out of or under the agreement it should be referred to arbitration. Disputes having arisen concerning the first defendant's remuneration the second defendant was appointed sole arbitrator and the first defendant delivered points of claim. The plaintiffs contended before the arbitrator that some of the matters referred to in the points of claim were outside the scope of the submission to arbitration in cl. 9. The arbitrator, before coming to any determination on the matters raised, ruled that he had jurisdiction to hear the reference and the plaintiffs now sought a declaration to the contrary effect. The disputed matters in the points of claim included a claim by the first defendant for a sum of money on a quantum meruit for services rendered, it being alleged that the agreement had ceased to have any application to these services, and an alternative claim for a similar sum alleged to be payable, if the contract was adjudged to have been frustrated, partly under the Law Reform (Frustrated Contracts) Act, 1943, and partly on a quantum meruit.

Held: in the circumstances of the present case the claim for a quantum meruit, and the alternative claim in the event of the agreement being adjudged to have been frustrated, were both claims arising out of the agreement within the ambit of the arbitration clause and were matters which

A ought to be determined by the arbitrator and which could conveniently be determined by him, as there was no such clear separation of issues as would put one or more outside the arbitration agreement.

Dicta of VISCOUNT SIMON, L.C., and of LORD MACMILLAN in *Heyman v. Darwins, Ltd.* ([1942] 1 All E.R. at pp. 343, 347) applied.

B Per CURIAM: there may be circumstances where a court could appropriately make a declaration regarding the scope of an agreement to refer matters to arbitration where it might not be able to grant an injunction to restrain proceeding with an arbitration beyond the agreement of reference (see p. 25, letters D and G, post).

Cases referred to:

- C (1) *North London Ry. Co. v. Great Northern Ry. Co.*, (1883), 11 Q.B.D. 30; 52 L.J.Q.B. 380; 48 L.T. 695; 2 Digest 377, 412.
(2) *Den of Airlie S.S. Co., Ltd. v. Mitsui & Co., Ltd. & British Oil & Cake Mills, Ltd.*, (1912), 106 L.T. 451; 2 Digest 378, 419.
(3) *Farrar v. Cooper*, (1890), 44 Ch.D. 323; 59 L.J.Ch. 506; 62 L.T. 528; 2 Digest 378, 417.
D (4) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

Claim for a declaration.

E By an agreement dated Apr. 25, 1946, the plaintiffs, the Government of Gibraltar, employed the first defendant, Cyril Ernest Kenney, as a quantity surveyor in connection with the erection of blocks of flats in Gibraltar at a remuneration which was specified in the agreement. Clause 9* of the agreement provided for any dispute or difference arising out of or under the agreement to be referred to a single arbitrator appointed by the President of the Chartered Surveyors' Institution. Disputes having arisen between the parties the second defendant, Cecil Tom Every, was on the application of the first defendant appointed arbitrator in August, 1955. On Dec. 14, 1955, the first defendant delivered points of claim which he subsequently amended. The plaintiffs
F contended that some of the matters referred to in the amended points of claim were outside the scope of the reference to arbitration under cl. 9 of the agreement. On Apr. 27, 1956, the second defendant (the arbitrator) having heard argument on this point, informed the parties that he was of the opinion that he had jurisdiction to determine all the matters raised in the points of claim and ordered
G the plaintiffs (respondents to the arbitration) to deliver their points of defence. The plaintiffs brought this action claiming a declaration that the second defendant (the arbitrator) had no jurisdiction to hear certain of the matters claimed in the amended points of claim of the first defendant and for an order restraining the second defendant from hearing or determining those matters. The matters claimed which gave rise to this dispute are referred to in the judgment.

H *J. F. Donaldson* for the plaintiffs.

Neil Lawson, Q.C., and *R. D. Stewart-Brown* for the first defendant.

The second defendant (the arbitrator) did not appear.

I **SELLERS, J.:** The plaintiffs bring these proceedings against the first defendant, who is a quantity surveyor and who had an agreement with them for some work in his professional capacity, and also against the second defendant, who, at the moment, is an arbitrator who has been appointed in accordance with an arbitration clause in the contract under which the first defendant was doing the work for the plaintiffs. The action asks for a declaration relevant to that arbitration to this effect: "That the second defendant has no jurisdiction to hear or determine the claims by the first defendant set out in" certain paragraphs of the claim in the arbitration between the plaintiffs and the first defendant. They also ask for an order against the arbitrator restraining him from

* The terms of the clause are printed at p. 24, letter C, post.

hearing or purporting to hear the matters against which complaint has been made. A

As soon as these proceedings were launched, the arbitrator took the very proper course of notifying the plaintiffs that he would take no part in the proceedings but would abide by any order which the court might make. As a consequence, counsel for the plaintiffs asks for no further order against the arbitrator. The proceedings have been pursued against the first defendant for the declaration asked. B

The contract in question, which contains the arbitration clause, was entered into on Apr. 25, 1946, and was made between the Crown Agents for the Colonies, acting on behalf of the plaintiffs, and the first defendant, retaining his services as a quantity surveyor in connection with a scheme of works consisting of the construction of blocks of flats and other ancillary works at Alameda Gardens, Gibraltar. In that agreement cl. 9 provided as follows: C

"If any dispute or difference shall arise or occur between the parties hereto in relation to any thing or matter arising out of or under this agreement the same shall be referred to some person nominated as single arbitrator by the President for the time being of the Chartered Surveyors' Institution and this agreement shall be deemed to be a reference to arbitration within the meaning of the Arbitration Acts, 1889 to 1934 or any statutory modification or re-enactment thereof." D

The second defendant was appointed as arbitrator under that clause by the President for the time being of the Chartered Surveyors' Institution, the plaintiffs in this action simply letting the clause be invoked by the first defendant. E

In that arbitration points of claim were put in and amended, and the amended points of claim set out in detail, with particulars, the claim which the first defendant was making against the plaintiffs to this suit. No defence was put in, but reference was made before the arbitrator to the claim and it was submitted to him by counsel that he had no jurisdiction to try some of the matters which were the subject of the claim. The arbitrator heard counsel and expressed the view that he had jurisdiction and was prepared to undertake the arbitration of those issues, and it is that course which the arbitrator indicated it was his intention to take that has given rise to this action in the High Court. F

The plaintiffs do not seek to say that the arbitrator had no jurisdiction at all on any of the matters claimed in the points of claim, but they allege that three matters in particular do not fall within the submission arising under cl. 9 of the contract. The issues in the points of claim as delivered in the arbitration by the first defendant and not yet defined by any points of defence by the plaintiffs can be placed in five classes: There is a claim under the contract based on the express terms of the contract leaving a sum of money still outstanding which will call for consideration and also an allegation that there has been a breach of the agreement in various matters and that damages flow from that breach which are recoverable. In so far as the claim is referable to those matters no complaint is made that they are not properly the subject of the arbitration; but there are three other matters which, it is said, are not appropriate to the arbitration and are outside its scope. They can be briefly summarised thus: First, that there is a claim, not under the contract at all but for a quantum meruit, for no less than £107,000 odd, which is to be compared with remuneration under the contract of something like £25,000. The claim for the quantum meruit is based on allegations that the agreement ceased to have any application to the services rendered by the first defendant as quantity surveyor or that it was frustrated. Then there is an alternative claim that the first defendant is entitled to recover part of the sum which represents remuneration for his services under the contract on the basis of the frustration of the contract by reason of the benefit for work done under the Law Reform (Frustrated Contracts) Act, 1943, in so far as the contract was performed up to the date of frustration and thereafter there is a claim for a G H I

A quantum meruit with regard to the other work. The third claim which is said to be outside the submission to arbitration and, therefore, outside the scope of the arbitration is in relation to some further services which were alleged to have been performed by the first defendant outside the provisions of the agreement but consequential thereon, in particular one relating to some work done in assessing the quantities on another building altogether.

B With regard to the third item which I have mentioned, that was not pressed as being wholly outside the province of the arbitrator and if the arbitrator is rightly entitled to adjudicate on the quantum meruit which is claimed in two different ways for different amounts and is entitled to adjudicate on the claim under the Law Reform (Frustrated Contracts) Act, 1943, then it was not sought to say that that item of claim would not be appropriate in the arbitration. The question, C therefore, arises whether the submission of the plaintiffs is right that these heads of claim fall outside the ambit of the arbitration clause.

That matter was discussed by both counsel, but counsel for the first defendant said that, whatever the appropriate decision ought to be on that matter, this court had no jurisdiction to determine it, and he relied on *North London Ry. Co. v. Great Northern Ry. Co.* (1) ((1883), 11 Q.B.D. 30) which decided that

D “... the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious.”

That is the headnote, and I think that it is the effect of what was said by BRETT, L.J., and COTTON, L.J., in that case. It was also supported by the decision in *Den of Airlie S.S. Co., Ltd. v. Mitsui & Co., Ltd. & British Oil & Cake Mills, Ltd.* (2) ((1912), 106 L.T. 451) where *North London Ry. Co. v. Great Northern Ry. Co.* (1) was followed.

E Counsel for the plaintiffs sought to distinguish *North London Ry. Co. v. Great Northern Ry. Co.* (1) on the ground that that was where the whole of the matter in dispute and under discussion was beyond the jurisdiction of the arbitrators and he pointed out that that was not the circumstance here, that this was only going to part of the arbitrator's jurisdiction and that, in the result, great injustice might be visualised because of the form in which the award might be framed so that there could not be a clear differentiation between the decision on the matters which were appropriate for the arbitrator's consideration and those which the plaintiffs claimed to be outside his jurisdiction. I think that is clearly a distinction between those cases and the present one, but this is not a case where an injunction is sought against the first defendant, it is a claim for a declaration. G Although a declaration was asked for in conjunction with an injunction in *Den of Airlie S.S. Co., Ltd. v. Mitsui & Co., Ltd.* (2), it seems to me that there may be circumstances where the court could appropriately make a declaration where it might not, on those authorities, be able to grant an injunction. That position with regard to an injunction was modified in some way in the view of H KEKEWICH, J., in a case which was cited*, but however bad an application for an injunction may be, I would not have felt myself restricted in granting the declaration if I had come to the conclusion on the merits that it was one which I ought to grant in favour of the plaintiffs.

I I must now deal with the merits of the claim as it is framed before me. The question has to be judged by an interpretation of the arbitration clause and the claims which are sought to be made in the arbitration.

In my view, this arbitration clause is very wide. It covers

“... any dispute or difference [which] shall arise or occur between the parties hereto in relation to any thing or matter arising out of or under this agreement . . .”

* *Farrar v. Cooper* (3) ((1890), 44 Ch.D. 323).

The distinction between matters "arising out of" and "under" the agreement is referred to in most of the speeches in *Heyman v. Darwins, Ltd.* (4) ([1942] 1 All E.R. 337) and it is quite clear that "arising out of" is very much wider than "under" the agreement. This clause incorporates a difference or dispute in relation to any thing or matter "arising out of" as well as "under" the agreement, and, in my view, everything which is claimed here in this arbitration can be said to be a dispute or difference in relation to something "arising out of" the agreement. A
B

It is true that a quantum meruit is a quasi-contract and arises, in a sense, on an implied contract and not on any express agreement, but, in my view, in the circumstances of this case (although it may not be in all cases) the quantum meruit is an incident which arises out of the contract. It is not a remedy for breach or arising on frustration, but it is an incident, in my view, which does arise as a consequence of the contract or "arising out of" it. One has only to look at the pleadings, at the points of claim, and to visualise what is involved in the arbitration to see the close association between the written contract and the claim advanced in this way on a quantum meruit. C

The issue whether there has been a frustration giving rise to a quantum meruit or giving rise to a claim under the Law Reform (Frustrated Contracts) Act, 1943, is one wrapped up with all the terms of the contract and its purported performance. Until the arbitrator has decided that issue on the contract and what took place in purported performance and all the circumstances, no question of the quantum meruit arises. Indeed, it would give rise to a difficult and highly unsatisfactory position if the arbitrator were to be left to decide whether the facts and circumstances amounted to a frustration or to a repudiation of the contract, or, putting it in another way, whether they were such that the contract had ceased to exist, and then, having arrived at that conclusion, it should be said that the matter as to quantum had to be referred to the court. Notwithstanding the effort counsel for the plaintiffs made to satisfy me that there were good reasons for this procedure (i.e., this attempt to have the court invoked for part of the claim), I am afraid I have not been convinced. I can well understand that the more complicated matters, not of quantity but of law and fact to decide the issues of frustration or repudiation might be appropriate to the court. It seems to me most inappropriate that the court should be asked to assess the sum on the basis of the findings of the arbitrator in relation to other matters. D
E
F

If, as I think, the claim for quantum meruit is incidental to this claim and, therefore, within the arbitration clause, so, I think, is the alternative claim under the Law Reform (Frustrated Contracts) Act, 1943. It requires the same investigation of the contract and its terms and the performance under it and is so closely linked up with the contract which existed until it was frustrated that I think it properly falls within the submission. G

Very little authority has been referred to with relation to this particular aspect of the case. The matter did not arise in the case which has been most referred to, *Heyman v. Darwins, Ltd.* (4), although there are indications of the view their Lordships might have taken if a claim for a quantum meruit had arisen there. VISCOUNT SIMON, L.C., says ([1942] 1 All E.R. at p. 343): H

"By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so", I

which goes to show that, in the view of LORD SIMON, L.C., incidental relief, although not expressly stated in the submission, would be within the jurisdiction.

LORD MACMILLAN, dealing with the effect of repudiation, said (*ibid.*, at p. 347):

"I am accordingly of opinion that what is commonly called repudiation

A or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

C I think that the important words there are that "it survives for the purpose of measuring the claims arising out of the breach", and it does not seem to me that that observation would have any less force if the words were "claims arising out of the frustration."

For those reasons, I find and hold that the plaintiffs are not entitled to the declaration for which they ask. It is, perhaps, not for me to emphasise, but I have already indicated that it would greatly inconvenience any further pursuance of this dispute if the view which I took of the matter had been different and I had to give effect to the claim which is made and make a declaration that this particular dispute had to be tried in two parts, partly before the arbitrator and partly before the court. There may be cases where there is a clear separation of the issues and one or more may be said to be wholly outside the submission, but I do not find that to be the case here.

E If I had felt that the declaration asked for was one which might be given but that I had discretion in the matter, I should not have exercised my discretion in favour of the plaintiffs' claim. I think good sense and good reason, in the particular circumstances of this case, do not justify a separation of the issues of the claim which the first defendant is making against the plaintiffs. Therefore, I dismiss the claim.

Claim dismissed.

Solicitors: *E. F. Turner & Sons* (for the plaintiffs); *Jaques & Co.* (for the first defendant).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

Re COOPER'S CONVEYANCE TRUSTS.
CREWDSON AND OTHERS v. BAGOT AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), July 3, 4, 5, 1956.]

Charity—Cy-près doctrine—Gift over on failure of charitable trust—Gift over void—Whether charitable gift limited—Reverter to donor's estate.

By a deed dated Apr. 13, 1864, land and buildings thereon were conveyed by a donor to trustees "their heirs and assigns for ever in trust nevertheless for the purposes of the Orphan Girls' Home at Kendal (that is to say) the charity of which the object and constitution and the governing rules and regulations are . . . contained in the schedule hereunder . . . and on failure of the said trust evidenced by a resolution of the committee of management of the said institution confirmed by a general meeting of the subscribers to the same then the said several messuages and hereditaments and premises . . . shall subject to the said foregoing trust . . . be held upon such trusts and for such intents and purposes as shall correspond . . . with the uses and limitations . . . to which [a certain mansion house] shall then be subject and to the intent that the person or persons who on the failure of the afore-said charitable objects shall under the said uses and limitations be entitled . . . to the said mansion house . . . for any estate or successive estates of freehold for life or lives or for any greater estate or estates . . . shall have been entitled to the same or the like estate or estates . . . in the said [property] hereinbefore expressed to be hereby granted . . . and to convey and assure the same messuage and premises accordingly and upon or for no other trust or purpose whatsoever". In June, 1954, the orphanage was closed, there being no prospect of continuing it. No valid resolution of the committee of management could be passed, because no one was qualified under the rules (in the events which had happened) to be a member of the committee, and for a similar reason no meeting of subscribers could take place. The court held that the gift over on failure of the charitable trust was void as infringing the rule against perpetuities, and the question arose whether the orphanage was held on resulting trusts for the donor's estate or whether it was held on valid charitable trusts and a scheme should be directed cy-près.

Held: on the true construction of the deed the donor had evinced an intention that the charity was only for a limited time and purpose, since the charity was intended to continue only while it could be carried on as an orphan girls' home by the committee of management, and accordingly, when the charity could no longer be so carried on, an interest was undisposed of and resulted to the donor's estate; therefore the property should not be applied cy-près.

Principle stated by STIRLING, J., in *Re Bowen* ([1893] 2 Ch. at p. 495) applied.

Re Slevin ([1891] 2 Ch. 236) and *Re Wright* ([1954] 2 All E.R. 98) considered.

[As to the rules applicable to limited gifts to charities and gifts over in favour of non-charitable objects, see 4 HALSBURY'S LAWS (3rd Edn.) 301, para. 619; and for cases on the subject, see 8 DIGEST (Repl.) 434-437, 1251-1272.]

* Cases referred to:

- (1) *Re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789; 8 Digest (Repl.) 441, 1309.
- (2) *Re Peel's Release*, [1921] 2 Ch. 218; 90 L.J.Ch. 369; 127 L.T. 123; 8 Digest (Repl.) 442, 1318.
- (3) *Re Randell, Randell v. Dixon*, (1888), 38 Ch.D. 213; 57 L.J.Ch. 899; 58 L.T. 626; 8 Digest (Repl.) 435, 1253.
- (4) *Re Blunt's Trusts, Wigan v. Clinch*, [1904] 2 Ch. 767; 74 L.J.Ch. 33; 91 L.T. 687; 68 J.P. 571; 8 Digest (Repl.) 435, 1254.
- (5) *Re Talbot, Jubb v. Sheard*, [1933] Ch. 895; 102 L.J.Ch. 362; 149 L.T. 401; 8 Digest (Repl.) 415, 1076.

- A (6) *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985; [1950] Ch. 177; 8 Digest (Repl.) 320, 51.
- (7) *Re Wilson, Twentyman v. Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest (Repl.) 422, 1132.
- (8) *Re Stevin, Stevin v. Hepburn*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 8 Digest (Repl.) 463, 1633.
- B (9) *Re Wright, Blizard v. Lockhart*, [1954] 2 All E.R. 98; [1954] Ch. 347; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs, as trustees of a conveyance dated Apr. 13, 1864, applied to the court by originating summons for the determination of the following questions (among others): (i) whether the trust in the said conveyance that on the failure or termination of the trust for the charity known as the Orphan Girls' Home at Kendal the hereditaments conveyed should be held on trust for the person or persons who should be entitled to the mansion house called Levens Hall was (a) void for remoteness as infringing the rule against perpetuities or (b) was valid; and (ii) if such trust failed, whether, according to the true construction of the conveyance and in the events which had happened, the hereditaments comprised in the conveyance were held on valid charitable trusts and ought to be held and applied by way of scheme or whether the hereditaments were held on a resulting trust for the persons entitled to the residuary real estate of the donor, the Honourable Mary Howard, deceased.

HIS LORDSHIP held on question (i), that the gift over was void as infringing the rule against perpetuities. This report is limited to the court's decision on question (ii).

W. T. Elverston for the plaintiffs, the trustees of the charity.

N. S. S. Warren for all defendants other than the first defendant and the Attorney-General, being those interested in the event of there being a resulting trust.

Denys B. Buckley for the Attorney-General.

The first defendant did not appear and was not represented by counsel.

UPJOHN, J.: The Howard Orphan Home near Kendal, in the County of Westmorland, was founded by the generosity of the Honourable Mary Howard in 1864, but due to a change of circumstances it was forced to close in 1954 after ninety years of useful life. The question which I have to determine is whether the lands and buildings on which the charity was conducted, and the proceeds of sale of a small part which has been sold, are now held on valid charitable trusts and a scheme ought to be directed for their application cy-près, or whether there is a resulting trust for the estate of the grantor, who has long since died.

The orphanage was constituted by a deed dated Apr. 13, 1864. By that deed, land and property were conveyed to a body of trustees,

"their heirs and assigns for ever in trust nevertheless for the purposes of the Orphan Girls' Home at Kendal (that is to say) the charity of which the object and constitution and the governing rules and regulations are defined set forth and contained in the schedule hereunder written in which schedule the same charity is termed the institution and to hold apply and dispose of the same accordingly pursuant to the said rules and regulations for the time being in force and on failure of the said trust evidenced by a resolution of the committee of management of the said institution confirmed by a general meeting of the subscribers to the same then the said several messuages and hereditaments and premises hereinbefore expressed to be hereby granted or so many and such parts thereof and such estates and interest therein as shall not have been disposed of under the foregoing trust shall subject to the said foregoing trust and to all acts and things done by virtue

thereof be held upon such trusts and for such intents and purposes as shall correspond (as far as circumstances will permit and the rules of law and equity shall allow) with the uses and limitations (other than uses or limitations by way of mortgage or charge) to which the aforesaid mansion house called Levens Hall or the land on which the same and the outbuildings and offices thereof now stand shall then be subject and to the intent that the person or persons who on the failure of the aforesaid charitable objects shall under the said uses and limitations be entitled or who (but for prior incumbrances) would be entitled to the said mansion house land and premises for any estate or successive estates of freehold for life or lives or for any greater estate or estates at law and in equity or in equity only shall have been entitled to the same or the like estate or estates (as nearly as may be) in the said messuage or home and buildings hereditaments and premises with the appurtenances hereinbefore expressed to be hereby granted or in such undisposed part thereof or interest therein as aforesaid and to convey and assure the same messuage and premises accordingly and upon or for no other trust or purpose whatsoever."

I need refer in detail only to two of the rules contained in the schedule. Part IV of the rules constituted the committee of management of the orphanage, and r. 11 was in these terms:

"The conduct and management of the institution in accordance with the rules and by-laws of the institution for the time being in force shall be vested in the committee of management consisting of seven subscribers."

Part V, r. 36 to r. 38, provided for general meetings of subscribers. Part VI, r. 39, dealt with the winding-up in these terms:

"If at any time the committee of management shall come to a unanimous resolution that it is impossible to prosecute the objects or design of the institution as hereinbefore set forth with advantage it shall be lawful for such committee by resolution confirmed by a general meeting of the subscribers to declare that the objects of the institution have failed and that the same ought to be discontinued and wound up and thereupon the committee shall wind up the affairs of the institution accordingly and the messuages and premises vested in the trustees of the institution for the purpose of being used as the home of the institution shall be held by them upon the trusts and for the purposes to and for which the same are above declared to be subject in the event of the failure of the trusts above declared for the benefit of the institution and the committee shall cause to be converted into money the other real and personal property and effects of the institution in such manner as the committee of management shall deem expedient and shall apply the net proceeds of such conversion to such objects or purposes of charity within the said County of Westmorland as the committee of management shall unanimously resolve upon and a general meeting of the subscribers specially convened for the purpose shall sanction and confirm."

Pausing there, certain funds are held on the trusts of the charity, and it is common ground that, having regard to the rules that I have just read, those funds are held on valid charitable trusts and a scheme must be directed for their administration *cy-près*.

For many years the orphanage was supported by voluntary contributions, but no one has subscribed for ten years at least, and in its latter years the orphanage was in fact supported by grants from various local authorities and from the Ministry of Education. These bodies were placing girls there for their education. Through changes of policy, in 1953 these authorities ceased to send girls to the orphanage or to support the home. A meeting was held in December, 1953, at which representatives of the Home Office were present, and, as a result, it was

A plain that there was no prospect of continuing the orphanage, which finally closed in June, 1954.

Pursuant to r. 39, the committee of management purported to pass a resolution closing the home. I do not read their resolution, for it is clear that the committee, though de facto managing the orphanage, had not been constituted according to the rules for many years, for no one was a subscriber; and for a like reason it was impossible to convene a meeting of subscribers to confirm the resolution of the committee of management.

One thing is clear on the construction of the deed or grant, and that is that the gift over on failure of the trust to the person or persons who should be entitled to the mansion house called Levens Hall is void as infringing the rule against perpetuities, and I have already formally made a declaration to that effect.

C The question whether the property, i.e., the lands and buildings, ought now to be applied on charitable trusts cy-près or results to the estate of the donor depends on the true construction of the deed. A number of authorities have been cited to me. They establish clearly the following propositions: Where in terms an absolute and perpetual gift to charity is made with a gift over on cesser which fails for remoteness or for some other reason, the original perpetual gift to charity remains; but, on the other hand, where there is a gift to charity for a limited period then the undisposed of interest reverts to the grantor.

The question to be answered was succinctly put by STIRLING, J., in *Re Bowen, Lloyd Phillips v. Davis* (1) ([1893] 2 Ch. 491). He said (*ibid.*, at p. 495):

E “The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i.e., whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue.”

In that case, and in *Re Peel's Release* (2) ([1921] 2 Ch. 218), in which SARGANT, J., followed *Re Bowen* (1), the original beneficial gift was made perpetual in express terms. On the other hand, *Re Randell, Randell v. Dixon* (3) (1888), 38 Ch.D. 213 and *Re Blunt's Trusts, Wigan v. Clinch* (4) ([1904] 2 Ch. 767) were cases on the other side of the line, for the gift in each of those cases was expressed to be limited in duration.

G MAUGHAM, J., considered those cases in *Re Talbot, Jubb v. Sheard* (5) ([1933] Ch. 895). The decision there turned ultimately on the Methodist Church Union Act, 1929, but the earlier authorities were discussed. As in the case before me, there was in that case a gift neither expressed to be in perpetuity nor, on the other hand, limited in duration. The judgment of MAUGHAM, J., was not entirely easy to follow, but I respectfully agree with SIR RAYMOND EVERSHED, M.R., in *Gibson v. South American Stores (Gath & Chaves), Ltd.* (6) ([1949] 2 All E.R. 985 at p. 999), that had the matter arisen for decision MAUGHAM, J., would have held that the gift in that case fell into the second branch of the problem stated by STIRLING, J.

H Counsel for the Attorney-General referred me to a number of authorities to establish the proposition that when once the charitable gift has taken effect, as distinct from an initial failure through impracticability or lapse during the testator's lifetime, the question of general charitable intention is irrelevant, although he concedes that one must in the first place find a perpetual or out-and-out gift to charity. The matter is really one of language. The general principle is stated in TUDOR ON CHARITIES (5th Edn.) at p. 141, where, after referring to the well-known passage in the judgment of PARKER, J., in *Re Wilson, Twentyman v. Simpson* (7) ([1913] 1 Ch. 314 at p. 320), the editor continues:

I “The importance of the distinction lies in the fact that the cy-près principle is confined to property given with a general intention of charity. There is an exception to this rule concerning property given absolutely and perpetually to charity, and which has vested in the charity: in such

circumstances a rule of convenience has grown up that on the subsequent failure of the trusts, the fund can be applied cy-près irrespective of the donor's intention."

I draw attention to the words "property given absolutely and perpetually to charity".

Then I was referred to *Re Slevin*, *Slevin v. Hepburn* (8) ([1891] 2 Ch. 236), and the more recent case of *Re Wright*, *Blizard v. Lockhart* (9) ([1954] 2 All E.R. 98). Those cases appear to me to establish that if one finds an initial out-and-out or perpetual gift to charity, albeit to a particular charity or to a particular charitable purpose, and that charity or charitable purpose fails after the gift has vested in interest, it is in a sense irrelevant to consider whether there is a general charitable intention. This is because the donor has made initially an out-and-out gift to charity, although to a particular charity or charitable purpose, and has reserved no interest to himself. Thus, in the present case, if there had been no gift over on the failure of the orphanage, it would hardly have been suggested that on the subsequent failure of it there would have been a resulting trust. Where, however, the donor uses language showing an intention that in some circumstances he contemplates a failure of the purpose or indicates that his gift is only to be for a limited time or purpose, then it becomes a question of construction, whether he has made an out-and-out or perpetual gift to charity or not, and that is not inaptly expressed by asking whether he has evinced a general charitable intention.

Whatever language is used, however, the whole question is what are the donor's intentions, to be ascertained on a true construction of the relevant documents in the light of the relevant surrounding circumstances. Thus, even where the gift is in the first place unlimited in time but is followed by clauses of defeasance or powers of revocation, it is a question of construction whether a donor intended to devote his gift to charity out-and-out or in perpetuity or only for a limited purpose and period: see *Re Talbot* (5) and *Gibson v. South American Stores (Gath & Chaves), Ltd.* (6). In considering the construction of the deed, those two cases also make it clear that the court may rely on a clause of defeasance though that clause is open to objection on the ground of perpetuity.

I turn to a consideration of this deed. Counsel for the Attorney-General submitted that the clause of defeasance, like all conditions subsequent, must be construed strictly, and as there was no de jure committee of management and no general meeting of subscribers could be summoned, the gift to charity has not yet come to an end for the gift over has not yet operated, and, as there are no subscribers, never can operate. I do not agree with that. The deed has been most carefully drawn, and the donor is dealing with the case where there has been a failure, and that failure is to be evidenced by a resolution of the committee and of the subscribers. It was only a question of evidence, and, in my judgment, that was put in by this careful draftsman purely as a piece of machinery to protect the trustees in whom the land was vested so that the trustees could safely act on those resolutions. The fact that there can be no resolutions now, in my judgment, may be rejected as irrelevant. The fact remains that the charity has failed.

It is clear that the grant of the legal estate was expressed to be in perpetuity, for it was to the trustees, "their heirs and assigns for ever", but the trusts declared were not expressed to be either limited in time or in perpetuity, and in that respect the case, as I have pointed out, is somewhat similar to *Re Talbot* (5). What, however, seems to me clear is that the donor desired the charity to continue only while it could be carried on as an orphan girls' home by the committee of management and subject to the general supervision of general meetings of subscribers as detailed in the schedule. When that particular charity came to an end, in my judgment, she evinced the clearest possible intention that the property was to go over to the non-charitable purpose mentioned in her will,

- A She has said quite clearly that, on failure of the trusts, to be evidenced by these resolutions, then, "subject to the foregoing trust and to all acts and things done by virtue thereof", it is to be held on the new trusts, and she ends up her direction on this matter by saying that the property is to be conveyed "accordingly and upon or for no other trust or purpose whatsoever". Truly those concluding words have no dispositive effect, and in that sense are otiose, but they do confirm
- B the view which independently thereof I should have formed, that the donor in this case is concerned and concerned only with an orphanage carried on on the particular property by the particular bodies she has appointed in the schedule to carry it on. The moment that particular purpose comes to an end, it is to go over and the donor has again made that intention as to the land and buildings abundantly clear by the language she has employed in r. 39.
- C Accordingly, in my judgment, I think this is a case where the donor intended a gift to charity only for a limited time and for a limited purpose; the time is limited by the time for which the orphanage could be carried on. That period having come to an end, in my judgment, there is an interest in the donor remaining undisposed of; that is held on trust for her estate by way of resulting trust, and I must declare accordingly.

D

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Milne, Moser & Sons*, Kendal, Westmorland (for the plaintiffs); *Peacock & Goddard* (for the second and third defendants); *Hunters* (for the fourth and fifth defendants); *Hillearys* (for the sixth defendant); *Farrer & Co.* (for the seventh defendant); *Evans, Barraclough & Co.* (for the eighth defendant); *Leman, Harrison & Flagg* (for the ninth defendant); *Treasury Solicitor*.

E

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

ESCOIGNE PROPERTIES, LTD. v. INLAND REVENUE COMMISSIONERS.

F

[CHANCERY DIVISION (Vaisey, J.), June 28, 1956.]

Stamp Duty—Transfer of property from one associated company to another—Contract by original owner to sell freehold and leasehold properties to a company—Purchase price received but no conveyance or transfer executed by owner—Sale by company to associated company after death of owner—Conveyance, transfer and assignment executed by deceased's personal representatives—Whether exempt from ad valorem stamp duty—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, s. 58 (4)—Finance Act, 1930 (20 & 21 Geo. 5 c. 28), s. 42—Finance Act, 1938 (1 & 2 Geo. 6 c. 46), s. 50 (1) (b).

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The owner of freehold and leasehold properties in 1950 contracted to sell them to a limited company for £9,998, which was to be satisfied by an issue to him of the company's shares. He was allotted the shares but did not execute a conveyance or transfer before his death in 1951. In 1954 the company made arrangements to sell the properties, of which it was the absolute owner beneficially, to a new company in which it owned substantially all the shares. On the question of the stamp duty chargeable on the three transfers and one assignment of leasehold properties and the conveyance of freehold properties by the executors of the original owner to the new company,

Held: none of the documents was chargeable with ad valorem stamp duty, since under s. 42 of the Finance Act, 1930, they were exempt as transfers of beneficial interests of one limited company to another in which it owned not less than ninety per cent. of the issued share capital, and were not excluded from that exemption by s. 50 (1) of the Finance Act, 1938, since the beneficial interests in the properties under the arrangement had not been "previously

conveyed or transferred directly or indirectly " by the original owner to the first company within the section. A

Appeal allowed.

[As to relief from stamp duty on transfers between associated companies, see 6 HALSBURY'S LAWS (3rd Edn.) 786, para. 1585.

For the Stamp Act, 1891, s. 54 and s. 58 (4), see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 628. B

For the Finance Act, 1930, s. 42, and the Finance Act, 1938, s. 50, see 21 HALSBURY'S STATUTES (2nd Edn.) 959, 1196.]

Case Stated.

This was an appeal by Escoigne Properties, Ltd. (referred to hereinafter as the "appellant company") against assessments made by the Inland Revenue Commissioners in respect of the stamp duty chargeable on five instruments of conveyance or assignment on sale of properties in land or houses to the appellant company, the instruments having been presented by the appellant company to the commissioners under s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instruments were chargeable. C

Three of the instruments (exhibits A, B and C) were Land Registry transfers to the appellant company of leasehold properties by the personal representatives of Samuel Cohen deceased, at the request and by the direction of Samuel Cohen (Properties), Ltd. The fourth instrument (exhibit D) was an assignment made between the executors of the will of Samuel Cohen, of the first part, Samuel Cohen (Properties), Ltd., of the second part, and the appellant company, of the third part, of certain leasehold property. The fifth instrument (exhibit E) was a conveyance made between the same parties of certain freehold property. Exhibit A was dated Nov. 2, 1954; exhibits B, D and E were dated Nov. 5, 1954; and exhibit C, Nov. 6, 1954. In the case of exhibits B and C, the transfers were subject to certain charges, and there was contained in each deed a new covenant by the appellant company with the respective mortgagees for payment of the mortgage debt. The conveyance of the freehold property (exhibit E) was also subject to a mortgage. The expressed consideration (£24,200 in exhibit A; £30,250 in exhibit B; £35,200 in exhibit C; £3,080 in exhibit D; and £16,170 in exhibit E) was, in each case, stated to have been paid and satisfied by the allotment to Samuel Cohen (Properties), Ltd. of a certain number of shares of £1 each, credited as fully paid, in the appellant company. D E F

By an agreement dated June 30, 1950, the late Mr. Samuel Cohen agreed to sell to Samuel Cohen (Properties), Ltd. certain freehold and leasehold properties including those referred to above, subject to the incumbrances then affecting them. The consideration for the sale was stated to be £9,998 to be satisfied by the allotment to Mr. Cohen or his nominees of 9,998 fully paid shares of £1 each of Samuel Cohen (Properties), Ltd. The shares were allotted on or about June 30, 1950. On July 21, 1951, Mr. Cohen died. Before his death he had not executed any conveyance, transfer or assignment of the properties. His will was proved by his executors (parties to the deeds presented for adjudication) on Feb. 29, 1952. Before the execution of the instruments presented for adjudication, the executors had not given any assent or made any conveyance in respect of a legal estate in or affecting the properties conveyed or assigned by the instruments. G H

The appellant company was incorporated on Aug. 26, 1954, under the Companies Act, 1948, with a capital of £10,000 divided into ten thousand shares of £1 each, of which one hundred were issued for cash. Two of these shares were issued to subscribers on the incorporation of the appellant company, and the remaining ninety-eight of the shares issued for cash were allotted to Samuel Cohen (Properties), Ltd., on or about Nov. 1, 1954, as part of an allotment to that company of 2,298 shares of the appellant company, the remaining 2,200 of those shares being the consideration for the transfer to the appellant company of the I

- A property transferred by exhibit A. Immediately before the execution of the instruments presented for adjudication, Samuel Cohen (Properties), Ltd., was beneficial owner of not less than ninety per cent. of the issued share capital of the appellant company. The value of the shares of the appellant company far exceeded their nominal value, and it appeared from the instruments presented for adjudication that the shares were issued at a premium of £10 per £1 share.
- B The appellant company entered into separate bargains with Samuel Cohen (Properties), Ltd. for purchase of the properties for shares of the appellant company.

- The appellant company claimed that the conveyances and transfers presented for adjudication were not liable to any stamp duty under the heading "Conveyance or transfer on sale", in Sch. 1 to the Stamp Act, 1891, because the effect of the instruments was "to convey or transfer a beneficial interest in property from one company with limited liability [Samuel Cohen (Properties), Ltd.] to another such company [the appellant company]", within s. 42 (2) (a) of the Finance Act, 1930, and the former company was beneficial owner of not less than ninety per cent. of the issued share capital of the appellant company, as required by s. 42 (2) (b) of the Act of 1930, and that, therefore, the appellant company was entitled to relief under s. 42 of the Act of 1930.
- D

- The commissioners were of the opinion that the instruments presented for adjudication were not entitled to exemption from stamp duty under s. 42 of the Finance Act, 1930, because (a) each of the instruments was an "instrument . . . whereby . . . property upon the sale thereof" by the late Mr. Cohen to Samuel Cohen (Properties), Ltd. was "transferred to or vested in" the appellant company within the definition of "conveyance on sale" in s. 54 of the Stamp Act, 1891, and was liable to stamp duty under the heading "Conveyance or transfer on sale" in Sch. 1 to the Act of 1891; (b) the commissioners were not satisfied that the effect of any of the instruments was "to convey or transfer a beneficial interest in property from" Samuel Cohen (Properties), Ltd. to the appellant company within the meaning of s. 42 of the Finance Act, 1930; (c) even if the effect of any of the instruments was to convey or transfer a beneficial interest from Samuel Cohen (Properties), Ltd. to the appellant company, the beneficial interest could only have become vested in Samuel Cohen (Properties), Ltd. under the agreement of June 30, 1950, and, although at that date the appellant company was not in contemplation as a sub-purchaser, each of the instruments was executed pursuant to the obligation imposed on Mr. Cohen by the agreement of 1950 to execute, when called on to do so, a conveyance or transfer of the property affected by the agreement, and, therefore, the instruments were excepted by s. 50 of the Finance Act, 1938, from the exemption conferred by s. 42 of the Act of 1930, as they were "executed in pursuance of or in connection with an arrangement whereunder . . . the beneficial interest in the property [thereby affected] was previously conveyed or transferred directly or indirectly" by the late Mr. Cohen or his executors. The commissioners, accordingly, assessed the duty on the instruments by reference to the heading "Conveyance or transfer on sale" in Sch. 1 to the Stamp Act, 1891, s. 54, s. 55, s. 57 and s. 58 (4) of the Act of 1891, and the other relevant statutory provisions, the total duties assessed being £3,980.
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- I *J. Pennyquick, Q.C., and J. P. F. E. Warner* for the appellant company.
Raymond Jennings, Q.C., and E. Blanshard Stamp for the Crown.

VAISEY, J.: This is a Case Stated by the Commissioners of Inland Revenue asking me to determine the proper amount of stamp duty chargeable on five instruments of conveyance or assignment on sale. Those five instruments were executed in the following circumstances. On June 30, 1950, the late Mr. Samuel Cohen entered into a contract to sell certain properties of freehold and leasehold tenure to a company known as Samuel Cohen (Properties), Ltd. The consideration for that sale was a sum of £9,998 to be satisfied by the issue to Mr. Cohen of

certain shares. No question arises as to the stamping of that document. The shares in question were duly allotted to Mr. Cohen but the contract was not completed by the execution of any conveyance or transfer. Mr. Cohen died on July 21, 1951, and the position at that date was that his legal personal representatives would have to hold the legal estate of the various properties in trust for Samuel Cohen (Properties), Ltd., to which they then belonged beneficially and absolutely. Three years later, in 1954, the appellant company, Escoigne Properties, Ltd., was incorporated and terms were arranged, without there being any written contract, for the sale of the properties by Samuel Cohen (Properties), Ltd. to the appellant company. As a result of that arrangement the five documents in respect of which the questions now arise were executed.

Those documents got in, in favour of the appellant company, the legal estate outstanding in Mr. Cohen's executors and, secondly, they conveyed and transferred the beneficial interest already vested in Samuel Cohen (Properties), Ltd. to the appellant company. So far the transaction is of the simplest character and the question is, how ought those documents to be stamped? Section 54 of the Stamp Act, 1891, provides that for the purposes of that Act

"the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

So far, it seems clear that these five documents come within that comprehensive definition. Section 58 (4) provides:

"Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser."

That means, of course, that the duty has to be so assessed whether the consideration for the sub-sale be greater or less than the consideration for the original sale. Down to that point again it is clear that the proper stamp to be affixed to these five documents would be calculated by reference to the consideration for the respective sub-sales to the appellant company, the total consideration having been divided for the purposes of the documents.

Section 42 of the Finance Act, 1930, provides:

"(1) Stamp duty under the heading 'Conveyance or transfer on sale' in Sch. 1 to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies . . . (2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company; and (b) that . . . (i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company . . ."

Samuel Cohen (Properties), Ltd. owned all the shares in the appellant company, and, therefore, it would seem that an exemption would be granted to these transactions under s. 42 of the Act of 1930.

The Finance Act, 1938, s. 50 (1), provides:

"Section 42 of the Finance Act, 1930 (which relieves from stamp duty any instrument the effect whereof is to convey or transfer a beneficial interest in property from one associated company to another, in this section respectively referred to as the 'transferor' and 'transferee') shall not apply to any such instrument, unless it is shown to the satisfaction of the

- A Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connection with an arrangement whereunder . . .
- (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly by such a person as aforesaid."
- "Such a person as aforesaid" means some person other than an associated company, there being a reference back to para. (a) of this sub-section*, where the expression is in effect so defined. I cannot find, however, that any arrangement within the meaning of this sub-section was ever made. There were the preceding contract for sale, by which Mr. Cohen sold to Samuel Cohen (Properties), Ltd., and the sub-sale whereby Samuel Cohen (Properties), Ltd. sold to the appellant company. But the arrangement to which the section refers has to be an arrangement under which "the beneficial interest in the property was previously conveyed"—which, I think, must mean "had previously been conveyed"—"or transferred to any person directly or indirectly". Counsel for the Crown suggested that one way of transferring property was to receive the purchase money without a transfer of it being executed. That is true up to a point, but I do not think that in a taxing statute that kind of pretence is very appropriate. The truth is that there was, in fact, no transfer of the property, either directly or indirectly, before its transfer by the instruments now presented for my consideration. I agree that in some sense there can be a transfer by reason of there being no transfer; but I do not think that is what s. 50 (1) of the Act of 1938 means.

- Although counsel for the appellant company does not claim any particular merit in asking me to arrive at the conclusion which I do and counsel for the Crown thinks it is a rather surprising conclusion, it seems to me on the facts of the case, and having regard to the four sections to which I have referred, that these five documents are all exempt from any ad valorem stamp duty. Regard being had to certain admissions which were made as regards the form of the documents and certain collateral matters which were included in them, I think that I must declare that the instruments presented for adjudication are liable, as regards exhibits B and C to a duty of 10s. and no more, and as regards exhibits A, D and E, to no duty of any kind.

Appeal allowed.

Solicitors: *Nicholson, Graham & Jones* (for the appellant company); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

* Section 50 (1) (a) reads: "the consideration for the transfer or conveyance was to be provided directly or indirectly by a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee."

LONDON COUNTY COUNCIL v. WILKINS (VALUATION OFFICER).

A

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Earl Jowitt, Lord Oaksey, Lord Radcliffe and Lord Tucker), May 9, 10, July 11, 1956.]

Rates - Rateable occupation - Temporary structures - Builders' huts assembled and used on building site - Whether part of rateable hereditament.

B

The London County Council owned land on which, under a written contract with the council dated March, 1950, a firm of building contractors agreed to erect a school. The contract provided for the completion of the work within twelve months of the date of the order to commence given by the architect, who was given rights of access to the site and to the contractors' workshops. In January, 1950, temporary structures for the use of persons connected with the builders and for storage purposes were erected on the site, comprising the following: (i) A general foreman's and timekeeper's office, which was a sectional hut, with a wood roof covered by tarred felt, and a wood floor standing on sleepers, having an area of 114 square feet. This was used only for work in connection with the building of the school. It was moved once during the course of building operations from one position to another on the building site. (ii) A cement store, having corrugated iron sides and roof, resting on a concrete floor. Its area was 126 square feet and it was used solely for the storage of cement. (iii) Canteen and store, which was a wooden sectional hut with wood roof, covered with tarred felt, and a wood floor, standing on the site of an old roadway or playground. Its area was 445 square feet. It contained forms and a table. Electric light was laid on, and there was a stove, for heating water, fixed in one corner, with a pipe through the roof. (iv) Plumbers' store, made of corrugated iron, also standing on the site of a roadway or playground. It had an area of ninety-six square feet, and was used solely for the storage of plumbers' goods. All the huts were locked each night by the contractors, who kept the keys. None of the huts was fixed to the ground but all rested on the ground only by their own weight. The structures were assembled from component parts brought to the site which did not have the character of huts and were not capable of being occupied until they were assembled; when the time came for their removal the structures were dismantled into their component parts. Three huts were removed in June, 1951, and the fourth in September, 1951. A proposal was made to add the four structures to the rating valuation list. The Lands Tribunal held that the four structures were rateable.

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Held: (i) the Lands Tribunal had not misdirected itself in law and its decision should stand as there had been evidence on which it could have reached its decision on the questions on which rateability depended of which the principal for the purposes of this case was (see per EARL JOWITT, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER) whether the occupation of the huts had sufficient permanence or was too transient to render it rateable.

H

(ii) a structure, being a chattel, placed on another person's land could form with it a rateable hereditament even though the structure remained in law a chattel and as such the property of the person who placed it there.

John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee ([1949] 1 All E.R. 224), *Mitchell Brothers v. Worksop Union Assessment Committee* ([1904], 92 L.T. 62) and *Westminster Corpn. v. Southern Ry. Co.* ([1936] 2 All E.R. 322) considered.

I

Decision of the COURT OF APPEAL ([1955] 2 All E.R. 180) affirmed.

[As to the elements of rateable occupation, see 27 HALSBURY'S LAWS (2nd Edn.) 351, para. 782; and for cases on the subject, see 38 DIGEST 426-430, 440, 450, 451, 10-17, 27-46, 113-117, 174-181.]

A Cases referred to:

- (1) *Woodward (V. O.) v. Brading & Blundell, Ltd.*, (1951), 44 R. & I.T. 758.
- (2) *Mitchell Brothers v. Workshop Union Assessment Committee*, (1904), 1 Konst. Rat. App. 181; 92 L.T. 62; 69 J.P. 53; 38 Digest 424, 6.

B

- (3) *Laing (John) & Son, Ltd. v. Kingswood Assessment Area Assessment Committee*, [1948] 1 All E.R. 943; [1948] 2 K.B. 116; *affd.* C.A., [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 2nd Digest Supp.
- (4) *Cory v. Bristow*, (1875), L.R. 10 C.P. 504; *reversd.* C.A., (1875), 1 C.P.D. 54; *affd.* H.L., (1877), 2 App. Cas. 262; 46 L.J.M.C. 273; 36 L.T. 594; 41 J.P. 709; 38 Digest 451, 178.

- (5) *Lancashire Telephone Co. v. Manchester Overseers*, (1884), 14 Q.B.D. 267; 54 L.J.M.C. 63; 52 L.T. 793; 49 J.P. 724; 38 Digest 442, 135.

C

- (6) *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.

- (7) *Holland v. Hodgson*, (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 31 Digest (Repl.) 206, 3376.

D

- (8) *Assessor for the City of Glasgow v. Gilmartin*, 1920 S.C. 488; 57 S.C.R. 224; 1 S.L.T. 191.

- (9) *Harter v. Salford Overseers*, (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 122 E.R. 1313; 38 Digest 525, 726.

- (10) *Liverpool Corpn. v. Chorley Union Assessment Committee & Withnell Overseers*, [1912] 1 K.B. 270; 81 L.J.K.B. 426; 106 L.T. 205; 76 J.P. 161; *affd.* H.L., [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 38 Digest 428, 36.

E

- (11) *Hobson v. Gorrings*, [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 31 Digest (Repl.) 206, 3375.

- (12) *Elwes v. Maw*, (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, 3454.

- (13) *Kirby v. Hunslet Assessment Committee*, [1906] A.C. 43; 75 L.J.K.B. 129; 94 L.T. 36; 70 J.P. 50; 38 Digest 533, 785.

F

- (14) *R. v. West Middlesex Waterworks*, (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; 38 Digest 450, 171.

- (15) *R. v. East London Waterworks Co.*, (1852), 18 Q.B. 705; 21 L.J.M.C. 174; 19 L.T.O.S. 182; 16 J.P. 392; 118 E.R. 266; 38 Digest 450, 170.

- (16) *Cleveland Bridge & Engineering Co., Ltd. v. Darlington Union Assessment Committee*, (1923), 21 L.G.R. 511; 38 Digest 443, 138.

G

Appeal.

Appeal by owners of land, the London County Council, from an order of the Court of Appeal, dated Mar. 30, 1955, and reported [1955] 2 All E.R. 180, dismissing their appeal on a Case Stated by the Lands Tribunal. The council appealed to the Court of Appeal against a decision of the tribunal made on Nov. 1, 1954, dismissing an appeal by the council against the decision of the local valuation court for North East London, by which it was directed that a hereditament consisting of contractors' huts should be added to the valuation list for the Stepney Metropolitan Borough Rating Area.

H

Michael Rowe, Q.C., and *G. D. Squibb, Q.C.*, for the appellants, London County Council.

I

Maurice Lyell, Q.C., and *P. R. E. Browne* for the respondent, the valuation officer.

The House took time for consideration.

July 11. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal from an order of the Court of Appeal dated Mar. 30, 1955, whereby that court (SIR RAYMOND EVERSHERD, M.R., JENKINS, L.J., and ROMER, L.J.), dismissed an appeal by

the appellants on a Case Stated by the Lands Tribunal pursuant to s. 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58B, and affirmed the decision of the Lands Tribunal. That decision had dismissed (subject to an agreed minor amendment of the valuation list) an appeal from a decision of the local valuation court for North East London.

The question raised by the appeal is whether huts erected by a builder on a building site for use in connection with his building operations are rateable. The appellants are the owners of certain land situate in Walker Street in the Metropolitan Borough of Stepney. In order to build a school thereon, the appellants entered into a contract with F. R. Hipperson & Son, Ltd. (whom I shall call "the contractors") dated Mar. 30, 1950. The appellants handed over the building site to the contractors on Dec. 12, 1949. In about January, 1950, the contractors brought on to the building site and erected there certain huts which are described in the Case Stated as follows:

"A. General foreman's and timekeeper's office. Wooden sectional hut with wood roof covered by tarred felt, wood floor on sleepers. Dimensions, nine feet by twelve feet nine inches, area 114 square feet. Dismantled early in September, 1951. If assessed separately gross value attributable was £4.

"B. London County Council clerk of works office. Wooden sectional hut with wood roof covered by tarred felt, wood floor on sleepers. Dimensions: eleven feet nine inches by fourteen feet three inches, area 167 square feet. Dismantled on July 16, 1951. If assessed separately gross value attributable was £6.

"C. Cement store. Corrugated iron sides and roof with concrete floor. Dimensions: nine feet by fourteen feet, area 126 square feet. Dismantled on June 30, 1951. If assessed separately gross value attributable was £5.

"D. Canteen and store. Wooden sectional hut with wood roof covered by tarred felt, wooden floor, standing on old roadway or playground site. Dimensions: fourteen feet ten inches by thirty feet, area 445 square feet. Dismantled on June 30, 1951. If assessed separately the gross value attributable was £17.

"E. Plumbers' store. Corrugated iron sides and roof, standing on old roadway or playground site. Dimensions: eight feet by twelve feet, area ninety-six square feet. Dismantled on June 30, 1951. If assessed separately the gross value attributable was £3.

"It was agreed in this case that the London County Council clerk of works office should not be included in the hereditament and that in consequence the gross value should, if the huts were held to be rateably occupied, be £29, rateable value £20. Huts A, C, D and E will be referred to hereafter as 'the said huts'. The said huts were erected on the actual building site, no particular area of which was set aside for that purpose. The contractors chose where to erect each of the said huts on the building site. The said huts were used for the following purposes:

"A. General foreman's and timekeeper's office. This was where the general foreman kept his drawings and the timekeeper his books. One or two implements—a theodolite and various odds and ends of builders' materials were stored here. The office was not used for anything except work in connection with building the school. It was moved once during the course of building operations from one position to another on the building site.

"C. Cement store. This was used solely for the storage of cement.

"D. Canteen and store. This contained forms and a table; electric light was laid on; and there was a stove fixed in the corner, with a pipe through the roof, for heating water and for tea. There were no other cooking facilities, and no food was provided there.

A "E. Plumbers' store. This was used solely for the storage of plumbers' goods.

"The tools, builders' materials and cement referred to in the last preceding sub-paragraph hereof were brought on to the building site solely for the purposes of the said contract. The said huts were locked by the contractors each night and the keys were kept by the contractors' foreman. The clerk of works could demand admission to the said huts at any time but as the keys were in the possession of the contractors he could only enter the said huts when admitted by the foreman or other employee of the contractors."

The decision of the Lands Tribunal was that they were unable to find any distinction between this case and that of *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1) ((1951), 44 R. & I.T. 758). The decision of the Lands Tribunal in *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1) also related to various structures described as "builders' huts" which had been erected by builders on sites where they were carrying out work. In its decision in that case, the Lands Tribunal referred to s. 21 and s. 68 of the Rating and Valuation Act, 1925, and to the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, and continued:

D "We think it follows that the primary question for our decision . . . is whether the 'builders' huts' described are within the description of 'lands, tenements, hereditaments or property which are or may become liable to any rate . . .' so as to constitute a 'hereditament' of which the prescribed particulars should be inserted in the valuation list."

E The Lands Tribunal then referred in that case to the decision of the Divisional Court in *Mitchell Brothers v. Worksop Union Assessment Committee* (2) ((1904), 1 Konst. Rat. App. 181), and to the decisions of the Divisional Court and the Court of Appeal in *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (3) ([1948] 1 All E.R. 943; [1949] 1 All E.R. 224), quoted the definition of the "four factors or ingredients of rateability" submitted by counsel (Mr. Michael Rowe, Q.C.) and adopted by the Court of Appeal in the last-mentioned case as set out in the judgment of JENKINS, J. ([1949] 1 All E.R. at p. 232), and stated its conclusions as follows:

G "We are satisfied, on the facts submitted to us, not only that the buildings which are the subjects of these appeals are of rateable types but that each of the [ratepayers] had actual possession and an exclusive beneficial occupation for the purpose of carrying out the respective contract; and furthermore that the possession [of the ratepayers] in each of the cases had a sufficient quality of permanence to justify the [valuation officer] in making his proposal."

The Lands Tribunal also rejected a contention put forward by the ratepayers

H "that the various buildings were 'plant' in the sense of that word as used in s. 24 [of the Rating and Valuation Act, 1925], so as not to be rateable . . ."

I The question stated in the present Case by the Lands Tribunal for the decision of the Court of Appeal was "whether we came to a correct decision in law, and if not, what should be done in the premises". In their notice of motion in the Court of Appeal, the appellants stated that the grounds on which they contended that the determination and decision of the Lands Tribunal was erroneous in point of law were that the Lands Tribunal were wrong in law in holding:

"(i) that the hereditament was capable of beneficial occupation; (ii) that the occupation of the said hereditament was sufficiently permanent to give rise to rateable occupation; (iii) that the said hereditament was rateably occupied by the contractors."

The Court of Appeal held that, apart from the question (with which *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (3) did not deal) whether these huts were in the nature of chattels as distinct from being part of the hereditament consisting of the structure itself and the area of land supporting it, this case was governed by *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (3). They further held that the structures were not chattels standing on the land, but were structures which, while they remained on the land, were for the purposes of rating properly regarded as part of the hereditament. A B

The argument of counsel for the appellants before this House had to me the perennial attraction of rugged simplicity. He submitted that these sheds were brought on to and used on a building site which was not rated, just like any other part of the builders' equipment; that, although only one shed was moved to another part of the site, any of them might have been moved according to the needs of the building operations; and that, therefore, there was neither the intention to create nor the de facto creation of a hereditament which by statutory definition means "any lands, tenements, hereditaments or property which are or may become liable to any rate . . .". C

It must not, however, be forgotten that, by virtue of the Lands Tribunal Act, 1949, s. 3 (4), a decision of the tribunal is final; but a person aggrieved by such a decision, as being erroneous on a point of law, is entitled to require the tribunal to state a Case for the decision of the Court of Appeal. It is, in my view, particularly important in these days, when juries in civil matters are seldom seen, that reserved fields of fact should be inviolate and that appellate courts should not, by the intrusion of their factual opinions, make more difficult the correct decision on particular circumstances. Doubtless with this in mind, counsel for the appellants went on to submit, first, that there was no evidence that the structures had lost their chattel character, and secondly that the Lands Tribunal and the Court of Appeal had ignored an essential factor in the creation of a hereditament, namely, the intention of the person who had put structures on the site. D E

Junior counsel for the respondent, in an argument that was as pointed as it was brief, submitted that chattel character is not enough. He referred us to the rating of moorings in the Thames which remained the property of Messrs. Cory according to the opinions of LORD CAIRNS, L.C., LORD HATHERLEY and LORD O'HAGAN in *Cory v. Bristow* (4) ((1877), 2 App. Cas. 262 at pp. 271, 278 and 280). He also drew our attention to the rating of the company's telephone apparatus in *Lancashire Telephone Co. v. Manchester Overseers* (5) ((1884), 14 Q.B.D. 267), and to the rating of the show cases in *Westminster Corpn. v. Southern Ry. Co.* (6) ([1936] 2 All E.R. 322 at p. 352). On these authorities, counsel submitted that chattel character was not a final test of rateability. It is, however, to be noted that in these cases the chattels had qualities which made it clear that they were enjoyed by their owners with the land on which they were. The moorings, including their attachment to the bed of the river, were held to be very different from the ordinary anchor of a ship that might move from one rating area to another. The equipment of the telephone company was held to occupy so much of the soil as was necessary to support so much of the building as in turn was necessary to support its equipment (per BRETT, M.R., 14 Q.B.D. at pp. 269-271). The show cases in the railway station according to LORD WRIGHT ([1936] 2 All E.R. at p. 352) "might fairly be regarded as shop windows". These examples are different from chattels, say bricks, simply placed—although for a considerable time—on a site which in this case is not rated even as a place of storage. The bricks on the building site, waiting to be made into a school, cannot be said to be enjoyed with the land. In my view, a chattel to be rateable must be enjoyed with the land on which it rests. I do not wish to magnify what may fundamentally be merely a difference of phraseology, F G H I

A but I agree that, even if counsel could have satisfied me that there was no evidence that the structures had ceased to be chattels, he would still have had to face the further question whether they were enjoyed with the land on which they rested. However, it is implicit in the argument for the appellants that the structures were so obviously ancillary and subsidiary to the building operations that there was no such enjoyment.

B From this aspect, counsel for the appellants pressed the importance of the intention of the contractors. Reliance was placed on a statement in the judgment of BLACKBURN, J., in *Holland v. Hodgson* (7) ((1872), L.R. 7 C.P. 328 at p. 339):

C " . . . where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied."

D I respectfully agree with the warning of JENKINS, L.J., in the present case* in regard to the different subject-matter of *Holland v. Hodgson* (7). Nevertheless, I think that the above quotation does give assistance on the question of intention. If counsel had satisfied me that the intention of the contractors in this case had been ignored, then I should have been prepared to say that the tribunal of fact in this case had misdirected itself in law.

E I have carefully considered the case from this aspect. I observe that in *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1), on which the decision of the Lands Tribunal in this case is based, counsel for the appellants adduced in support of his contention that the huts in that case were plant within s. 24 of the Rating and Valuation Act, 1925, evidence that they were dealt with as stock and loose plant in the accounts of the builders concerned. The Lands Tribunal were unable to find any distinction in substance between *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1) and the present case. As a result of counsel's submission, the builders' intention must have been considered fully in that case and I do not, therefore, think it would be right to say that it was ignored in this. In my opinion, the proper inference is that the Lands Tribunal assumed that the contractors, in their accounts, dealt with these huts in substantially the same way, and, if that is so, they must (though they have not expressly so stated) have considered the question of the contractors' own intention.

G It must then be considered whether the tribunal misdirected themselves as to the importance of intention. Counsel for the appellants, at one stage, submitted that the true question was whether the person erecting the structures considered them as attached to the soil. He had previously submitted that the annexation of the soil, the period of the erection, the size, quality, amenities and purpose of the structures should be considered, but he qualified this by saying that it was not fatal to his case if the contractors were trying to get the economic equivalent of a rateable structure out of a non-rateable one. I fear that I cannot appreciate this last refinement. When it is clear that the purpose is to create a hostel as in *Mitchell Brothers v. Worksop Union Assessment Committee* (2), a bothie, as in *Assessor for the City of Glasgow v. Gilmartin* (8) (1920 S.C. 488), or what was substantially a branch office as in *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (3), it would, in my view, be open to the tribunal of fact to find that a rateable hereditament had been created; in this, as much as in any other branch of the law, a man may be presumed to intend the natural consequence of his acts. If the natural consequence of the manner in which builders erect and use huts like these is that they satisfy what is, in my opinion, the true test of rateability, the tribunal of fact may properly come to the conclusion that those builders so intended, whether

* See [1955] 2 All E.R. at p. 192.

or not that was their conscious purpose and whatever they may have called the component parts of the huts. A

I think that the respondent's submission was right, viz., that the test of rateability is whether there is evidence that the structures were enjoyed with the land and enhanced its value. In considering this, the intention of the erector and the other elements of annexation, period, size, quality, amenities and purpose are all material. All these factors are important, but intention, and certainly what I may call the "conscious element" in intention, is no more than one factor and its importance is not overriding. The question is eminently one of fact, and whether I should have come to the same conclusion is immaterial. I do not think that there are grounds for saying that the tribunal misdirected themselves or for disturbing their decision. The appeal must, therefore, be dismissed. B C

EARL JOWITT: My Lords, this is an appeal from a decision of the Court of Appeal, which dismissed an appeal brought by the London County Council as appellants, arising on a Case Stated by the Lands Tribunal.

Under the Lands Tribunal Act, 1949, s. 3 (4), the decision of the Lands Tribunal is to be final, provided that any person aggrieved by the decision as being erroneous in point of law may ask for a Case to be stated. The appellants, being aggrieved, accordingly asked for a Case to be stated, and the Court of Appeal considered that the appellants had failed to show that the Case so stated revealed any error of law. D

The Case Stated set out the relevant facts, to which I need not refer at length. It is enough to say that the case concerned four disputed structures which were erected by contractors who were to erect a building on a site belonging to the appellants. The site was handed over to the contractors in December, 1949, and in January, 1950, these structures were brought on the site. Three of them were finally removed in June, 1951, and the fourth in September, 1951. The structures were manifestly of a purely temporary character, and were erected to facilitate the work of the contractors in carrying out their contract with the appellants. E F

In these circumstances, it would not have been in the least surprising if the Lands Tribunal had come to a conclusion of fact that the structures were of such a transient nature as to justify their exclusion from the valuation roll; and, if the Lands Tribunal had come to such a conclusion, I should have thought that there was ample evidence to support them in so finding. They have expressed the conclusion to which they have come in the following terms: G

"We came to the conclusion that, while there were certain differences in detail, we were unable to find any distinction in substance between this case and that of *Woodward (V.O.) v. Brading & Blundell, Ltd.* ((1951), 44 R. & I.T. 758), already considered by this tribunal, and following our usual practice we see no reason to depart from that decision unless and until it is modified or reversed by the Court of Appeal." H

This form of expressing their conclusions obscures the point that the decision to which they have to come is essentially one of fact. I think, however, that the tribunal clearly indicated that, just as they came to a decision of fact in *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1), so also (notwithstanding slight differences) they decided that they ought to come to a similar decision of fact in the present case. I

On this basis, I think that the point we have to decide is whether we can assert, as a matter of law, that there was no evidence which could justify the tribunal in coming to such a conclusion. I agree with the Court of Appeal, though I confess I agree with some hesitation and reluctance, that we cannot say that the tribunal committed any error of law in arriving at their conclusion.

A I can well understand that structures erected by a contractor, even though not intended to be of a permanent character, might be of such an elaborate character as to justify their inclusion in the valuation roll. On the other hand, they might be of such an unsubstantial and ephemeral character as to make it obvious that they should not be included. The distinction between these cases must be one of degree and, therefore, of fact, and, in these circumstances, B I am not prepared to differ from the conclusion at which the Court of Appeal arrived.

Accordingly, for the reasons given in the judgments of the Court of Appeal, I would dismiss this appeal.

C LORD OAKSEY: My Lords, at the hearing of this appeal I inclined to the view that the appeal ought to be allowed on the ground that the huts in question were chattels not forming part of the land and that they were, for that reason, not rateable, but on further consideration of authorities, which were not all cited to your Lordships, I have come to the conclusion that the decision of the Court of Appeal was right.

D A consideration of the authorities leads me to the conclusion that an occupier who makes any beneficial use of land is rateable if he does so for a period which is not transient. The building contractors undoubtedly occupied the land on which their huts were placed and got benefit from it and the fact that they did not pay any specific sum for their occupation is irrelevant. The words of BLACKBURN, J., in *Harter v. Salford Overseers* (9) ((1865), 6 B. & S. 591 at p. 597) cited by BUCKLEY, L.J., in *Liverpool Corpn. v. Chorley Union Assessment Committee & Withnell Overseers* (10) ([1912] 1 K.B. 270 at p. 288), appear to me to show that, E if a person is capable of maintaining trespass to land and is enjoying any benefit from the land, he is rateable in respect of that land. As in *Harter v. Salford Overseers* (9), the person rated need not go on the land nor place anything on the land; it is sufficient if he derives a benefit from the land; in that case, by ensuring that the waters on the land would not be polluted or diminished. F So, in the present case, the building contractors, by their contract, were entitled to place their huts on the building site and to have, as the courts below have held, exclusive possession of them, and they undoubtedly derived a benefit from their use of the land for the purpose of storing their property.

I am, therefore, in agreement with JENKINS, L.J., that *Holland v. Hodgson* (7) ((1872), L.R. 7 C.P. 328) is really irrelevant, since the present question is not G whether the huts formed part of the realty by reason of the way in which they were annexed to the land and the intention with which they were so annexed, but whether the building contractors had sufficient exclusive possession of the huts that they could maintain trespass in respect of them and derived a benefit from their use for a period which has been found not to be transient.

H Since writing the above I have had the opportunity of reading the opinion of my noble friend, LORD RADCLIFFE, and I agree with it.

LORD RADCLIFFE: My Lords, I think that this appeal fails. In my opinion the Lands Tribunal made no error of law in holding that the premises now in question were rateable hereditaments, and I agree with the Court of Appeal both in their reasoning and in their conclusion.

I I do not wish to do any injustice to the able argument that was submitted to us on behalf of the appellants, and it is possible that I am over-simplifying in what I shall say about it, but, as I understood it, the argument concentrated on two aspects of the case, on each of which, it was said, the tribunal had failed to apply the true law of rating. One was that the structures in question were chattels and, being chattels, were incapable of constituting a rateable hereditament. The other was that the nature of their construction and the circumstances in which they came to be constructed excluded that element of

permanence in the occupation which the law requires as a condition of a person's rateability. A

As to the first, I do not regard it as an accepted principle that a structure which is placed on land cannot be a rateable hereditament unless it has ceased to be a chattel in the eyes of the law. The question whether such a structure has been so affixed to the land as to become "part of the freehold" is sometimes an important one when it affects the property rights of two contending parties; B and the tests that determine that question, as is shown by *Holland v. Hodgson* (7) ((1872), L.R. 7 C.P. 328), and *Hobson v. Gorringe* (11) ([1897] 1 Ch. 182), to an examination of which no small part of the argument before us was devoted, are neither easily ascertained nor easily applied. Indeed, we know from BLACKBURN, J.'s well-known judgment in *Holland v. Hodgson* (7) (L.R. 7 C.P. at p. 334):

"... it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case..." C

The difficulty of arriving at any general statement of the tests by which a structure on land is or is not to be found to be legally a chattel is not diminished by the fact that somewhat different considerations apply according to the particular relationship in which the parties, whose property rights are in conflict, stand to each other. In his judgment in *Elwes v. Maw* (12) ((1802), 3 East, 38), LORD ELLENBOROUGH, C.J., found it necessary to consider the law of fixtures, itself a somewhat complicated branch of the general law of chattels and realty, under three separate heads distinguished by the varying relationships of the parties concerned, as heir and executor, as executor and remainderman, as landlord and tenant respectively. Since then the industry of the learned editors of SMITH'S LEADING CASES (see 13th Edn., vol. 2, p. 209), has found it possible or necessary to add four further categories, of which the first, the relationship between vendor and purchaser and mortgagor and mortgagee, is certainly an important one. My Lords, I do not think that all the curious and complicated learning which can be brought to bear on the question whether a chattel is in law "part of the freehold" when the property rights of contending parties have to be resolved is of any direct assistance when what is in issue is the rateability of a structure by which it is claimed that a person occupying it occupies the land which is its site. For such a purpose, we must look to a less meticulous standard of inquiry. D

No one supposes, of course, that a man is rateable in respect of the enjoyment of chattels as he is in respect of the occupation of land. But, on the other hand, I think that that is a long way from saying that the presence of chattels on land can never be a relevant factor either in determining the assessment of the rateable value of a hereditament or in determining whether there is a rateable occupation or not. For instance, in 1906, before the rating of plant and machinery had come under statutory regulation by the Rating and Valuation Act, 1925, this House held in *Kirby v. Hunslet Assessment Committee* (13) ([1906] A.C. 43), that a factory's assessment to poor rate must be based on the standing equipment of machinery in the factory, irrespective of whether or not it was affixed to the freehold so as to form part of it. In doing so, as LORD MACNAGHTEN pointed out (ibid., at p. 50), the House was doing no more than affirm a rule that had constantly been applied throughout the preceding fifty years. E F

On the second point, I think it equally well established that a structure placed on another person's land can with it form a rateable hereditament, even though the structure remains in law a chattel and as such the property of the person who placed it there. It has been habitual practice to treat gas and water pipes, drains and sewers, telegraph posts placed in, and telegraph or telephone wires placed over, land as being themselves rateable subjects. Yet I do not think that there is any foundation for supposing that when the undertaker, equipped either with the licence of the owner of the soil or with statutory powers, affixes his apparatus to a building or lays it in or on the soil the law regards him as G H I

- A thereby making it part of the freehold. It is quite common in these cases to find stress laid on the point that the apparatus concerned remains the "exclusive property" of the undertaker (see *Lancashire Telephone Co. v. Manchester Overseers* (5) ((1884), 14 Q.B.D. 267 at p. 270 per BRETT, M.R.)), yet without the undertaker acquiring "any freehold or leasehold interest in the soil" (see *R. v. West Middlesex Waterworks* (14) ((1859), 1 E. & E. 716 at p. 720 per WIGHTMAN, J.)).
- B I do not know that, if one is to look for general principle, it is necessary to go further than *Cory v. Bristow* (4) ((1877), 2 App. Cas. 262). In all the successive stages of hearing in that case (L.R. 10 C.P.D. 504, 1 C.P.D. 54, 2 App. Cas. 262), I do not think that any judge, except possibly MELLISH, L.J., in the Court of Appeal, considered it relevant to inquire whether the moorings laid in the Thames, the subject that was claimed as the rateable hereditament, were themselves part of the soil in the sense that they were affixed to the freehold. On the contrary,
- C judges seem to have been at pains to allude to the fact that the conservators who owned the freehold of the bed of the river had no interest in the moorings whatsoever and that these, which amounted in effect to a great deal of rubble deposited on a part of the bed scooped out for the purpose, remained the sole and exclusive property of the company which had placed them there. Yet the moorings were
- D a rateable subject and the company rateable as occupiers; for, as JAMES, L.J., said in the Court of Appeal (1 C.P.D. at p. 55):

- "There is no dispute as to the general principle of law, viz., that where any part of the soil is permanently occupied by anybody for profitable purposes, as, for instance, where it is occupied by a company by means of its water or gas pipes or telegraph posts, then the person so occupying is
- E rateable in respect of such occupation . . ."

- With the law of rating formed in this way, the decision of this House in *Westminster Corpn. v. Southern Ry. Co.* (6) ([1936] 2 All E.R. 322), is only a natural application of it. The whole issue was whether certain buildings or structures, situated within the general confines of the railway station premises, had been
- F "so let out as to be capable of separate assessment". Certain of the structures, such as kiosks, small shops and show cases, rested on the ground by their own weight and would not have satisfied the usual requirements of the law of fixtures of being so attached to the soil as to form part of the freehold. Of course if, being chattels, they could not for that reason alone be the subject of assessment, there was an end of the matter. Yet no member of your Lordships' House
- G thought it necessary to consider whether the nature of their attachment to the soil made it impossible to say that in law they constituted rateable subjects and as such were capable of separate assessment. In the result, it was held that they were so capable, since they were in separate occupation and the occupation itself possessed a sufficient "degree of permanence".

- My Lords, I think that the appellants' argument involved at one stage the
- H proposition that, even if the surface or stratum of the land itself constituted a rateable hereditament in cases such as those I have been describing, the definition of the hereditament must be confined to the land and must not extend to the structure on it so long as the structure remained legally a chattel. I cannot find that this distinction is borne out by the authorities, and in principle I do not agree with it. When the owners of pipes, cables, posts, etc., are rated as occupiers
- I they are rated in respect of those things themselves, by means of which they occupy land, not merely in respect of the land that is occupied; just as in *Cory v. Bristow* (4), it was the moorings themselves that were treated as the rateable hereditament. Indeed, in *Mitchell Brothers v. Worksop Union Assessment Committee* (2) ((1904), 1 Konst. Rat. App. 181), a case which I regard as indistinguishable in all essentials from that now under appeal, the result was achieved of rating the contractor's huts as rateable hereditaments without any alteration of the rating assessment of the area of land on part of which they stood.

In my opinion, the present case really centres round the question whether the sheds, erected on a building site by a building contractor for the purpose of his operations, involve such a degree of permanency in his occupation as to make it a rateable one. I have no doubt that, in considering this, it is at any rate relevant to ascertain to what extent and in what way these constructions have been made a fixed part of the site on which they stand, for the more casually they are attached the less likely it is that the occupation of them will be found to be a permanent one. In this sense it may be of some importance to inquire whether they are chattels or not; but to make the whole issue of rateability depend on the bare issue, for instance, whether a particular structure has or has not foundations in the ground which give it a measure of lateral as well as subjacent support would be to use a legal distinction for a purpose for which it was never intended.

Is there then any error of law in the Lands Tribunal's holding that the appellants' occupation of the huts is a rateable one? I think not. Certain circumstances were dwelt on in argument which were said to tell against rateability, but, as I see it, they are circumstances from which no legal consequence properly results. Building sites themselves are not treated as rateable hereditaments while the work of building is in progress. But, that being so, I see no reason why any particular part of the site, if sufficiently defined by the fact of its appropriation for the support of a building or structure, should not itself thereby become rateable (*John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (3), [1949] 1 All E.R. 224). In that case the building owner himself specified the site to be reserved for contractor's buildings; here it was left to the contractor himself to appropriate what and as he required. I see no importance in this distinction, given that a defined site is appropriated and used as the floor of a building.

Certainly it is true that the law demands that an occupation to be rateable should be permanent; but then it is equally certain that permanence does not connote what it might appear to in this connection. It is rather easier to say what it does not mean than what it does. An occupation is not the less permanent because it is that of a lessee who holds under a lease for a fixed term. In other words, there is permanent occupation however clearly the end may be in sight. More than that, an occupation can be permanent even though the structure or other chattel which is the means of occupation is removable on notice. It is not necessary to go so far as LORD CAMPBELL, C.J., who suggested that a water company whose pipes were liable to be resited by paving commissioners as occasion required were rateable because they had "a movable freehold" (*R. v. East London Waterworks Co.* (15) ((1852), 21 L.J.M.C. 174)). It may be that permanent signifies no more than continuous, as opposed to intermittent, physical possession of the soil, as is suggested by the learned editors of RYDE ON RATING (see 10th Edn., p. 39). However that may be, it is well settled that a tenant at will has an occupation that is sufficiently permanent to carry rateability. If so, I see no reason why the contractor's occupation of his huts during the pendency of the building contract should not produce a similar result.

This is not, after all, a new question. It came up in 1904 in *Mitchell Brothers v. Workson Union Assessment Committee* (2), where LORD ALVERSTONE, C.J., ignored what I may call the chattel argument and decided that the contractor's structures were rateable. It came up again in *Cleveland Bridge & Engineering Co., Ltd. v. Darlington Union Assessment Committee* (16) ((1923), 21 L.G.R. 511), and the decision there against rateability was based solely on the ground that the employer's control was of such a nature that there was no exclusive occupation. Lastly, it came up in *John Laing & Sons, Ltd. v. Kingswood Assessment Area Assessment Committee* (3), although it is quite true to say that the particular point which we are now invited to consider was there not directly challenged. Each decision, no doubt, has to be related to its own particular facts. But, in

A my opinion, within very wide limits, which are not overstepped in the present case, the question whether there is sufficient permanency of occupation is essentially a question of degree and, as such, is a proper question for the final determination of the Lands Tribunal. If the evidence had been, as it was not, that the huts or sheds were constantly being moved from one site to another, so that there was no real appropriation of any particular area of soil to the purposes of occupation, I can see that it might be necessary to say that the law did not admit so transient an occupation to be a rateable one. But all that we know is that one structure was once moved during the course of the operations, and I do not think that we ought to assume that the occupation was, in fact, more transient than the evidence suggests. If so, eighteen months on the site does not present itself to me as something inherently too brief for rateability. The rate is an annual impost on the occupier in respect of his profitable occupation of land; it is not a capital charge on the owner in respect of the property interest in the soil. If such an occupation in fact endures for a year or more, I do not see why the occupier should not contribute to the current fund of the rating area for that period. The mere brevity of his occupation will be itself the cure of any hardship in his liability.

D **LORD TUCKER:** My Lords, the decision of the Lands Tribunal with regard to the structures under consideration in the Case Stated was as follows:

E “We came to the conclusion that, while there were certain differences in detail, we were unable to find any distinction in substance between this case and that of *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1) ((1951), 44 R. & I.T. 758), already considered by this tribunal, and following our usual practice we see no reason to depart from that decision unless and until it is modified or reversed by the Court of Appeal.”

F In order, therefore, to ascertain what were the findings of fact in the present case it is necessary to refer to the tribunal's decision in *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1). In that case, which, like the present, was concerned with builders' huts erected on building sites for the duration of building contracts, the tribunal stated their decision in the following words:

G “We are satisfied, on the facts submitted to us, not only that the buildings which are the subject of these appeals are of rateable types but that each of the [ratepayers] had actual possession and an exclusive beneficial occupation for the purpose of carrying out the respective contract; and furthermore that the possession [of the ratepayers] in each of the cases had a sufficient quality of permanence to justify the [valuation officer] in making his proposal.”

H The huts in the present case were erected in January, 1950, and consisted of (a) general foreman's and timekeeper's office, being a wooden sectional hut with wood roof covered by tarred felt with wood floor on sleepers. It was moved once during the building operations from one position to another on the site. It was dismantled in September, 1951; (b) cement store with corrugated iron sides and roof with concrete floor. Dismantled, June, 1951; (c) canteen and store. A wooden sectional hut with wood roof covered by tarred felt and a wooden floor. Dismantled, June, 1951; (d) plumbers' store. Corrugated iron sides and roof standing on old roadway or playground site. Dismantled, June, 1951. These huts were erected on the actual building site, no particular area having been set aside for the purpose, the contractors choosing the particular site in each case. The contract time for completion of the operation was twelve months, but, as will be seen from the dates at which the huts were dismantled, this period was exceeded by some six months or more, so that the huts were in the occupation of the contractors for about eighteen months. The Case contains no specific finding to this effect, but it is, I think, obvious from the above descriptions that

none of these huts were "portable" in the sense that they could be taken up and removed intact, but, on the other hand, with the exception of the concrete floor in (b), they were all "removable" in the sense that they could be easily dismantled and re-erected. A

It being admitted that there is no material distinction between the huts in this case and those in *Woodward (V.O.) v. Brading & Blundell, Ltd.* (1), the Lands Tribunal must, I think, be taken to have decided that—(i) The huts, together with the land on which they stood, constituted separate rateable hereditaments. (ii) The contractors had actual possession of them. (iii) Their possession was exclusive for the purpose of performing their contract. (iv) It was beneficial. (v) It had a sufficient degree of "permanence" to attract rateable liability. B

My Lords, these findings, which are all necessary before liability can attach, are largely matters of fact and degree in every case, and the tribunal not having, in my view, in any way misapprehended the law, it is, I think, impossible to say that there was no evidence on which they could have come to these conclusions. I do not understand that findings (ii), (iii) and (iv) above are challenged provided findings (i) and (v) can be sustained. C

A hereditament only becomes a subject of rateability if there is a sufficient element of "permanence" in its occupation. This is essentially a question of fact and degree. It has long been settled that occupation for a defined period of time, or even under a tenancy at will, or by virtue of licence subject to revocation at any time, may not be too transient to be regarded as "permanent". See, for example, *Cory v. Bristow* (4) ((1877), 2 App. Cas. 262), where the moorings were subject to removal at a week's notice from the conservators. If, therefore, the sites on which these huts stood, apart altogether from the huts themselves, were exclusively and beneficially occupied by the contractors for a sufficient length of time, they would become rateable hereditaments. The presence of the huts thereon would merely be an element enhancing the value of their occupation. In this case, their presence is also a factor to be taken into consideration in deciding whether there has been a sufficient "carving out" or appropriation of a particular portion of the site to amount to exclusive occupation by the contractors. D E F

I do not think the fact that no particular area was defined by the contract as the site for the huts is decisive in favour of the appellants. If, in fact, the contractors had the right to select the sites and did, in fact, select and exclusively occupy certain sites with the licence of the appellants for a sufficient length of time, I find difficulty in distinguishing the consequences in each case. In my view, on the undisputed facts it is impossible to hold as a matter of law that there was no evidence to warrant the finding that there was in this case a sufficient "carving out" or "appropriation" and sufficient degree of permanence to give rise to rateability unless the appellants can make good their submission that these huts, by virtue of their construction and liability to removal, were to be regarded as mere chattels which could not be the subject of rating or even be taken into account as enhancing the value of the occupation of an otherwise rateable piece of land. G H

My Lords, I do not think this submission is sound or supported by authority. I can derive no assistance in the field of rating law from authorities dealing with fixtures as between landlord and tenant or mortgagor and mortgagee or the law of larceny. As far back as 1904 it was decided in *Mitchell Brothers v. Workop Union Assessment Committee* (2) ((1904), 1 Konst. Rat. App. 181), that builders' huts temporarily erected and occupied by the builder can be rateable hereditaments. A similar decision was reached by the Court of Session in Scotland in 1920 in *Assessor for the City of Glasgow v. Gilmartin* (8) (1920 S.C. 488) under statutes the language of which, it is true, is slightly different from that of the relevant English Acts. The submission is also, I think, irreconcilable with the decision in *Cory v. Bristow* (4), where LORD CAIRNS, L.C., and LORDS HATHERLEY and O'HAGAN all held that, although the moorings were attached to the bed of I

A the river so as to become part of the realty, they remained the property of the appellants, who were held liable to be rated in respect of their occupancy thereof.

Furthermore, a decision in favour of the appellants would, in my view, be contrary to the basic reasoning of the speeches in this House in *Westminster Corpn. v. Southern Ry. Co.* (6) ([1936] 2 All E.R. 322). It is true, as pointed out by counsel for the appellants in the present case, that, in that case, the whole

B area of Victoria Station was, in any event, rateable, and the only question was whether certain persons other than the company should be separately rated in respect of certain portions or whether the whole was a railway hereditament. None the less, in order to be separately rated, the portions in question had to come within the proviso to s. 1 (3) of the Railways (Valuation for Rating) Act, 1930, which enacted that

C “ . . . no premises . . . so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway hereditament.”

This House held that various structures, some of which were easily removable and were in the nature of chattels were so let out as to be capable of separate assessment. Having regard to the counsel engaged in the case and the elaborate

D speeches of their Lordships, it would be remarkable if it had escaped the notice of all concerned that the short answer to the case was that the chattel character of the structures of itself alone rendered them incapable of being “ let out as to be capable of separate assessment ”. My Lords, I refrain from quoting at length from the speeches in that case and content myself with stating that, in my view, their reasoning is destructive of the submission made on behalf of the appellants in the present case.

E My Lords, in my opinion, there was evidence on which the Lands Tribunal could hold that these structures were “ buildings ” which, under Sch. 3 to the Valuation (Metropolis) Act, 1869, constituted the hereditaments to be inserted in the valuation list. I should, however, add one qualification or note of warning. There is a finding in the Case that one of the huts had been moved on one occasion.

F It is not stated for what period it remained on each site. The question of actual removal during the relevant period is a matter of considerable importance because it must result in two different hereditaments for different periods of time, and would also be relevant on the question of transience. I am prepared to assume, in the absence of findings to the contrary and having regard to the fact that your Lordships were not invited to differentiate between the four huts, that this particular hut remained on one site for a sufficient length of time to provide

G the necessary element of permanence.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitors: *J. G. Barr* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

HART (INSPECTOR OF TAXES) v. SANGSTER.

[CHANCERY DIVISION (Vaisey, J.), June 26, 27, July 3, 1956.]

Income Tax—Income—Acquisition of new "source" of income—Income on sum paid by taxpayer to credit of deposit account with bank—Deposit account already in existence for several years—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case III, r. 2 (1), as substituted by Finance Act, 1922 (12 & 13 Geo. 5 c. 17), s. 17.

Bank—Deposit account—Whether payment in a fresh contract.

In March, 1951, a taxpayer paid a cheque for £2,000,000 into his deposit account at a bank which he had been using for many years and on June 20, 1951, he was duly credited with interest thereon. He was assessed to tax under Sch. D on the interest on the basis that it arose from a new source of income.

Held: the assessment was properly made, because the taxpayer on making the deposit entered into a new contract with the bank and a new source of income was so created.

[As to assessment on a new source of income, see 17 HALSBURY'S LAWS (2nd Edn.) 189, para. 388.]

As to the effect of receipt of money by a banker on deposit account, see 2 HALSBURY'S LAWS (3rd Edn.) 174.

For the Finance Act, 1926, s. 30, see 12 HALSBURY'S STATUTES (2nd Edn.) 271; for the Finance Act, 1951, s. 21, see 30 HALSBURY'S STATUTES (2nd Edn.) 162, and for the Income Tax Act, 1918, Sch. D, Case III, r. 2 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 168.

For the replacing provisions of the Income Tax Act, 1952, s. 131, see 31 HALSBURY'S STATUTES (2nd Edn.) 126, 127.]

Cases referred to:

- (1) *Rhodesia Metals, Ltd. v. Comr. of Taxes*, [1940] 3 All E.R. 422; [1940] A.C. 774; 109 L.J.P.C. 81; 2nd Digest Supp.
- (2) *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; 81 L.J.Ch. 184; sub nom. *Hatzfeldt v. Alexander*, 105 L.T. 434; 12 Digest (Repl.) 92, 523.
- (3) *Lilley v. Harrison, Harrison v. Lilley*, (1952), 33 Tax Cas. 344, 357; 3rd Digest Supp.
- (4) *Cull v. Cowcher*, (1934), 18 Tax Cas. 449; Digest Supp.

Case Stated.

The respondent taxpayer appealed to the Special Commissioners against assessments made on him to income tax, Sch. D, for the years 1951-52, 1952-53, in the amounts £7,037 and £29,371 respectively. The main ingredient in the amount assessed for each year was interest on the taxpayer's deposit account with a branch of Barclays Bank, Ltd., and the question for determination was the correct method of computing the income tax in respect to that interest.

The assessment for 1952-53 was made under the Income Tax Act, 1952, and that for 1951-52 was made under the Income Tax Acts in force before the Act of 1952 came into operation, but, as there was no material difference between the two sets of provisions, the appeal was argued, and the Case was stated, by reference to the provisions of the earlier Acts as if they applied to the 1952-53 assessment in the same manner as they applied to the 1951-52 assessment.

For many years before 1951 the taxpayer had a deposit account with the Colmore Row, Birmingham, branch of Barclays Bank. No special agreement was concluded between him and the bank. Interest on deposit accounts was calculated on the principal on a day-to-day basis and was credited on half-yearly rest dates, June 20 and Dec. 20 in each year. When so credited, the interest became principal and began to earn interest. It was not the practice to allow accruing interest to be withdrawn between the half-yearly rest dates unless an

A account was closed, in which case interest was calculated up to the date of closure and credited as principal. The rate of interest allowed varied from time to time. In 1951 the bank required fourteen days' notice of withdrawals from deposit account, and, if a depositor withdrew without giving this notice, he lost fourteen days' interest on the sum withdrawn.

B In the early part of 1951 the taxpayer's deposit account with the bank stood at £20,496. On Mar. 17, 1951, he paid in £2,000,000. On Mar. 30, 1951, he withdrew £250,000, without giving notice, and thus lost fourteen days' interest on this sum. On June 20, 1951, he was credited with the sum of £2,215 3s. 1d. for interest.

C The assessments under appeal were made on the basis that the income in question had to be computed in accordance with the Finance Act, 1951, s. 21*, which dealt with cases where a person acquired a new source, or an addition to any source, of income chargeable under Case III of Sch. D. By s. 21 (3), the section applied in relation to sources or additions to sources of income acquired before Apr. 6, 1951, only where income first arose therefrom on or after that date. Where a person had acquired a new source or an addition to any source of such income and the income first arose therefrom before that date, the case was D governed by the Finance Act, 1926, s. 30. If the matter under appeal were governed by s. 21 of the Act of 1951, then r. 2 (1) (a) and the proviso to r. 2 (1) of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918†, would apply to interest on the deposit of £2,000,000 made on Mar. 17, 1951, in relation to the years of assessment 1951-52, 1952-53, and 1953-54. If the matter were governed by s. 30 of the Act of 1926, then the said r. 2 (1) (a) and the proviso to E r. 2 (1) would apply to the interest in relation to the years of assessment 1950-51, 1951-52, and 1952-53. If the matter were not within either s. 21 of the Act of 1951 or s. 30 of the Act of 1926, then r. 2 (1) (b) of the Rules applicable to Case III of Sch. D to the Act of 1918 would apply in relation to all material years of assessment.

F The taxpayer contended (a) that, when he paid in the £2,000,000 to the credit of his deposit account, he did not acquire a new source, or an addition to a source, of income within s. 21 of the Act of 1951 or s. 30 of the Act of 1926, and that income tax on the interest of his deposit account should be computed for 1951-52 and 1952-53 on the preceding year basis in accordance with r. 2 (1) (b) of the Rules applicable to Case III of Sch. D; and, alternatively (b) that, if he acquired a new source, or an addition to a source, of income when he paid in the £2,000,000, G income first arose therefrom prior to Apr. 6, 1951; that, therefore, s. 21 of the Act of 1951 was not applicable to the income; and that income tax for the years to which the appeal related should be computed in accordance with s. 30 of the Act of 1926.

H The Crown contended (a) that the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Sch. D on Mar. 17, 1951; (b) that income first arose therefrom on June 20, 1951, when the interest was placed at the credit and disposal of the taxpayer; and (c) that income tax for the years to which the appeal related was properly computed by reference to s. 21 of the Act of 1951.

I The Special Commissioners held that the only source of the income which was the subject of the appeal was the contractual relationship between the taxpayer and the bank which came into being when the taxpayer first opened his deposit account; that the taxpayer did not acquire a new source, or an addition to a

* This section was repealed by the Income Tax Act, 1952, s. 527 (1), and Sch. 25, except with regard to income tax for the year 1951-52 and any previous year of assessment. The corresponding provisions of the Act of 1952, so far as relevant to this case, are to be found in s. 131 (3), proviso (b), s. 134 (3).

† See now s. 131 of the Income Tax Act, 1952; 31 HALSBURY'S STATUTES (2nd Edn.) 126.

source, of income when he made the deposit on Mar. 17, 1951; and that, therefore, neither s. 21 of the Act of 1951 nor s. 30 of the Act of 1926 had any application to the income. Accordingly, it was not necessary for the Special Commissioners to make any decision on the taxpayer's alternative contention, but they indicated the opinion which they had formed that, if a new source, or an addition to a source, of income was acquired on Mar. 17, 1951, income first arose therefrom on June 20, 1951. The Special Commissioners, accordingly, adjusted the assessments by reducing the assessment for 1951-52 to £53, and the assessment for 1952-53 to £7,032, those figures having been agreed by the parties as being correct on the basis of the decision of the Special Commissioners. The Crown appealed.

Sir Millard Tucker, Q.C., and Sir Reginald Hills for the Crown.
Heyworth Talbot, Q.C., and G. A. Grove for the taxpayer.

Cur. adv. vult.

July 3. **VAISEY, J.**, read the following judgment: The facts in this case are quite simple, and it may be thought that the only strange feature of it is the conclusion to which I find myself driven at the end of it.

The respondent, Mr. John Young Sangster [referred to hereinafter as "the taxpayer"], had for several years prior to 1951 kept a deposit account with the Colmore Row branch of Barclays Bank at Birmingham. In the first quarter of 1951, down to Mar. 16, the amount standing to his credit on such account was £20,496. On Mar. 17 he paid a further sum of £2,000,000 by cheque into the account, and on Mar. 30 he withdrew from the account £250,000. The arrangement as regards interest was that it was credited on half-yearly rest dates, June 20 and Dec. 20 in each year, and it was calculated in the ordinary way on a day-to-day basis.

The other arrangements between the taxpayer and the bank, so far as they seem to me to be material, were as follows: the interest, when credited, became principal, and then, but not before, began itself to earn interest. It was not the practice to allow accruing interest to be withdrawn between the rest dates, but if an account was closed interest was calculated to the date of closure, credited as principal, and withdrawn. The rate of interest varied from time to time. Fourteen days' notice of withdrawals from the deposit account was required, and withdrawal without notice involved the customer in a loss of fourteen days' interest. In fact, the £250,000 was withdrawn without notice, and fourteen days' interest on that sum was duly deducted in calculating the interest credited on the following June 20.

There is a statement in the Case that there was no "special agreement" between the taxpayer and the bank, which I understand as meaning that the arrangements which I have mentioned are to be regarded as usual and ordinary arrangements, such as obtain generally between English banks and their customers. It cannot mean that there was no particular agreement between the taxpayer and the bank in the present case, because the relationship of customer and banker with regard to a deposit account, or, indeed, any other account, is essentially and necessarily contractual: see *PAGET'S LAW OF BANKING* (5th Edn.), c. 6, s. 1, and 2 *HALSBURY'S LAWS OF ENGLAND* (3rd Edn.) 174.

The assessments to income tax under Sch. D made on the taxpayer for the years 1951-52 and 1952-53 amount to £7,037 and £29,371 respectively. These sums were reduced by the Special Commissioners, from whom this appeal is brought, to £53 and £7,032 respectively. The Crown asks that the assessments be restored. The main ingredient in the amounts assessed was the interest on the deposit account, and the correct method of computing the tax on such interest is what now falls to me to decide.

- A The basis of the assessment is as follows. Taking the position on June 20, 1951, the sum of £2,215 3s. 1d. was credited for interest on that day, made up of (i) eighty-seven days' interest on £20,496 the amount of the deposit down to Mar. 17, (ii) thirteen days' interest on £2,020,496, the amount of the deposit from Mar. 17 to 29, less four days' interest on £2,000,000, being the four days while the taxpayer's cheque was being cleared, and (iii) eighty-two days' interest on £1,770,496, the amount of the deposit from Mar. 30 to June 20, from which there is deducted fourteen days' interest on £250,000 withdrawn without the requisite notice.
- B

It seems to me, and I understand the parties to be agreed, that the question depends on whether the taxpayer did, or did not, acquire a new source of income or an addition to a source of income within the meaning of s. 30 of the Finance

- C Act, 1926, or s. 21 of the Finance Act, 1951, when he paid the £2,000,000 into his deposit account on Mar. 17, 1951. The assessments were made on the footing that he did; the Special Commissioners held that he did not; the Crown now submits that he did. What, therefore, I have to consider is: What was the source of the income arising from the £2,000,000? First, what is a "source"? The only statutory definition of the word, so far as I am aware, is to be found in s. 10 (1) of the Water Supplies (Exceptional Shortage Orders) Act, 1934. This is obviously quite unhelpful. Nor do the observations of LORD ATKIN in *Rhodesia Metals, Ltd. v. Comr. of Taxes* (1) ([1940] 3 All E.R. 422 at pp. 425, 426) in the Privy Council, give me any real assistance. I come to the conclusion that the word "source" in the context in which I have to consider it is altogether indistinguishable in meaning from the word "origin".
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- E Both sides agree that the source or origin of the interest on the £2,000,000 is to be sought and found in some contractual relationship (that is to say a contract) between the taxpayer and the bank, but they are not agreed what that contractual relationship (or contract) was. The Crown's contention is that it was a new contractual relationship resulting from and brought into existence by the tender of the £2,000,000 by the taxpayer to the bank and the acceptance of it by the

- F bank from the taxpayer, and, indeed, that such a new contractual relationship arises on each occasion when money is (to use colloquial language) placed on deposit by a customer in a bank. The opposite view, put forward by the taxpayer, is that there was on Mar. 17, 1951, a subsisting pre-existent and continuing contractual relationship affecting and covering whatever money was for the time being and from time to time standing on the deposit account, and that there is no need, and no room, for the conception of a series of contracts arising whenever a new deposit is made. The latter view has the superficial attraction of according with what I may call the popular view of the position, and I was much disposed to accept it as prima facie correct. Does it, however, stand the test of analysis as the Crown's view does? I think not. The conception of what I may call a
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- H running contract is vitiated, in my judgment, by the principle that a present contract to enter into a future contract or future contracts is, in English law, no contract at all: see *Von Hatzfeldt-Wildenburg v. Alexander* (2) ([1912] 1 Ch. 284). I think that the contentions of the Crown are well founded and must prevail.

The Special Commissioners adopted a view somewhat similar to that put forward by the taxpayer when they said that the only source of the income in question was the contractual relationship between the taxpayer and the bank which came into existence when he first opened the account. I cannot accept that as an accurate statement of the position. On the footing of my holding that the contentions of the Crown are well founded, it is not, I think, disputed that the income from the new source first arose on June 20, 1951, and that the figures in the assessments for the two years in question are correct. My decision seems to me to accord with *Lilley v. Harrison* (3) ([1952], 33 Tax Cas. 344). Both sides relied on *Cull v. Cowcher* (4) ([1934], 18 Tax Cas. 449), in which there

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is certainly nothing to disturb and perhaps something to fortify the conclusion at which I have arrived. I allow the appeal accordingly. A

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hale, Ringrose & Morrow*, agents for *Glaisyer, Porter & Mason*, Birmingham (for the taxpayer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] B

CARDIFF CORPORATION v. ROBINSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), July 12, 1956.] C

Rates—Rateable occupation—Liability for rates—Husband separated from wife—Wife allowed to live in husband's father's house rent free—Whether husband liable for rates.

The respondent and his wife and children had, until they separated, lived rent free in a house belonging to the respondent's father. After the separation she and the children continued by arrangement with the respondent to live there rent free. In addition the respondent made her a weekly allowance for herself and the children. On the question whether the respondent was liable to pay rates in respect of the house in which his wife and children were living, D

Held: the respondent was in beneficial occupation of the house since he was discharging his duty to provide accommodation for his wife and family by allowing them to remain in the house rent free, and he was therefore liable to pay the rates. E

Robinson v. Taylor ([1948] 1 All E.R. 291) distinguished.

Appeal allowed.

[As to rateable occupation, see 27 HALSBURY'S LAWS (2nd Edn.) 351, para. 782; and for cases on the subject, see 38 DIGEST 426, 427, 10-26.] F

Case referred to:

- (1) *Robinson v. Taylor*, [1948] 1 All E.R. 291; [1948] 1 K.B. 562; [1948] L.J.R. 1585; 112 J.P. 170; 2nd Digest Supp. G

Case Stated.

This was a Case Stated by the stipendiary magistrate for the City of Cardiff in respect of his adjudication at a magistrates' court sitting at Cardiff. G

A complaint was preferred on July 27, 1955, by the appellants, the Lord Mayor, Aldermen and Citizens of the City of Cardiff against the respondent, John H. Robinson, that he, being a person duly rated and assessed by a general rate in the sum of £19 1s. 4d., had not paid that sum. The appellants were the rating authority for the City of Cardiff and the respondent was entered in the rate book as the owner-occupier of a house and garage at 11, Roath Court Road, Cardiff. The appellants had demanded payment from the respondent as occupier of £19 1s. 4d. in respect of the first instalment of the general rate payable on Apr. 1, 1955, and the respondent had not paid any part of that sum. 11, Roath Court Road was at all material times owned by the respondent's father and the respondent and his wife and two children had lived there rent free until November, 1954. In November, 1954, he left the house and lived apart from his wife. He left behind furniture for the use of his wife. The respondent's father had permitted the respondent's wife and children to continue to live rent free in the house. On Nov. 25, 1954, a solicitor acting for the respondent had written to the respondent's wife's solicitors informing them that the respondent would pay maintenance of £6 per week for his wife and children, that no rent would be payable for the house, and that she was to pay the rates and all charges for gas and electricity out of her allowance and that pending any agreement as to her H
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A continued occupation she was not at liberty to create any tenancy or sub-tenancy of any part of the premises, though she could take in lodgers. No formal written agreement was entered into between the respondent and his wife but she acquiesced in the terms proposed save that she did not pay the rates. The respondent had written to the appellants on Jan. 17, 1955, giving notice to the effect that he was not the occupier of nor resident at 11, Roath Court Road, as from Jan. 1, 1955, and that he had arranged to pay the rates due up to March, 1955, but not thereafter. It was contended for the respondent that rateable occupation was a question of fact as to which the intentions of the alleged occupier were relevant and that he had ceased at the material time to be in rateable occupation. The magistrate dismissed the complaint on Feb. 3, 1956.

C *P. R. E. Browne* for the appellants.

Michael Evans for the respondent.

LORD GODDARD, C.J.: The circumstances are very simple. The respondent is a man who was allowed to live in a house belonging to his father rent free. So long as he lived in that house, there is no question that he was the rateable occupier, he having beneficial occupation. He was rated and he paid the rates. In November, 1954, however, differences arose between him and his wife, and he left the house where he and his wife and children had been living. The fact that there were children is not unimportant. Then he and his wife came to an arrangement, whereby he was to pay her for the maintenance of herself and the children £6 a week, and she was to live in this house which he had a licence to occupy. She was to live in that house on certain not very onerous terms which he dictated to her. There is a letter which says she is not to sub-let, because that was a term between himself and his father, and, of course, at any time the father could revoke his licence, but he has not done so.

The respondent having left his wife and children is under an obligation to maintain them and, among other things, he is under an obligation to provide a roof over their heads. He has done that by telling his wife that she may go on occupying this house which he occupied as a licensee. Obviously the respondent has made this provision for his wife as part of the obligation which he is under to maintain her. He is using the house in the most beneficial way he can, for the purpose of housing his wife and children. It is agreed that if the respondent goes out of the house and leaves his furniture in it, he is liable so long as his furniture is there to pay the rates because there is then a beneficial occupation.

G If he chooses to leave the house and leave his wife and family there, why is it any different from leaving his furniture there? He may come to an arrangement between himself and his wife under which his wife agrees to pay the rates. That may be, but the local authority are not bound by any arrangement of that sort.

H The only question here is: has the respondent got a beneficial occupation? I think that he has a very beneficial occupation because it enables him to provide for his wife and family who, if they had to provide a home for themselves would naturally require more money from him.

I With one exception, I do not think the cases which have been cited have any real bearing on this case. The cases under the Rent Restriction Acts show that the wife has a right to remain in the matrimonial home. In this case the wife is not staying in the matrimonial home because of a right given by the statute but under an agreement with the respondent. It is agreed that part of her maintenance should be residence in this house; therefore, he is making a most beneficial use of the right which he has to occupy that house. The fact that he is not living there himself is neither here nor there. He has put his wife and family in the house, he being liable to maintain them and that is part of the maintenance for which he is liable.

The only case which I think has any direct bearing on this case is *Robinson v. Taylor* (1) ([1948] 1 All E.R. 291), in this court, which is a decision that may, as I say with all respect, require consideration in another court hereafter. I do

not say that I disagree with it, but there are some points which I find difficult to follow, and I think it might well be desirable to have it considered hereafter in the Court of Appeal. One difficulty I have in the case is that it seems to me that HUMPHREYS, J., and SINGLETON, J., really put their judgments on different grounds. That was a case where the husband had become insane and the wife was occupying the house in consequence of an order of the Court of Protection, and one of the things the Court of Protection had done in applying the husband's income and managing his property was to declare that the wife could be occupier and live in the house. The husband could know nothing about it or exercise any judgment on the subject because he was insane. I do not think that that case has really any bearing on this particular case. Here there is an agreement, and the agreement seems to me to show that the husband was using this house for the purpose of maintaining his wife and therefore had a beneficial occupation of the house. A B C

For these reasons, I disagree with the conclusion to which the magistrate came and this case must go back with a direction that a distress warrant must issue.

ORMEROD, J.: I agree, for the same reasons. D

DONOVAN, J.: I agree. The point is not altogether an easy one, but I think that the answer is clear. It is important to remember that up to November, 1954, the respondent was admittedly in occupation of this house. The ownership was in the respondent's father. What the respondent did after 1954 was to turn his existing occupation to account by leaving his wife and children living there rent free. That has enabled him to discharge his obligation to maintain his wife and children at a smaller pecuniary outlay than he would otherwise have incurred. In that way he is having and exercising a beneficial use of the hereditament and therefore does not cease to be in rateable occupation despite his physical absence. E

I agree with LORD GODDARD, C.J., that the case which does cause difficulty at first sight is *Robinson v. Taylor* (1) ([1948] 1 All E.R. 291). That may turn on the special feature of insanity which was there present, but for the moment I cannot see why it should seem that the receiver stood in the same position as the insane person. It was held there that the insane person had ceased to be in regular occupation and the wife who was in rateable occupation of the house was the person so rated, and by parity of reasoning it would seem to follow that in this case the wife should be treated as the rateable occupier; I cannot, however, treat that case as overriding the plain facts of this case, namely, that by turning his occupation into account in the way he has done, this respondent remains in rateable occupation. I agree with the judgment proposed. F G

Appeal allowed. Case remitted to the magistrate.

Solicitors: *Theodore Goddard & Co.*, agents for *S. Tapper Jones*, Cardiff (for the appellants); *Fortescue, Adshead & Guest*, agents for *Richards & Guest*, Cardiff (for the respondent).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A COMMISSIONERS OF CUSTOMS AND EXCISE v. ANCO
PLANT & MACHINERY CO., LTD.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), July 3, 1956.]

Practice—Summary judgment—Leave to defend—Trial without further pleadings—Concurrent remedies—Application for alternative relief—Unconditional leave to defend—Appeal from judge—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (c)—R.S.C., Ord. 14, r. 1 (a), Ord. 14B, r. 1.

B The plaintiffs, the Commissioners of Customs and Excise, instituted against the defendants proceedings in the High Court for condemnation of certain goods pursuant to Sch. 7 to the Customs and Excise Act, 1952. The writ, which was accompanied by the statement of claim, included the notice prescribed by R.S.C., Ord. 14B, r. 1, that if an appearance were entered the plaintiffs intended to apply for trial without further pleadings. The plaintiffs applied by summons for an order under R.S.C., Ord. 14, for leave to sign final judgment and alternatively for an order under R.S.C., Ord. 14B, that the action be entered for trial without further pleadings. The master made an order under R.S.C., Ord. 14. The defendants appealed to the judge who allowed the appeal and made an order under R.S.C., Ord. 14B. The plaintiffs appealed to the Court of Appeal. By s. 31 (1) (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, no appeal lies from an order of a judge giving unconditional leave to defend an action.

C **Held:** by allowing the appeal and making an order under R.S.C., Ord. 14B, the judge had in effect granted to the defendants unconditional leave to defend, and accordingly there was no right of appeal from the judge's order (see p. 61, letters D and E, and p. 63, letter I, post).

E Per CURIAM: it was not open to the plaintiffs to pursue concurrently their remedies under R.S.C., Ord. 14B and R.S.C., Ord. 14; having elected to proceed under R.S.C., Ord. 14B, by including in the writ the notice referring thereto, they were bound to follow R.S.C., Ord. 14B (see p. 63, letter C, and p. 64, letter A, post).

F Appeal dismissed.

[For the Customs and Excise Act, 1952, Sch. 7, para. 10, see 32 HALSBURY'S STATUTES (2nd Edn.) 912.]

G For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (c), see 5 HALSBURY'S STATUTES (2nd Edn.) 358.]

Appeal.

H The plaintiffs, the Commissioners of Customs and Excise, appealed from an order of COLLINGWOOD, J., sitting as vacation judge, dated May 29, 1956, allowing an appeal from an order of Master HARWOOD and ordering that the affidavits filed in the action should stand as pleadings, pursuant to R.S.C., Ord. 14B, r. 1.

Rodger Winn for the plaintiffs.

W. R. Rees-Davies for the defendants.

I **JENKINS, L.J.:** The plaintiffs, the Commissioners of Customs and Excise, brought the action by writ dated Apr. 10, 1956, against the defendants, Anco Plant & Machinery Co., Ltd., for the condemnation of certain goods, consisting, I understand, of a quantity of old tank tracks, as forfeited under the Export of Goods (Control) (Consolidation) Order, 1955, as amended*. I need not go in detail into the technicalities of condemnation proceedings, but some reference must be made to the terms of the Customs and Excise Act, 1952, Sch. 7, para. 10, which provides the commissioners with their warrant for bringing proceedings of this character in the High Court. That paragraph provides:

* S.I. 1955 No. 518, as amended by S.I. 1955 Nos. 984, 1920, S.I. 1956 No. 150.

"(1) In any proceedings for condemnation instituted in England, Wales or Northern Ireland, the claimant or his solicitor shall make oath that the thing seized was, or was to the best of his knowledge and belief, the property of the claimant at the time of the seizure. (2) In any such proceedings instituted in the High Court, the claimant shall give such security for the costs of the proceedings as may be determined by the court. (3) If any requirement of this paragraph is not complied with, the court shall give judgment for the commissioners".

It appears that the goods in question were at one time covered by an export licence, but it is alleged by the plaintiffs that this licence was subsequently revoked. As I understand the matter, apart from the question of the ownership of the goods, to which I will return, the sole effective issue between the plaintiffs and the defendants was whether the licence to which I have referred had been validly revoked. It would, I apprehend, have been open to the plaintiffs to issue a specially indorsed writ under R.S.C., Ord. 3, r. 6, and apply for summary judgment under R.S.C., Ord. 14, unless the defendants complied with Sch. 7, para. 10 (1), to the Act of 1952, by swearing an affidavit or causing an affidavit to be sworn to the effect that the goods were, or were to the best of the knowledge of the defendants or the deponent, the property of the defendants. The plaintiffs, however, did not take that simple course; they preferred to issue a writ bearing on it the note prescribed by R.S.C., Ord. 14B, r. 1. That order provides for trial without further pleadings, that is to say without pleadings beyond the indorsement on the writ and the affidavits sworn in support of or in opposition to the application.

The plaintiffs, having issued a writ with that note on it, applied to the court by a summons dated Apr. 25, 1956, in which they asked for alternative relief. Primarily they sought leave to enter judgment condemning as forfeited quoad only the defendants and any alleged rights of theirs the goods referred to in the statement of claim, which were particularised,

"unless the defendants or their solicitors before the hearing of this application shall have made oath that they the defendants were at the time of seizure of the said goods the owners thereof to the best of their knowledge and belief."

In the alternative, they applied

"provided that within seven days of the hearing of this application the defendants shall pay into court such sum as the court shall fix as security for the plaintiffs' costs for an order that the affidavits filed herein shall stand as pleadings and that this action shall be entered for trial without further pleadings and for such further orders and directions as to the court may seem right and that in default of such security judgment be entered for the plaintiffs for the relief above set out."

That summons was supported by an affidavit by Mr. Kenneth Stacey, a person employed by the plaintiffs, which consisted largely of verification of the statement of claim attached to the writ and concluded with the statement: "I verily believe that there is no defence to this action". On this application coming before Master HARWOOD, he made an order in the first of the two alternative forms sought by the summons, his order being:

"It is ordered the defendant be given leave to defend this action upon condition that within seven days from May 17, 1956, he or his solicitor shall have made and filed an affidavit that the goods seized were or were to the best of his knowledge and belief, the property of the defendant at the time of the seizure. In default of such affidavit leave be given to the plaintiffs to sign judgment for the relief claimed on the writ with costs to be taxed or agreed. Fit for counsel. If the affidavit hereinbefore referred to be sworn and filed as aforesaid liberty be given to restore for directions. Costs to be the costs in the cause."

A From that order the defendants appealed to the judge in chambers. The appeal was heard by COLLINGWOOD, J. He allowed the appeal and made an order, in effect, in the second alternative sought by the plaintiffs, that is to say an order under R.S.C., Ord. 14B.

B The issue raised by the appeal is, in effect, whether the plaintiff in an action can issue his writ and indorse it with the note prescribed by R.S.C., Ord. 14B, and then make an application under that order combined with an application under R.S.C., Ord. 14. The master appears to have thought that this procedure was permissible, but COLLINGWOOD, J., took the contrary view; and we are now asked to reverse the decision of COLLINGWOOD, J., and, in effect, to restore the decision of the master. Counsel for the defendants raised in the forefront of his argument an objection to the effect that the appeal now before us was an appeal from an order of a judge giving unconditional leave to defend which was not a proper subject for appeal to this court in view of s. 31 (1) (c) of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 31 (1) provides:

“No appeal shall lie . . . (c) from an order of a judge giving unconditional leave to defend an action.”

D Counsel for the plaintiffs argued that the order made by COLLINGWOOD, J., was not an order giving unconditional leave to defend but merely an order ruling that relief under R.S.C., Ord. 14, could not be obtained in circumstances such as these, that is to say in a case where the plaintiff had elected, by including the appropriate note on his writ, to proceed under R.S.C., Ord. 14B. I find it impossible to accept that argument. The position was that Master HARWOOD made an order giving the defendants conditional leave to defend. Counsel for the plaintiffs admits that that was an order which could only be made under R.S.C., Ord. 14. The order which came before COLLINGWOOD, J., being an order granting conditional leave to defend under an application purporting to have been made under R.S.C., Ord. 14, COLLINGWOOD, J., allowed the appeal and gave the appropriate directions under R.S.C., Ord. 14B. It seems to me that, by allowing the defendants' appeal from an order giving conditional leave, what the learned judge did was to grant unconditional leave to defend; and, if that is right there is an end of the application, because of the prohibition against any appeal from such an order contained in s. 31 (1) (c) of the Act of 1925.

G Although the objection taken by counsel for the defendants is sufficient to dispose of the present application, I will deal briefly with the merits of the case, which have been the subject of considerable argument before us. As I have said, the only issue between the parties concerned the alleged revocation of the licence covering the goods in question, apart from the question of ownership, with respect to which the defendants had to provide an affidavit under Sch. 7, para. 10 (1), to the Act of 1952, in default of which the plaintiffs would, by the terms of para. 10 (3), be entitled to judgment. One should look first of all at H R.S.C., Ord. 3, r. 6. Rule 6 (1) provides that in any action in the Chancery Division or Queen's Bench Division, with certain exceptions,

“ . . . the writ of summons may, at the option of the plaintiff, be specially indorsed with or accompanied by a statement of his claim . . . ”

I It is not in dispute that the present was such an action, and therefore the plaintiffs were justified in issuing a writ, as they did, with their statement of claim in extenso indorsed on it. The writ being of that nature, it would have been open to the plaintiffs to proceed under R.S.C., Ord. 14, which provides by r. 1 (a):

“Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Ord. 3, r. 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any,

apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

If the plaintiffs had proceeded under that rule they would, I apprehend, have been justified in seeking leave to sign judgment in default of an affidavit being sworn as to the ownership of the goods under Sch. 7, para. 10 (1), to the Act of 1952. But they were not content with commencing the proceedings simply with a specially indorsed writ; they preferred to proceed under R.S.C., Ord. 14B, to which I will refer in a moment; and, accordingly, this note was included in the writ:

"If the defendants enter an appearance to this writ the plaintiffs will apply under R.S.C., Ord. 14B, for trial without further pleadings."

That note was included in the writ; and the cautionary note as to the delivery of a defence, which appears on a specially indorsed writ not designed for procedure under R.S.C., Ord. 14B, was struck out. R.S.C., Ord. 14B, provides as follows:

"1 A writ of summons specially indorsed with or accompanied by a statement of claim under Ord. 3, r. 6 may, at the option of the plaintiff, include (instead of the notice, if any, to the defendant that if he enters an appearance he must also deliver a defence) a notice that, if an appearance is entered to the writ, the plaintiff intends to apply under this order for trial without further pleadings . . . 2 (1) Where an appearance has been entered to any writ of summons which includes such a notice as aforesaid, the plaintiff shall apply to the court or a judge for an order that the action shall be tried without further pleadings. (2) Any such application shall be made by summons served within seven days from the entry of appearance and returnable not less than twenty-one days after the service thereof . . . (3) Any such application shall be supported by an affidavit, made by the plaintiff or by any person who can swear positively to the facts—(a) summarising the questions believed to be at issue between the parties; and (b) indicating, so far as necessary, the grounds for the contention that the case is suitable to be tried without further pleadings. (4) A copy of the said affidavit must be served with the summons. (5) If the plaintiff fails to perform his obligations under this rule within the time limited, the defendant may, at the expiration of that time, apply to the court or a judge to dismiss the action with costs for want of prosecution; and on the hearing of the application the court or judge may order the action to be dismissed accordingly or make such other order on such terms as the court or judge may think just."

The summons and Mr. Stacey's affidavit in support of the application were duly served on the defendants. It is to be noted that the affidavit was indorsed with the words "Affidavit in support of summons under R.S.C., Ord. 14B".

Counsel for the plaintiffs submits that it is open to a plaintiff to pursue concurrently his remedies under R.S.C., Ord. 14 and R.S.C., Ord. 14B, so that in the present case the plaintiffs were justified in issuing their writ as for proceedings under R.S.C., Ord. 14B, and then issuing a summons serving the double purpose of a summons to lead to relief under R.S.C., Ord. 14B, or alternatively to relief under R.S.C., Ord. 14. I find it impossible to accept that view. It seems to me reasonably plain, on the language of R.S.C., Ord. 14B, that, once a plaintiff elects to proceed under R.S.C., Ord. 14B, by including in the writ the notice referring to

A R.S.C., Ord. 14B, which I have read, he commits himself to the course marked out by R.S.C., Ord. 14B. It will be seen that r. 2 (1) is in imperative terms:

“Where an appearance has been entered to any writ of summons which includes such a notice as aforesaid, the plaintiff shall apply to the court or a judge for an order that the action shall be tried without further pleadings.”

B That seems to me to mean that it is obligatory on the plaintiff to make such an application once he has elected to proceed under R.S.C., Ord. 14B, by including the appropriate note in his writ. I think that the imperative language used is inconsistent with the view that a plaintiff who has elected to proceed in this way should combine his proceedings under R.S.C., Ord. 14B, with proceedings under R.S.C., Ord. 14. I think that the general principle to be applied in construing these rules is that, *prima facie*, a defendant is entitled to go to trial and defend himself at the trial in the ordinary way unless there is something in the rules to cut down that right. One set of provisions in the rules drastically cutting down that right is to be found in R.S.C., Ord. 14; but, if that order is to be relied on, then it seems to me that the plaintiff should frame his proceedings accordingly and cannot, while proceeding under R.S.C., Ord. 14B, properly introduce into his application under that order an application for summary judgment under R.S.C., Ord. 14.

The point is one which does not admit of any great elaboration; but, giving the best consideration I can to the matter, I come to the conclusion that the decision of the learned judge in the present case was right. I reach that conclusion, I confess, with no great satisfaction, since it is apparent from the provisions of Sch. 7 to the Act of 1952 that, unless and until an affidavit is sworn to the effect that the goods here in dispute are the property of the defendants, the defendants can have no *locus standi* to defend this action; but that does not mean that it is possible for us here and now to compel them to provide such an affidavit on pain of being excluded from defending the action. It may well be that the plaintiffs could have secured that result if they had proceeded under R.S.C., Ord. 14; but, in my view, by adopting the alternative procedure under R.S.C., Ord. 14B, they missed their opportunity, and the master's order giving leave to defend conditionally on the affidavit being sworn was an order which, in the proceedings as constituted before him, it was not open to him to make. In these circumstances I hold, first, that this court has no jurisdiction to entertain the appeal and, secondly, that, even if there is jurisdiction to hear it, the appeal must fail for the reasons which I have endeavoured to indicate.

HODSON, L.J.: I am of the same opinion. I also have reached this conclusion without any great satisfaction, because the defendants, according to the terms of Sch. 7, para. 10, to the Customs and Excise Act, 1952, have not so far indicated that they have any *locus standi* at all. So far as the present appeal is concerned, the plaintiffs are, I think, precluded by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (c), from bringing an appeal from the learned judge's order. That sub-section provides that no appeal shall lie from an order of a judge giving unconditional leave to defend an action. The plaintiffs have brought an action, and the master gave conditional leave to defend. It was from that decision that the defendants successfully appealed. The effect of the judge's order allowing the appeal, together with the directions which he subsequently gave, was to give unconditional leave to defend. We were told by counsel for the plaintiffs that that was not the judge's intention; when the judge was reminded that, if he gave unconditional leave to defend, there would be no possibility of any further appeal, he indicated that that was not his intention, but that his intention was simply to direct that the action should proceed not under R.S.C., Ord. 14, but under R.S.C., Ord. 14B. In my opinion, however, whatever his intention, the effect of his order was to give unconditional leave to defend.

The second matter is not, I think, capable of great elaboration. I agree with what JENKINS, L.J., has said, that the course taken by the plaintiffs of giving notice under R.S.C., Ord. 14B, as they did by their indorsement on the writ, compelled them to follow the provisions of R.S.C., Ord. 14B, r. 2 (1):

"Where an appearance has been entered to any writ of summons which includes such a notice as aforesaid, the plaintiff shall apply to the court or a judge for an order that the action shall be tried without further pleadings."

Having taken that course, the plaintiffs were committed to follow it to the end, and I agree with the view which the learned judge took on that matter also. Therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Customs and Excise* (for the plaintiffs); *Philip Conway, Thomas & Co.* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

EVANS v. WALKDEN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), July 11, 1956.]

Insurance—Motor insurance—Using and permitting vehicle to be used on road without policy of insurance being in force—Son, under seventeen, driving father's car—Father, licensed to drive, sitting in passenger's front seat but not touching any controls—Policy in force but excepting liability where car driven by unlicensed driver—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 35 (1).

A car was driven along a public road by D., who had no driving licence and was under seventeen years old. The car was driven in bottom gear at a speed not exceeding five miles per hour; the road was level and without traffic, and the total distance covered was about two hundred yards. B., who was D.'s father and was the owner of the car and a licensed driver of thirty years' experience, was in the front seat beside D. The steering wheel, ignition key, clutch pedal and gear handle were within reach of B., but the hand-brake was on the far side of D. from where B. was sitting and to put on the foot-brake B. would have had to displace D.'s foot. When D. was driving B.'s hands were not on the steering wheel nor on the hand-brake. B. had in force an insurance policy against third-party risks, but by condition 3 the underwriters were not liable for liability arising while the car was being driven by an unlicensed driver. Condition 9 provided "Notwithstanding anything to the contrary contained in this policy, the insured car may be used for tuition purposes subject to the following limitations . . . (b) There shall be present in the insured car as a tutor a person under whose supervision the holder of a provisional licence would be entitled to drive." B. was charged under s. 35 of the Road Traffic Act, 1930, with permitting D. to use a car on the road without such a policy of insurance against third-party risks as satisfied the requirements of the Road Traffic Act, 1930. The charge having been dismissed,

Held: the offence charged was established and the case would be remitted to the justices for them to convict because

(i) on the facts B. was not a driver of the car at the time, since although he was in a position to assume control of the car he was not actually in control (*Langman v. Valentine*, [1952] 2 All E.R. 803 distinguished); and

(ii) condition 9 (b) of the policy was concerned with the qualification of the tutor, not of the driver, and thus the condition did not prevent condition 3 excluding the underwriters from liability, as D. was unlicensed.

Appeal allowed.

A [**Editorial Note.** In the present case it is intimated that the justices could properly find that "special reasons" existed, so that they might order that B. should not be disqualified for driving; see per LORD GODDARD, C.J., at p. 68, letter H, post.

For the Road Traffic Act, 1930, s. 35 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 602.]

B Case referred to:

(1) *Langman v. Valentine*, [1952] 2 All E.R. 803; 116 J.P. 576; 3rd Digest Supp.

Case Stated.

C This was a Case Stated by justices for the County of Merioneth in respect of their adjudication as a magistrates' court sitting at Barmouth, Merionethshire. The respondent David Walkden was charged with using a car without there being in force an insurance policy contrary to s. 35 (1) of the Road Traffic Act, 1930, and the respondent, Bernard Walkden, who was David Walkden's father, was charged with permitting his son to use the car. The facts as found by the justices and their decision are stated in the judgment of ORMEROD, J.

D *L. J. Davies* for the appellant, the police prosecutor.
A. J. Irvine for the respondents.

LORD GODDARD, C.J.: ORMEROD, J., will deliver the first judgment.

E **ORMEROD, J.:** This is an appeal by Case Stated from the justices of the County of Merioneth, who on June 25, 1955, dismissed two informations against the respondents, Bernard and David Walkden. The information so far as the second respondent, David Walkden, was concerned was that on June 2 he drove a motor car without having an insurance policy in force in respect of the user of the car by him contrary to s. 35 of the Road Traffic Act, 1930. The information against the first respondent, Bernard Walkden, was that on the same day he permitted David Walkden to use that motor car without having an insurance policy in force in accordance with the provisions of the section.

F The facts which were found by the justices were as follows:—At a quarter to ten on June 2, 1955, David Walkden was sitting in the driving seat of a car at Beach Road, Fairbourne, a car which was owned by his father, the first respondent. David Walkden (hereinafter referred to as "the son") was under seventeen years of age (in fact he was only fifteen years old) and by that reason was disqualified for holding a driving licence. Seated in front of the car with the son was his father, the first respondent, who was a driver of thirty years' experience. The Case states that the road was perfectly level and there was no other traffic on the road at that time. The car was overtaken by a police car and the son admitted that he had no driving licence, had never had one, and was not entitled to have one because he was only born in the year 1940.

H The justices found that the car was being driven in bottom gear and was not doing more than four to five miles an hour, that the total distance driven was about two hundred yards, that the first respondent was in a position to control the driving of his son and was in fact doing so and could have stopped the car immediately at that slow speed. They went on to find that the steering wheel was within reach of the first respondent, as also were the brake and clutch pedals, the ignition key, and the gear handle on the steering wheel. It should be pointed out here, though it does not appear in the Case, that the hand-brake of the car was on the right-hand side of the driver and was not accessible to anybody sitting in the passenger seat, so that when the justices find that the brake was available for the use of the first respondent if he wished to control the car, they must presumably be referring to the foot-brake only.

I On those facts the justices came to the following conclusion:

"We were of opinion that [the first respondent] had effective control of

the car and if an accident had happened his insurance company would have been liable and we accordingly dismissed both informations." A

After that finding, the matter came before this court and was considered on Jan. 18, 1956, when it was ordered that the determination of the justices should be reversed and the matter should be remitted to them to continue the hearing so that the first respondent could, if he was so advised, produce his policy of insurance so that the matter could be further considered in relation to certain decisions, particularly *Langman v. Valentine* (1) ([1952] 2 All E.R. 803). The insurance policy was duly produced and the further hearing of the information took place on Mar. 9, 1956. Apart from the documents in the case, no further evidence was called, and after consideration of the documents and after hearing arguments principally founded on *Langman v. Valentine* (1), the justices came to this conclusion: B C

"We were of the opinion that having regard to the degree of control being exercised by [the first respondent] he, as well as [his son] was a driver of the car and he would under the terms of the said policy have been indemnified against any third-party claims under section A . . ."

As a result of that opinion, the justices dismissed the informations and this is an appeal from that decision. It is important to look at the terms of the policy, in which the first respondent was the assured, which was in force at the time these events happened. Section A of the policy, dealing with third-party claims, states that the insurance company indemnifies the assured for any claim for which he may become liable by injury causing death or damage, and so on, caused by or arising out of the use of the car. If the terms of the policy stopped there, it might very well be said that this was a case where any injury which had occurred—of course there was none—might have been covered by this policy because it came within the words "caused by or arising out of the use of the car"; but the policy does not stop there and there are certain conditions. Condition 3 is as follows: D E

"The underwriters shall not be liable for any loss or damage or liability (a) arising whilst the car is being driven by an unlicensed driver." F

It is abundantly clear from that, and counsel for the respondents has not argued to the contrary, that if the only driver of the car at the time was the son, who was clearly an unlicensed driver, the policy was not a cover at the time when he was driving. The respondents' argument is that although the son at that time may have been a driver of the car, the first respondent was at the same time a driver of the car, and that, as the justices have so found and there was evidence to support their findings, therefore the car was being driven by a driver who was licensed and the policy was in force so far as this particular user of the car was concerned. If the justices were justified on the evidence before them in coming to the conclusion that the first respondent was a driver of the car then they would have been justified in dismissing these informations; but looking at the facts on which they found their decision, I myself am clearly of opinion that there was no evidence on which they could come to the conclusion that the first respondent was a driver of the car. It is argued that they took into account the whole of the circumstances, particularly the fact that the car was travelling in bottom gear and was only travelling at four to five miles an hour, and that in those circumstances it was a simple matter for the first respondent, who was sitting beside the driver, either to put his hand on the steering wheel or in some way or other to get to the brake or to switch off the ignition or possibly to knock the gear into neutral, and that by doing one or more of those things he could have stopped the car or had control of it in any way necessary; and it is submitted that in those circumstances the justices could say that the first respondent was a driver of the car. I think that is not so. It may well be that the first respondent was in control of his son who was driving, but I do not think G H I

A it is in any way true to say that he was in control of the car. He may have been in a position to assume control, but he was not in control at the time the car was being driven by his son. He may have been in a position to become at any moment a driver of the car, but on the facts as found by the justices, I fail to see how he can be regarded at that time as a driver of the car.

The justices were clearly influenced by the decision of this court in the case of B *Langman v. Valentine* (1) ([1952] 2 All E.R. 803). That was a case where the owner of a motor car was teaching a young woman to drive on a public road. She had no licence and at all material times he was sitting in the front passenger's seat and he kept one hand on the hand-brake and the other on the steering wheel and he was able to steer the car, stop it or start it, the ignition switch being within his reach. It was said, too, that the girl who was learning to drive sitting in the C driver's seat had her foot in a position to use the accelerator, the foot-brake and clutch pedal and, in those circumstances, the justices held that the owner was the driver of the car. This court on appeal on a Case Stated said that the justices were justified in coming to the conclusion that the owner was a driver, not necessarily the driver because there could be two drivers but, in those circumstances, a driver. Those circumstances appear to me to be very different from those in the D case we are considering at the moment. Here, the owner did not have his hand on the steering wheel. He did not have his hand on the hand-brake, which was in fact not accessible to him. The only brake he could have applied would have been the foot-brake, which is on the right-hand side of the driver, and could only be reached by him with very considerable difficulty. It is true I suppose that he could have switched off the ignition and he could have taken hold of the steering wheel and E possibly put the gear in neutral because it appears that the gear lever was on the steering wheel, but in fact he had done none of those things. He was not in fact touching any of the instruments of control and, in the circumstances, I think that this case is on its facts distinguishable from *Langman v. Valentine* (1) and that here there was no evidence which would justify the justices in coming to the conclusion that the first respondent was a driver of this car. If he was not a driver of F this car, it follows that the driver of the car and the only driver was the son. As he was an unlicensed driver it follows so far as that user of the car is concerned that there was no policy of insurance in force.

The other question raised by counsel for the respondents is that even supposing the father was not a driver of the car, and therefore that there was no policy of insurance in force having regard to the provisions of condition 3, yet condition G 9 brings the policy back into force as condition 9 deals with the position where the car is being driven by a person under tuition. Condition 3 limits the user of the car, amongst other things, to user for private purposes and does not include the use of the car for the purpose of tuition, but condition 9 provides:

H "Notwithstanding anything to the contrary contained in this policy, the insured car may be used for tuition purposes subject to the following limitations . . . (b) There shall be present in the insured car as a tutor a person under whose supervision the holder of a provisional licence would be entitled to drive."

I Counsel argues that the words at the beginning of that condition "Notwithstanding anything to the contrary contained in this policy" exclude the opening words of condition 3 of the policy and that condition 9 must be construed entirely as though condition 3 were not there, and that in those circumstances the words of condition 9 are not sufficiently explicit to permit of the construction that the person under tuition must be in possession of a provisional licence. It may be that, if condition 9 were being construed entirely without condition 3, that might be a proper construction of para. (b) of condition 9, but condition 3 must be taken into consideration unless it is in fact contradicted by the opening words of condition 9 which are: "Notwithstanding anything to the contrary

contained in this policy". As I read condition 9, there is nothing there contrary to the provision that the underwriters shall not be liable for loss or damage arising while the car is being driven by an unlicensed driver. In those circumstances, the respondents cannot get very much help from the construction which they seek to put on condition 9. It follows in my opinion that this appeal must be allowed, and the case must be sent back to the justices for them to convict. It may very well be that in these circumstances the offence which has been committed is not a serious one, but that is a matter for the justices and a matter entirely for their consideration. A

DONOVAN, J.: I agree. It is true that this was in all the circumstances a venial and not a serious offence, but on the facts I do not think the father, the first respondent, could be said to be the driver. In *Langman v. Valentine* (1) ([1952] 2 All E.R. 803) the person there concerned had one hand on the steering wheel and the other on the hand-brake. In the present case the first respondent was out of immediate reach of the hand-brake, he would have had to displace his son's foot in order to get to the foot-brake, and he had no hand on the steering wheel. It is true, of course, that he could have switched off the engine. B

It is argued that because the first respondent was in the immediate vicinity of the steering wheel, ignition switch and foot-brake that he was in such control as to be a driver of it, particularly when the car was travelling at only four miles an hour; but I cannot agree that that conclusion was open to the justices because control is not the same thing as the possibility of assuming control, and in a matter of this importance I do not think the decision in *Langman v. Valentine* (1) ought to be made the starting point for even more indulgence. C

As regards the policy itself, I do not regard condition 9 as antagonistic to that part of condition 3 which excludes cover if the car is driven by an unlicensed driver because condition 9 is dealing with the qualification of the tutor and does not touch the question of the pupil having, as by law he should have, a provisional licence. D

LORD GODDARD, C.J.: I agree. I confess I had some doubt at first whether we could in the circumstances of this case differ from the finding of fact of the justices; but I do not think they applied the proper test and, moreover, I do not desire to be a party to any extension of *Langman v. Valentine* (1) ([1952] 2 All E.R. 803) or any application of the decision in that case to facts which are not strictly in line with it. I think *Langman v. Valentine* (1) went as far as it was safe to go; we felt in that case that there were facts on which we could not have differed from the justices, though I think that we should have if we had felt able to do so. E

The only other point which I think that I should mention is this. The justices dismissed these informations and we are sending the case back to them: when considering these dismissals, it may be that they would be glad to find special circumstances if they could, and we think, although it is strictly a matter for them, that if in the circumstances of this case they do find there were special reasons for not imposing disqualification, we should not differ from them. F

Appeal allowed. Case remitted to the justices.

Solicitors: *Horace W. Davies & Co.*, agents for *J. Charles Hughes & Co.*, Dolgelley (for the appellant); *Amery-Parkes & Co.* (for the respondents). G

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.] H

INLAND REVENUE COMMISSIONERS v.
KENMARE (COUNTESS).

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), June 5, 6, 7, 8, July 2, 1956.]

Surtax—Settlement—Power to revoke or otherwise determine settlement—Foreign settlement, settlor and trustees resident abroad, but trust funds in United Kingdom—Trusts for settlor's issue subject to her life interest—Trustee's power to declare sums held on trust for settlor absolutely—Amounts might ultimately exhaust fund—Whether terms of settlement such that trustees might have power to determine it—Finance Act, 1938 (1 & 2 Geo. 6 c. 46), s. 38 (2).

The taxpayer, who was not resident or ordinarily resident in the United Kingdom, executed a settlement in Bermuda, expressed to be governed by the law of Bermuda, under which she transferred certain stocks, shares and securities in the United Kingdom to trustees who were not resident in the United Kingdom. The trustees were in their absolute discretion to pay the income (or part thereof) of the trust fund to the taxpayer during her life, and (by cl. 3) to stand possessed of the capital and income thereof after her death on trust for her issue. The trustees had power (by cl. 5) in their absolute discretion at any time to "declare that any part of the trust fund . . . shall thenceforth be held in trust for the" taxpayer absolutely, with a proviso that such part or parts should not exceed £60,000 in aggregate value in any period of three years (subject to a right to carry forward any deficiency in one period to the succeeding one). The taxpayer was assessed to surtax on the basis that the income of the trust fund was her income under s. 38 (2) of the Finance Act, 1938.

Held: the taxpayer was properly assessed to surtax in respect of the income for the following reasons—

(i) the terms of the settlement satisfied s. 38 (2) (a) of the Finance Act, 1938, because the trustees "might have power . . . in the future to . . . determine" the trusts of the settlement "or a provision thereof", viz., cl. 3, since the last of successive payments to the taxpayer under cl. 5 might exhaust the trust fund and thus end the effectiveness of the trusts of the settlement or of cl. 3 thereof, and

(ii) the income being that of investments in the United Kingdom, s. 38 (2) applied notwithstanding that the settlement was a foreign settlement, that neither the settlor nor the trustees were resident in the United Kingdom (*Astor v. Perry* [1935] A.C. 398 distinguished), and that the settlor was not legally entitled to the income or property.

Per SINGLETON and MORRIS, L.JJ.: the word "provision" in s. 38 (2) is used in the sense of a clause in the settlement (see p. 74, letter A, p. 78, letter D, post).

Appeal dismissed.

[**Editorial Note.** As regards the meaning of the word "provision", compare *Saunders v. Inland Revenue Comrs.* (p. 83, post).

For s. 38 (2) of the Finance Act, 1938, see 12 HALSBURY'S STATUTES (2nd Edn.) 411; and for the replacing provisions of s. 404 (2) of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 381.]

Cases referred to:

- (1) *Berkeley v. Berkeley* [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.
- (2) *Saunders v. Inland Revenue Comrs.*, [1955] 3 All E.R. 274; 3rd Digest Supp.
- (3) *Astor v. Perry, Duncan v. Adamson*, [1935] A.C. 398; 104 L.J.K.B. 423; 153 L.T. 1; sub nom. *Perry v. Astor*, 19 Tax Cas. 255; Digest Supp.

- (4) *Ormonde (Marchioness) v. Brown*, (1932), 17 Tax Cas. 333.
- (5) *Colquhoun v. Heddon*, (1890), 25 Q.B.D. 129; 59 L.J.Q.B. 465; 62 L.T. 853; 2 Tax Cas. 621; 28 Digest 92, 546.
- (6) *Dreyfus (Camille & Henry) Foundation, Inc. v. Inland Revenue Comrs.*, [1954] 2 All E.R. 466; [1954] Ch. 672; 36 Tax Cas. 126; 3rd Digest Supp.

Case Stated.

The appellant taxpayer appealed to the Special Commissioners of Income Tax against an assessment to surtax made on her in the sum of £47,190 for 1947-48. The question for determination was whether the income on certain trust funds settled by her under a settlement dated Sept. 24, 1947, fell to be treated as her income for the purposes of surtax under s. 38 (2) of the Finance Act, 1938.

The taxpayer was neither resident nor ordinarily resident in the United Kingdom after Aug. 7, 1947, and the trustees of the settlement were not at any material time resident in the United Kingdom. Immediately before Sept. 24, 1947, the taxpayer was absolutely and beneficially entitled to certain stocks, shares and securities in the United Kingdom, the income from which was liable to United Kingdom income tax and surtax in her hands. On Sept. 24, 1947, she executed the settlement in Bermuda. By it, she transferred the stocks, shares and securities to trustees and directed that they should

“ in their absolute discretion pay the income (or such part thereof in their absolute discretion as aforesaid) of the scheduled investments and of the property for the time being representing the same ”,

i.e., the trust fund, to the taxpayer during her life. By cl. 3, after her death, the trustees were to

“ stand possessed of the capital . . . and future income of the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue ”

of the taxpayer in the manner indicated. Under cl. 5 (a):

“ The trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the [taxpayer] . . . declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the [taxpayer] absolutely . . . Provided always that the foregoing power shall not be exercisable by the trustees so as to vest in the [taxpayer] in any period of three years . . . a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda ”.

It was further provided by cl. 5 (b) that, if this power should not be exercised to the full extent of £60,000 in any period of three years, the deficiency could be carried forward to increase the amount in respect of which the power might be exercised in any succeeding period of three years. The settlement provided (by cl. 13 (a)) that it should be construed and take effect in accordance with the law of the Islands of Bermuda and that the courts of those islands should be the forum for administration thereof.

The whole of the income arising from the trust fund from Sept. 24, 1947, to Apr. 5, 1948, was within that period awarded by the trustees to the taxpayer in the exercise of their discretion by putting it at her disposal in an account and accordingly it was not contended by the Crown that s. 38 (3) of the Finance Act, 1938, was applicable.

The Crown contended: (i) that the income arising under the settlement was caught by Part 4 of the Finance Act, 1938, and in particular by s. 38 (2); (ii) that the jurisdiction of the United Kingdom legislature could not be called in question; (iii) that the admitted facts that the taxpayer at the material time

- A was neither resident nor ordinarily resident, and that the trustees were not resident, in the United Kingdom were irrelevant; (iv) that s. 38 (2) referred to the income arising from the trust fund under the settlement and the amount of income which the trustees might see fit to distribute and the nature of the taxpayer's interest in the settlement were irrelevant; (v) that, on a proper construction of cl. 5 of the settlement, in view of the trustees' power to take
- B the funds comprised in it out of it by successive stages, the settlement was revocable; (vi) that, on the exercise of the power, the taxpayer would become beneficially entitled to the whole or part of the trust fund comprised in the settlement; and (vii) that the taxpayer was correctly assessable to surtax for 1947-48 in respect of the income arising from the trust fund from Sept. 24, 1947, to Apr. 5, 1948, which was to be treated as her income under s. 38 (2)
- C of the Act of 1938.

- The taxpayer contended: (i) that the income arising under the settlement was not caught by Part 4 of the Finance Act, 1938, and in particular by s. 38 (2); (ii) that the United Kingdom legislature had no jurisdiction to impose a charge to surtax on the taxpayer in respect of income which did not arise to her, she being a non-resident; (iii) that s. 38 had no application to the income
- D arising from the settlement, the trustees of which, being non-resident, were outside the jurisdiction of the United Kingdom legislature; (iv) that on the proper interpretation of s. 38 (5) and para. 1 of Part 1 of Sch. 3 to the Finance Act, 1938, an effective right of recovery by the taxpayer of surtax with which she might become chargeable was a condition precedent to the imposition of a charge to surtax, and that no such right of recovery could be exercised and
- E enforced against the trustees of the settlement because they were outside the jurisdiction of the courts of the United Kingdom; (v) that on a proper construction of cl. 5 of the settlement, the settlement was not revocable, the trustees' powers being exercisable only within the framework of the settlement, and (vi) that the taxpayer was not liable to be assessed to surtax for 1947-48 in respect of the income arising from the trust fund comprised in the settlement.

- F The commissioners rejected the taxpayer's contention that s. 38 had no application to the settlement because the trustees to whom income from the trust fund arose were not resident in the United Kingdom, and they held that, on a proper construction of s. 38 (2) of the Finance Act, 1938, read in its context in Part 4 of the Act, the taxpayer, being outside the jurisdiction of the
- G United Kingdom legislature during the material time, was not liable to be assessed to surtax in respect of income from the trust fund, which did not arise to her and to which she had only such title as the trustees in their absolute discretion might see fit to allow her. They did not therefore give any decision on the taxpayer's contention that the settlement was not revocable, but allowed the appeal and reduced the assessment to £23,063. On May 12, 1955, DANCKWERTS, J., allowed the Crown's appeal against that decision, holding
- H that the trustees' power to vest part of the trust fund in the taxpayer was a provision which revoked either the settlement or some provision thereof under s. 38 (2) and that s. 41 of the Finance Act, 1938, extended the provisions of s. 38 (2) to income arising under a settlement payable to non-residents in respect of property in this country. The taxpayer appealed to the Court of Appeal.

- I *Geoffrey Cross, Q.C., Sir Reginald Hills and E. Blanshard Stamp* for the Crown.
Heyworth Talbot, Q.C., F. N. Bucher, Q.C., and H. H. Monroe for the taxpayer.

Cur. adv. vult.

July 2. The following judgments were read.

SINGLETON, L.J.: This is an appeal from the judgment of DANCKWERTS, J., who allowed the appeal of the Inland Revenue Commissioners against the decision of the Special Commissioners. [HIS LORDSHIP stated the facts and continued:] The scheduled investments, the subject-matter of the trust, were

investments by way of mortgage, or loan, or debentures and stocks and shares in English companies. I propose to consider the points raised in the order in which the learned judge dealt with them. Section 38 (2) of the Finance Act, 1938, reads:

"If and so long as the terms of any settlement are such that—
(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year and not as the income of any other person."

It is claimed by the Crown that the trustees

"have or may have power to revoke or otherwise determine the settlement or any provision thereof."

The taxpayer contends that there is no such power to be found within the terms of the settlement. Our attention was directed to cl. 3, which provides that, after the death of the settlor, the trustees should, subject to the provisions of the clause, stand possessed of the capital

"in trust for all or any of the children or child of the [taxpayer] now living or hereafter to be born who being male attain the age of twenty-one years or being female attain that age or marry under it and if more than one in equal shares."

On behalf of the taxpayer it was submitted that no power was given to revoke or to determine the settlement or any provision thereof.

Counsel for the Crown referred to the definition of "settlement" in s. 41 (4) (b) of the Act of 1938, and pointed out that a document was not essential to a settlement, but was merely the legal way of doing it. He submitted that, if there was power in a settlement to hand over to the settlor the whole fund, such a power would be a power to determine the settlement, while, if there was power to hand over one-half of the fund, that would be a power to make a partial revocation or determination and would be caught by sub-s. (2)—and he drew attention to the wording of sub-s. (2) (b). He asked us to read the word "provision" in sub-s. (2) (a) as covering the amount provided, or anything affected, by the settlement.

DANCKWERTS, J., in dealing with this point said:

"It was argued by counsel for the taxpayer that there was no power to revoke the settlement or any provision thereof, and he sought in aid the reference in para. (b) of sub-s. (2) dealing with beneficial interests in any part of the property as showing that the references to partial revocation were in a different context and not to be imported into para. (a) (which is really the material provision which I have to apply), because there is no appropriate context. It is plain that in the event of the trust being determined in this settlement the person who benefits is the taxpayer, who becomes absolutely entitled to the property in respect of which the trustees exercise their power of release. What the trustees can in fact do under the provisions of cl. 5 is not expressed, it is true, by using the word 'revoke.' What they can do is, they may 'by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned

A shall thenceforth be held in trust for the settlor absolutely'; and the clause proceeds: 'and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely'. Counsel for the taxpayer argues that that is not a provision which determines the settlement or the provisions, or a provision of the settlement, because it merely substitutes one trust for another, and the settlement continues: it is an exercise of the power within the framework of the settlement. That argument at first sight appears to have some attraction, but it is not a correct way of looking at the matter. In the first place I am satisfied that although the word 'revocation' is not expressly used the effect of the provision in cl. 5 (a) is a revocation of the trust; and it seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not, there is a revocation or determination of either the settlement or some provision thereof. It seems to me that there is clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund. Therefore, so far as that point is concerned, the settlement is clearly one which is revocable within the provisions of s. 38 (2) of the Finance Act, 1938."

E The word "provision" when used for the second time in s. 38 (1) (a) clearly means a clause, or part of a clause, in the settlement, and I think it has the same meaning earlier in s. 38 (1) (a) and in s. 38 (1) (b). In sub-s. (2) the words "or any provision thereof" following the word "settlement" should be given the same meaning. Before sub-s. (2) comes into play it must be shown that someone

F "has or may have power to revoke or otherwise determine the settlement or a provision of the settlement", by which I mean words which are contained in the settlement, "a clause or proviso, a defined part of a written instrument". Much argument was devoted to this point, based on *Berkeley v. Berkeley* (1) ([1946] 2 All E.R. 154). It may be said that the word "provision" is used in a different sense in different parts of the section, which would be odd. Whichever is the right view, the answer to the problem before us is not determined thereby.

G On a fair reading of the terms of the settlement I am satisfied that the position created was within the words of s. 38 (2) (a), and that, consequently, the income from the settled fund falls to be treated as the income of the settlor, subject to the second point in the case. The words "or may have" follow the words "if . . . any person has" in s. 38 (2) (a) of the Finance Act, 1938. It appears to me that the term of the settlement in cl. 5 that the trustees may pay out to the settlor in any three years the sum of £60,000 (with a carry-forward) might result in time in the fund being exhausted. That is not likely unless there should be a fall in the value of the investments held under the trusts, but it is something which might happen. It is covered by the words "may have". If the settled fund disappeared that would be a determination, though not a revocation, of the settlement. There would be nothing left except a document. If the position created by the settlement is such that that may be brought about, the case is then within s. 38 (2) (a), and, moreover, if the whole of the settled fund goes, there is nothing left to which the trust in cl. 3 of the settlement can apply and, consequently, there is, or would be, a determination of that provision, to wit, of cl. 3.

I Thus, I agree with the conclusion at which DANCKWERTS, J., arrived, though I do not go quite so far as he did in some respects. We were referred to the judgment of WYNN-PARRY, J., in *Saunders v. Inland Revenue Comrs.* (2) ([1955]

3 All E.R. 274). The learned judge there held that the word "provision" in s. 38 (2) meant a benefit conferred by the settlement, as the surrounding language was inapt if taken to refer to a defined part of the settlement. In the course of his judgment he said that he accepted the principle that the word "provision" should be given the same meaning wherever it occurred in the section. I am clearly of opinion that, in sub-s. (1), the word "provision" is used in the sense of a clause in the settlement*, and that is carried further by the use of the word in sub-s. (5) and sub-s. (7), and in Sch. 3. A B

On the other point in the case it was submitted on behalf of the taxpayer that s. 38 (2) of the Act of 1938 did not apply to the settlement, as the taxpayer was not and is not resident in this country, nor are the trustees, and the settlement is a foreign settlement (see cl. 13 (a)). From the date of the settlement the income was income of the trustees, it was said, and Parliament has no jurisdiction to lay a charge of tax on a non-resident in respect of income to which that non-resident person is not entitled: the trustees have a discretion whether they pay her or not. Reliance was placed on the decision of the House of Lords in *Perry v. Astor* (3) ((1935), 19 Tax Cas. 255), and, in particular, on the speech of LORD MACMILLAN in that case. The case arose under s. 20 (1) (a) of the Finance Act, 1922, which may be described as the forerunner of s. 38 of the Act of 1938 now under consideration. The finding of the Special Commissioners reads (*ibid.*, at p. 259): C D

"We, the commissioners who heard the appeal, held that the matter was concluded by the decision in the case of the *Marchioness of Ormonde v. Brown* (4) ((1932), 17 Tax Cas. 333), and that s. 20 (1) (a) of the Finance Act, 1922, could not be applied so as to charge the respondent with income tax on foreign income which under the provisions of the settlement was income of the American trustee. We accordingly amended the assessments by substituting amounts computed under r. 2 of Case V for those computed under r. 1 as from the date of the settlement." E

This was held by the House of Lords to be correct. In *Perry v. Astor* (3) LORD MACMILLAN said (19 Tax Cas. at p. 285): F

"My Lords, the argument for the Crown has at first sight an attractive simplicity. Is the appellant able, by means of the exercise of a power of revocation contained in a disposition made directly by himself, to obtain for himself the beneficial enjoyment of the income which, under that disposition, his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom. The answer must again be in the affirmative. The words of s. 20 and r. 1 of Case V fit the facts precisely, and that, contends the Crown, must end the matter. G

"This appearance of simplicity is delusive, for if, as the Crown submits, the critical words 'any income' with which s. 20 opens, are read without any qualification, territorial or other, the most startling anomalies result. Thus, if the section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment, it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British income tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can H I

* See *Saunders v. Inland Revenue Comrs.*, p. 83, post, where the decision of WYNN, PARRY, J., on this point was overruled.

A impute to an American citizen ' for the purposes of the enactments relating to (British) income tax (including super-tax) ' an income of which the American citizen has by the law of his own country effectually divested himself."

B Counsel for the Crown pointed out that s. 20 (1) (a) of the Act of 1922 was repealed by the Act of 1938 and was replaced by carefully thought out provisions in the light of the words used by LORD MACMILLAN, and that we have to consider the provisions of the Act of 1938. He referred to s. 38 (7)* to show that the provisions of the section apply to any settlement *wherever made* and to the words " any income arising under the settlement " in s. 38 (2) and to s. 41 (4) (a) to show what is covered by the words " income arising under the settlement ": and he added that income from investments in this country would be chargeable to tax against a person who was not residing in this country. I agree with the judgment of DANCKWERTS, J., that this point fails. His conclusion is stated in his judgment, in which he said:

D " I am unable to find, and counsel for the taxpayer was really unable to suggest, what limits I could put upon the provisions of s. 38 (2) which would be consistent with s. 41 and would operate in the way in which LORD MACMILLAN found himself able to deal with the matter in *Perry v. Astor* (3). I am unable, therefore, to limit the words in the way in which it was contended on behalf of the taxpayer and which satisfied the Special Commissioners, and I must come to the conclusion that the terms of this settlement and the position of the taxpayer fall within the provisions of s. 38 (2) of the Finance Act, 1938, and, accordingly, the appeal must be allowed."

E Before this court counsel for the taxpayer further submitted that Parliament could not have intended that the provisions of s. 38 (2) should extend to a case of this nature in view of the provisions of Part 1 of Sch. 3 to the Act (applied by s. 38 (5)). He argued that, if the settlor paid the tax, he or she would not be able to recover it. Now it is unlikely that any such question would arise, but none the less the point raised must be considered. Paragraph 1 of Part 1 of the Schedule contains the words:

F " He shall be entitled to recover from any trustee . . . the amount of the tax so paid."

G That means, entitled to obtain judgment for the amount: it is in no sense a guarantee that judgment so obtained will be satisfied. I know of no reason why the settlor should not be allowed, if necessary, to obtain leave to serve a writ outside the jurisdiction under R.S.C., Ord. 11, r. 1 (g), or, perhaps, r. 1 (c), and to obtain judgment against the trustees if he had paid. Such an action might be brought against the company claiming a declaration and an injunction if the trustees had not paid the amount due to the settlor, and the trustees could be joined as necessary parties. If a judgment so obtained could not be enforced, that is the misfortune of the settlor, who appointed trustees who were not resident here and gave them charge of funds invested in this country. The position would be precisely the same as if someone had been held entitled to contribution, or to an indemnity, but the party against whom the order was made could not meet his liability.

H This point fails. In my opinion the judgment of DANCKWERTS, J., was right and the appeal should be dismissed.

I **MORRIS, L.J.:** The taxpayer submits that there are two reasons why the income arising under the settlement should not be treated as her income by virtue of s. 38 of the Finance Act, 1938: first, that the terms of the settlement are not such that the provisions of s. 38 (2) of the Finance Act, 1938, apply to them; secondly, that the provisions of the Finance Act, 1938, do not apply for the

* See first footnote on p. 78, post.

reasons that the taxpayer and the trustees of the settlement are not resident in this country and that the settlement is governed by the law of Bermuda—which is the forum for the administration of the settlement. A

In dealing with the first of these submissions the question arises whether there is a power “to revoke or otherwise determine the settlement or any provision thereof”. The meaning of the word “provision” as used in its context has given occasion for much controversy. Before dealing with that matter, it is desirable to consider whether there is a power to “revoke or otherwise determine” the settlement. The words “revoke” and “determine” both denote putting an end to the settlement. I do not consider that it is necessary to express any concluded opinion as to the respective meanings of the two words. The word “revoke” might denote a cancellation of a settlement before it has been effectively operated; the word “determine” might denote the bringing to an end after a settlement has for a time been effective. The word “revoke” might relate to what a settlor himself could do and the word “determine” might denote that which someone else might do. B C

It is sufficient for present purposes that each word conveys the suggestion of bringing something to an end. It seems to me that one very effective way by which a settlement might be determined would be by withdrawing all the capital of the settlement. It becomes necessary, therefore, to investigate (following the wording of s. 38 (2)) whether any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to determine the settlement. The words “whether any person has or may have power” can cover both the case of someone having a present power and the case of someone who may in the future have a power. Thus it may be that, if someone has a present power to withdraw from time to time stated amounts from the capital, there may come a time when, because the amount of capital remaining is less than that which he may withdraw, he becomes in a position by his next operation of withdrawal effectively to put an end to or determine the settlement. D E

The provisions of cl. 5 (a), (b) and (c) of the settlement enable the trustees of the settlement to “declare” that a “part” of the trust fund shall be held in trust for the settlor absolutely. As to that part the trusts forthwith “determine”. Such “part” of the trust fund is a part not exceeding £60,000 in value every three years: the value is value “of the currency of the Islands of Bermuda”; to the extent that in a three-year period there has been a non-exercise of the power there may be a carry-forward. F G

It was submitted on behalf of the taxpayer that it could not be predicated that a time would ever come when by an exercise of the powers given by cl. 5 the trustees would be in a position to remove all remaining capital funds from the trust. This is true. There can be no certainty. There is the uncertain element of the length of life of the settlor. There is the uncertain element as to the value of the trust fund. It may increase or appreciate or it may not. The value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of cl. 5 of the settlement may be to exhaust the funds, there is even so no revocation or determination of the settlement. But it seems to me that, if the trustees by one or more declarations brought it about that the trusts concerning the greater part of the trust fund were “determined”, the time might come when the trustees, by declaration made by them, might be in a position to exercise their power so that it affects all the remaining part of the trust fund; if so, the trusts concerning that remaining part of the trust fund would “forthwith determine”. Such a time “may” come even though it may not seem likely that it will. If the trustees were in that position they would “have power . . . to . . . determine the settlement”. It seems to me that the trustees “may have” such power “in the future”. The wording of s. 38 (2) (a) H I

A is, therefore, satisfied. In the situation envisaged, the wording of s. 38 (2) (b) would also be satisfied, for, on the exercise of the power, the settlor would

“become beneficially entitled to the whole or any part of the property then comprised in the settlement.”

B I consider, therefore, that the trustees may have power in the future to “determine the settlement”. The word “settlement” is defined by s. 41 (4) (b) of the Finance Act, 1938 (for the purposes of Part 4), to include any disposition, trust, covenant, agreement or arrangement. This definition does not make it necessary to regard the word “settlement” as only denoting the document or instrument (if any) recording the terms of the disposition, trust, covenant, agreement or arrangement. I consider that a settlement may be “determined” even though
C some deed or written instrument remains physically in existence.

If the view which I have expressed is correct it will suffice for a decision on the first of the two main questions in the appeal. It is desirable, however, further to consider whether there is or may be a power to revoke or otherwise to determine any “provision” of the settlement. The phrase “provision of the settlement” is one that blossoms with ambiguity. The difficulty here is that some words in the
D vocabulary of speech and writing are perforce made to do service in varying contexts with varying meanings. When examining what is meant by a provision of a settlement it is necessary to consider the meaning both of the word “settlement” and of the word “provision”. The definition of the word “settlement” merely records what is to be included. The word “provision” may denote that which is provided: it may denote some clause or part of the words of some deed or
E instrument or agreement which is or which effects a settlement.

If the word “provision” is interpreted as meaning that which is provided, then, in my judgment, the effect of cl. 5 of the settlement is that the trustees may have power in the future to determine a provision of the settlement. Since on the exercise of the power the settlor would become beneficially entitled, then the wording of (a) and (b) in s. 38 (2) of the Finance Act, 1938, would be satisfied.

F If the word “provision” is interpreted as meaning a clause or part of the words which effect a settlement, then, if by successive exercise or deferred exercise of the power given by cl. 5 of the settlement the capital becomes completely withdrawn, the result would be to prevent the operation of cl. 3 of the settlement, which stipulates that

G “After the death of the [taxpayer] the trustees shall stand possessed of the capital (including any balance on income account as provided in cl. 2 (b) hereof) and future income of the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the [taxpayer].”

H It is to be observed that the clause states that the trustees “shall stand possessed of the capital . . . and future income”. If, therefore, before the death of the settlor, all capital was withdrawn from the trust, the trustees could not so stand possessed. The result would be that by the exercise of their power the trustees would prevent cl. 3 from ever coming into play. Can it be said that the trustees had power to “revoke” cl. 3? Can it be said that they had power to “determine” cl. 3? Their powers did not enable them to deal with cl. 3 in isolation. If
I the notion of determining implies putting an end to something which is operating, can there be determination before there is any operation? These questions are as elusive as are the meanings of the words which give rise to the questions. Endeavouring to read the words of s. 38 (2) (a) in reasonable manner, my view is that the exercise by the trustees of their powers under cl. 5 endows them with the power to determine cl. 3 if that clause is a “provision” of the settlement.

If the above conclusions are correct, then it is immaterial in this appeal whether the word “provision” in its context bears one or other of the meanings to which I have referred. That question is, however, of great importance. The words

"provision thereof" clearly refer to the "settlement": the words, therefore, mean "provision of the settlement". While any reference to a provision "of" a settlement could denote a provision in either of its two meanings, the word "of" seems to me to be slightly more appropriate if "provision" means a clause than it would be if "provision" refers to that which is provided. It is to be observed that in the opening words of the section the word "terms" is found. It can, therefore, be suggested that, if it was intended to refer to a clause in a settlement, the word "term" and not "provision" would have been selected.

Assistance can, I think, be derived by looking at the words used in s. 38 (1). It must, of course, be remembered that a word can be used in a section with two quite distinct meanings. The opening words in s. 38 (1) (a) correspond for nearly the first five lines with sub-s. (2) (a) and the opening words in sub-s. (2) (b). Where later in sub-s. (1) (a) there is a reference to payments which may be made "by virtue of" a "provision" of a settlement it seems to me that the word "provision" is being used in the sense of a clause or part. The words "by virtue of" point to that conclusion. I consider that in sub-s. (2) the word "provision" is used in similar sense. The word "provision" in the phrase "provision of the settlement" marches with the word "provision" in the phrase "provision of s. 38" in Sch. 3 and is, I think, in each instance used in the sense of a term. I have for these reasons come to the conclusion that the word "provision" is used in the sense of a clause or term or part as opposed to the sense of denoting that which is provided.

The second contention of the taxpayer is that the legislature did not intend the provisions of s. 38 (2) of the Finance Act, 1938, to apply to a foreign settlement and has not enacted that they do. In support of that contention attention is directed to the contents of Sch. 3 and it is submitted that, if they would not avail a settlor resident abroad as against trustees of a foreign settlement who are abroad, an indication is thereby given that s. 38 (2) does not apply where these circumstances exist. It was submitted that s. 38 (2) only applies to a settlement if the trustees of it are effectively under the control of the English courts and if it is to take effect in accordance with English law.

There are two considerations which, in my judgment, indicate that the contention should not be upheld. In the first place, the language of s. 38 (7)* shows that a settlement may be within the statutory definition irrespective of where the settlement is made. In the second place, the careful definition in s. 41† of the phrase "income arising under a settlement" shows that the legislature was clearly providing for cases where a settlor is not domiciled here and is not resident here and is not ordinarily resident here. The legislature was enacting within the limitation which LORD RUSSELL OF KILLOWEN in his speech in *Perry v. Astor* (3) ((1935), 19 Tax Cas. at p. 280) described as being inherent in all our income tax legislation that what is taxed is either (i) income which is here or (ii) income of a person resident here. The income which is affected if s. 38 (2) applies in this case is only the income which is here, and, in my judgment, the legislature contemplated and covered the cases of non-resident settlors. I cannot think that this settlement is excluded merely because it is provided in the settlement that it is to be governed by foreign law. On analysis it must be that this is the sole circumstance on which the taxpayer can rely in support of the present contention.

It may be that the rights given to a settlor by the Schedule will not always be effectively available as against foreign trustees. In the case of settlements made after the Act of 1938, a settlor could always insert suitable provisions in the settlement to ensure indemnity. Immediately prior to the date of the settlement

* This sub-section is not reproduced in the Income Tax Act, 1952, and it seems that the words "wherever made" which it contained have not been reproduced in the definition of "settlement" in s. 411 (2) of the Act.

† See, now, Income Tax Act, 1952, s. 411 (1).

A In this case (Sept. 24, 1947) the taxpayer (the settlor) was absolutely and beneficially entitled to certain stocks, shares and securities in the United Kingdom, the income from which was liable to United Kingdom income tax and surtax in her hands. But, quite apart from this, it seems to me that the Schedule merely gives a de jure right of recourse and the legislature does not purport to ensure that such right of recourse would in all cases prove effectively available.

B For these reasons I consider that the taxpayer's submissions fail and I would dismiss the appeal.

C **ROMER, L.J.:** It is the contention of the taxpayer that no such power of revocation or determination as is referred to in s. 38 (2) of the Finance Act, 1938, was or is vested in any person under the terms of the settlement which she executed on Sept. 24, 1947, and that, accordingly, she was free in the relevant year of assessment (1947-48) from the liability to surtax which arises in cases to which the sub-section applies. The Crown, on the other hand, submit, and it was so held by DANCKWERTS, J., that under the terms of the settlement the trustees thereof have, or might have, power in the future to revoke or otherwise determine the settlement or some provision thereof; and that inasmuch as the taxpayer would or might become beneficially entitled, if the power were fully exercised, to the whole of the property then comprised in the settlement, she was rightly assessed on the footing that s. 38 (2) applied.

D Although, in my view, the question in issue falls primarily to be answered by reference to the trusts declared by the settlement, there was much discussion during the argument before us as to the meaning of the word "provision" in the context in which it appears in the sub-section. Both leading counsel for the taxpayer contended that the word was used in the sense of some clause or other part of a written instrument. Counsel for the Crown, on the other hand, submitted that it meant, or at least included, some beneficial interest which was provided by a settlement. It seems to me that there is much to be said for each of these views. If "provision" was intended to be referable to some clause or term which appears in the settlement, then the word "determine", with which "revoke" is disjunctively associated, would not only be inapt but otiose; for "revoke" is just as applicable to the cancellation of a particular part of a written instrument as it is to the cancellation of an instrument as a whole—as was pointed out by WYNN-PARRY, J., in *Saunders v. Inland Revenue Comrs.* (2) ([1955] 3 All E.R. 274). As against this, it seems reasonably clear that, apart possibly from the first occasion where the word "provision" appears in s. 38 (1), it was intended in that sub-section to have the meaning of some written provision, which would in most cases be a covenant, contained in a settlement. Moreover, as MORRIS, L.J., observed during the hearing, the word as used in the first line of para. 1 of Part 1 of Sch. 3 to the Act ("where by virtue of any provision of s. 38 of this Act", etc.) would seem to be used in reference to the wording of that section. However, as LORD SIMONDS pointed out in *Berkeley v. Berkeley* (1) ([1946] 2 All E.R. 154 at p. 166) the word "provision" is

H "... a word of diverse meanings which slide easily into each other. It has come sometimes to mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it."

I It is, of course, an accepted rule of construction that, where the same word appears more than once in a section of a statute it should receive the same interpretation wherever it occurs; and ambiguity in one place will be resolved by any clarity of meaning which is apparent from another. Nevertheless, where a word has shades of meaning which merge into each other it is, I think, permissible to vary the shade according to each individual context without transgressing the rule to which I have referred. I am relieved, however, from the necessity of expressing any final conclusion on this question because this case, in my opinion,

falls within s. 38 (2) whether the word "provision" in the sub-section means "clause" or "result". A

The relevant terms of the settlement of 1947 have been fully stated by my Lord and I will not repeat them. The taxpayer contends that declarations made by the trustees under cl. 5 of the settlement and the consequent withdrawals of capital sums for the benefit of the taxpayer constitute no more than a due performance by the trustees of one of the trusts of the settlement and cannot be regarded in any sense as a revocation or determination of the settlement or of any provision thereof. The position was likened in argument to a power vested in trustees to make advancements of income to beneficiaries out of capital; or to resort to capital in order to maintain a life tenant's income at a prescribed minimum level. It was suggested that in neither of these illustrations could the trustees be regarded as having power to determine the settlement or any provision of the settlement, either for the purpose of s. 38 or for any other purpose, notwithstanding that the exercise of their powers might eventually diminish the trust capital to vanishing point, to the loss and prejudice of the remaindermen. B

I am not clear that, if in these illustrations the person to whom the advancements were authorised to be made, or whose income was to be maintained, were the settlor or the wife or husband of the settlor, and if during the lifetime of such person the whole trust capital might be exhausted by the exercise of the power, the case would not fall within s. 38 (2). But, however that may be, what we are concerned with is the powers which are vested in the trustees of the settlement of 1947 and the possible result of those powers being exercised in full. I do not think that each authorised withdrawal of £60,000 during a three-year period could in itself be regarded as a revocation or determination for the purpose of s. 38. Each such withdrawal would pro tanto reduce the corpus and future income of the trust fund, but the settlement would continue to subsist and no "provision" of the settlement could be said to have become determined, in whatever sense that word should be interpreted. It is, however, expressly provided by cl. 5 of the settlement that any sum authorised to be withdrawn should, from the time of the relevant declaration by the trustees, C

"thenceforward be held in trust for the [taxpayer] absolutely and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the [taxpayer] absolutely." D

Now, the taxpayer was only in her early fifties when the settlement was executed and it was not impossible, nor is it impossible now, that, if the trustees exercised to the full their powers under cl. 5 of the settlement, the whole of the trust fund might, during her lifetime, become subject exclusively to the trusts for the taxpayer to which I have just referred. Such a contingency cannot be said to be likely having regard to the size and value of the settled fund, but it is not outside the range of possibility. If it had not been for the proviso to cl. 5 (a), the trustees could have made a declaration as to the whole fund at any time and held it on trust for the taxpayer. Had such an unqualified power been vested in the trustees it could scarcely be doubted, in my judgment, that it would have been within s. 38 (2). The taxpayer challenges this, and says that the settlement and every provision thereof would remain unrevoked and undetermined, even though such a power had been conferred and exercised. If this be the true view, it would be no difficult matter to escape the provisions of the sub-section altogether. In my opinion, however, it is not the true view. An unqualified power such as I have mentioned would have enabled the trustees wholly to determine the trusts of cl. 3 of the settlement (which are the trusts in favour of the taxpayer's issue), for if there is no property there can be no trust. Accordingly, the trustees would have had power to determine, viz., to bring to a termination, a "provision" if the meaning of "clause" be attributed to that word; E

- A namely, the provision of the settlement in favour of the issue. Alternatively, the trustees would have had power to determine the "provision" made by the settlement in favour of the issue if that word in s. 38 (2) was intended to mean "the result ensuing from that which is provided by a written instrument or part of it". By reason of the proviso to cl. 5 (a), the trustees cannot at any time while the taxpayer is alive make a declaration as to the whole trust fund.
- B successive declarations which they are empowered to make may, however, eventually divert the whole fund to the taxpayer and the relevant statutory language is "has or may have power, whether immediately or in the future"; accordingly the position is the same, in my opinion, for relevant purposes, as though the proviso had been omitted. Accordingly, whether or not the power which the trustees have is a power to determine the settlement as a whole,
- C which I think it probably is, it is, in my judgment, at least a power to determine cl. 3 of the settlement and the benefits provided for the issue by that clause and is accordingly within s. 38 (2) of the Act of 1938.

The taxpayer then submits that the settlement is not within s. 38 (2) because Parliament has no jurisdiction to lay a charge of tax on a non-resident person in respect of income to which that person is not entitled. It is not disputed that

D Parliament could do so, but it is suggested that clearer language than that found in the Act of 1938 would be required before the court would be justified in attributing so improbable an intention to the legislature; and that there are, in fact, indications in the Act itself which tend strongly to negative any such intention. In support of his general proposition, counsel for the taxpayer placed much reliance on an observation made by LORD MACMILLAN in his speech in

E *Perry v. Astor* (3) ((1935), 19 Tax Cas. 255 at p. 286). The learned Lord in the course of his opinion cited the hypothetical case of irrevocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country, and, after considering some of the results of such a case, LORD MACMILLAN said (*ibid.*):

- F "Incidentally one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to (British) income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."

Counsel for the taxpayer sought to apply that observation to the present case but certain considerations exist which deprive this point of a good deal of its

G force. *Perry v. Astor* (3) was decided on s. 20 of the Finance Act, 1922. This section was replaced by s. 38 of the Act of 1938 and it may be supposed that the latter section received a good deal of consideration in its drafting and that the draftsman of this and the other relevant provisions had well in mind the decision in *Perry v. Astor* (3) and the speeches of the noble and learned Lords in that case. In particular, the point to which LORD MACMILLAN referred was dealt with by

H the concluding part of s. 41 (4) (a) of the Act; the effect of which, as applied to the present case, is that, had the investments comprised in the taxpayer's settlement been American investments instead of stocks and shares in the United Kingdom, the income of such investments would not have been "income arising under" the settlement for the purposes of s. 38 (2). It is further to be observed that the improbability of an intention to tax in LORD MACMILLAN's illustration would

I obviously be greater where the relevant funds are abroad than where they are situate in this country and earning income here. Nevertheless, counsel for the taxpayer contends that, in view of a general principle which emerges from what LORD MACMILLAN said, the court should lean against a construction of s. 38 (2) which would result in taxing the taxpayer in the circumstances of this particular case. As ancillary to the broad proposition to which I have referred, the case was put on behalf of the taxpayer in two somewhat different ways. First, it was said that, quite apart from putting any gloss on any particular word in s. 38 (2), when one takes the section along with Sch. 3 to the Act, it becomes manifest that

Parliament, duly observing the limitation of jurisdiction to which LORD MACMILLAN referred, could not have intended that the section should operate in the case where a settlor was not resident in this country and where recovery of tax in the way for which provision is made by the Schedule, viz., in the courts of this country, could not be effected. The whole machinery, it is contended, for the recovery of tax by the person charged from the trustees of the settlement, or other person to whom income arises under the settlement, breaks down in the case of a foreign settlement; and when one finds that no equivalent or other machinery which is suited to the case of such a settlement is provided by the Act, the inference must be that the legislature was not intending to deal with foreign settlements such as that now in question at all.

At first sight there seems force in this, but, even if it were founded on a right assumption, I do not think, on further examination, that it should succeed. If a taxing statute clearly imposes a liability on A and at the same time gives him a remedy over against B, I think the liability would still subsist even though it should transpire that in A's particular case he could not enforce his remedy against B. By Part 1 of Sch. 3 to the Act of 1938 the taxpayer is given the right of recovery therein mentioned, and nothing can deprive her of it; but Parliament does not guarantee that that right will be effective. What is given is, as I think junior counsel for the Crown suggested, a *de jure* right and not a *de facto* right. The effectiveness or otherwise of the right cannot govern liability to assessment; for, if it did, all kinds of matters would have to be inquired into, including the point of time at which the enforceability of the right falls to be considered; and in this connection it will be noted that the right to recover does not arise until after the settlor has paid the tax and this will not be until after the assessment has been made. Apart altogether, however, from these considerations, I am by no means satisfied that the taxpayer could not enforce her statutory right of recovery in the courts of this country. The only difficulty in her way would be that the relevant defendant would probably be outside the jurisdiction, but our procedural law gives adequate facilities for service on parties who are resident abroad.

I accordingly do not think that the taxpayer has succeeded in showing that a narrow interpretation should be given to s. 38 (2) because of considerations founded on Sch. 3 to the Act.

The second way in which counsel for the taxpayer put his case was to submit that the word "settlement" in s. 38 (2) should be confined in its meaning to a settlement which takes effect, and is enforceable, under the law of the United Kingdom. It is quite clear that in some cases where language of apparent generality is found in a statute, some limitation has perforce to be placed on it; and *Colquhoun v. Heddon* (5) ((1890), 25 Q.B.D. 129) and *Camille & Henry Dreyfus Foundation, Inc. v. Inland Revenue Comrs.* (6) ([1954] 2 All E.R. 466) to which counsel for the taxpayer referred us, are instances of this being done. I am unable, however, to see any sufficient reason to adopt the narrow construction of the word "settlement" in s. 38 (2) for which the taxpayer contends. It seems clear from s. 41 that the legislature was contemplating the possibility of settlers being domiciled abroad; and, when it is remembered that it is an inherent feature of our income tax code that foreign income which is sent here is taxable, there would appear to be no ground for assuming that, when the word "settlement" is used in a Taxing Act, it means only a settlement which is within the jurisdiction of our courts. Finally, the extremely wide scope of the definition of the expression "settlement" in s. 41 of the Act of 1938 disposes, as it seems to me, of the taxpayer's contention on this point.

As, therefore, the assessment of which the taxpayer complains was justified by the relevant language of the Finance Act, 1938, and as I can see no warrant

A for attributing an artificial construction to that language, I agree with DANCKWERTS, J., in thinking that the assessment was rightly made and I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Theodore Goddard & Co.* (for the taxpayer).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

SAUNDERS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), June 8, 11, July 2, 1956.]

C *Surtax—Settlement*—"Power to revoke or otherwise determine the settlement or any provision thereof"—Power to apply part of capital for benefit of class including settlor's wife—*Finance Act, 1938* (1 & 2 Geo. 6 c. 46), s. 38 (1) (a), (2) (a).

Under a clause of a settlement trustees were empowered to apply part of the capital of the trust funds during the settlor's lifetime for the benefit of a class of persons who, though they did not include the settlor, included his wife. The settlor was assessed to surtax for 1951-52 under s. 38 (2) of the Finance Act, 1938*, on the income from the settled property subject to the power. On appeal,

Held: the settlor was not chargeable to surtax in respect of the income of those trust funds which were subject to the power, since it was not a power to revoke or otherwise determine a "provision" of the settlement within the meaning of s. 38 (2) (a) of the Act.

Per SINGLETON and MORRIS, L.JJ.: the word "provision" in the phrase "power to revoke or otherwise determine the settlement or any provision thereof" in s. 38 of the Finance Act, 1938, refers to a written clause of the settlement (see p. 88, letter I, p. 90, letter G, post).

F *Berkeley v. Berkeley* ([1946] 2 All E.R. 154) and dictum of LORD NORMAND in *Inland Revenue Comrs. v. Wolfson* ([1949] 1 All E.R. at p. 869) considered.

Decision of WYNN-PARRY, J. ([1955] 3 All E.R. 274) reversed.

[**Editorial Note.** In *Berkeley v. Berkeley* ([1946] 2 All E.R. 154) the word "provision" was held to refer in the context being construed in that case, to the "benefit provided" as distinct from the written clause of the documents under which the benefit was provided. In view of the different conclusion reached by a majority of the court in the present case, it is material to note that the words of s. 38 (1) (a) and s. 38 (2) (a) of the Finance Act, 1938, are "to . . . determine the settlement or any provision thereof," not, e.g., "made thereunder." The enactment construed in *Berkeley v. Berkeley* included the words "provision which . . . (b) was made." Distinction may be drawn between making provision (i.e., conferring a benefit) and the provision (i.e., clause of the written document) under which the benefit is conferred. See, generally, pp. 87, 88, 90, post, for the considerations influencing the court in the present case, and compare *Inland Revenue Comrs. v. Kenmare (Countess)* (p. 69, ante).

H For s. 38 (2) of the Finance Act, 1938, see 12 HALSBURY'S STATUTES (2nd Edn.) 411; and for the corresponding s. 404 (2) of the Income Tax Act, 1952, see 31 I HALSBURY'S STATUTES (2nd Edn.) 381.]

Cases referred to:

- (1) *Berkeley v. Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.
- (2) *Re Waring, Westminster Bank, Ltd. v. Awdry*, [1942] 2 All E.R. 250; [1942] Ch. 426; 111 L.J.Ch. 284; 167 L.T. 145; 2nd Digest Supp.

* The relevant terms of s. 38 (2) of the Finance Act, 1938, are set out at p. 87, letters D and E, post.

- (3) *Inland Revenue Comrs. v. Wolfson*, [1949] 1 All E.R. 865; sub nom. *Wolfson v. Inland Revenue Comrs.*, 31 Tax Cas. 141; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Kenmare (Countess)*, p. 69, ante.

Appeal.

The taxpayer appealed to the Special Commissioners of Income Tax against an additional assessment to surtax in the sum of £4,167, made on him for 1951-52. Under cl. 4 of a settlement made by the taxpayer, the trustees were empowered with the taxpayer's consent during his life and thereafter at their absolute discretion, to apply part of the capital of the trust funds for the benefit of all or any of a specified class to the exclusion of the others "freed and released from the trust concerning the same", with a proviso that, during the life of the taxpayer, the capital of the trust funds remaining subject to the trust after such exercise with the taxpayer's consent must be of a value of not less than £100. The specified class of persons, set out in the schedule to the deed, did not include the taxpayer but included the taxpayer's wife. On July 25, 1951, the taxpayer transferred £100 to the trustees and on Aug. 13, 1951, he transferred £25,000 to them. The trustees invested £25,000 of these sums, and in the year ending on Apr. 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. An additional assessment to surtax for 1951-52 was made on the taxpayer in respect of this income.

The taxpayer contended that the £100 and £25,000 constituted one settlement, that the property comprising the trust funds was not itself a provision of the settlement within the meaning of s. 38 (2) of the Finance Act, 1938, and that in any event there was no power in cl. 4 or elsewhere in the deed to determine a provision of the settlement within the meaning of that enactment. The subsection therefore did not apply to the settlement. The Crown contended that the transfers of each of the two sums constituted a settlement, that the terms of the settlement of the £25,000 were such that the income arising thereunder was to be treated as income of the taxpayer under s. 38 (2) or alternatively that the terms of the one settlement (if the transfers were comprised in one settlement) were such as to bring it within the sub-section. The commissioners held that the sums of £100 and £25,000 were comprised in one settlement and that the trustees' power to pay or apply part of the capital of the trust funds for the benefit of one or more of the specified class, with a limitation that the capital must not be reduced below £100, was a power to determine a provision of the settlement within the meaning given to the word by LORD SIMONDS in *Berkeley v. Berkeley* (1) ([1946] 2 All E.R. 154), and that the taxpayer's wife might on the exercise of the trustees' discretion become entitled to part of the property comprised in the settlement. They held that the appeal failed but reduced the amount of income comprised in the assessment to £4,153.

On July 27, 1955, WYNN-PARRY, J., dismissed an appeal against this decision ([1955] 3 All E.R. 274). The taxpayer appealed to the Court of Appeal.

L. C. Graham-Dixon, Q.C., and *A. P. L. Barber* for the taxpayer.

Geoffrey Cross, Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

July 2. The following judgments were read.

SINGLETON, L.J.: This is another case arising under s. 38 of the Finance Act, 1938, the section which deals with settlements under which any person

"has or may have power, whether immediately or in the future . . . to revoke or otherwise determine the settlement or any provision thereof . . ."

It is said on behalf of the commissioners that the settlement made by the taxpayer on July 25, 1951, is such a settlement and that, in the event of the exercise of the power given to the trustees of the settlement, the wife of the settlor may become entitled to the whole or part of the property then comprised in the

A settlement or of the income arising from the whole or part of it, and that thus the income falls to be treated as the income of the settlor for the year of assessment, 1951-52. The decision of the Special Commissioners that the taxpayer's appeal failed was upheld by WYNN-PARRY, J., on July 27, 1955. The taxpayer appeals to this court.

B The settlement is made between the settlor of the one part and his son, wife, and solicitor of the other part and recites:

"Whereas the settlor is desirous of making such irrevocable provision as is hereinafter contained for the benefit of the specified class (the meaning of which expression is set out in the schedule hereto) and for the purpose of effectuating such desire has transferred to the trustees the sum of £100."

C The first five clauses of the settlement are as follows:

"1. The trustees shall invest the said sum of £100 and any further sum or sums which the settlor may hereafter transfer or cause to be transferred to the trustees in or upon any investments hereinafter authorised and may at any time or times and from time to time (but subject to the consent in writing of the settlor during his life and afterwards at their absolute discretion) transpose any such investments or any further investments or property which the settlor may hereafter cause to be transferred to the trustees or which may for the time being be subject to the trusts hereof into any others of the nature herein authorised.

E "2. The trustees shall hold the said sum of £100 and any further sum or sums or further investments or property as aforesaid and the investments for the time being representing the same and any augmentations thereof and additions and accretions thereto (hereinafter called 'the trust funds') upon the trusts and subject to the powers and provisions hereinafter declared and contained.

F "3. During the period commencing at the date of this deed and ending at the expiration of twenty years after the death of the last survivor of the persons who are now members of the specified class and of the lineal descendants of His Late Majesty King George V living at the date hereof (hereinafter called 'the appointed period'), the trustees shall pay divide or apply the income of the trust funds (less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance support or benefit of any one or more to the exclusion of the other or others of the specified class as the trustees shall in their absolute discretion determine.

H "4. It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the settlor during his life thereafter at their absolute discretion to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided always that during the life of the settlor any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100.

I "5. At the expiration of the appointed period the trustees shall hold the trust funds or so much thereof as shall remain subject to the trusts hereof for such person or persons as would under Part 4 of the Administration of Estates Act, 1925, have become entitled to the trust funds at the death of the settlor if he had died absolutely entitled to the trust funds intestate a widower and domiciled in England and his death had occurred immediately before the death of the last survivor of the specified class now living such persons if more than one to take the same respective shares and interests

in the trust funds as they would have taken under the said Part 4 of the said Act in the events aforesaid.” A

The only other part of the settlement to which I need refer is the schedule, in which there is a definition of the expression “the specified class”, which embraces (a) the wife of the settlor, (b) the issue of the settlor, (c) the spouses, widows and widowers of any issue of the settlor, and many others.

The sum of £100 was transferred by the taxpayer to the trustees on the date of the settlement. A further sum of £25,000 was transferred to them by the taxpayer on Aug. 13, 1951. £25,000 was invested by the trustees in ordinary shares in H. A. Saunders, Ltd.: £100 remained uninvested. In the year ending Apr. 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. B

The decision of the Special Commissioners is stated in para. 7 (2), (3) and (4) of the Case as follows: C

“7. We the commissioners who heard the appeal gave our decision in writing as follows:— . . . 2. It being accepted by the Crown that the deed of settlement contains no power to revoke or otherwise determine the whole of the settlement made thereunder, the issue before us resolves itself into the question whether the terms of that settlement are such that the trustees have power to revoke or otherwise determine ‘any provision thereof’.

“LORD SIMONDS pointed out in the case of *Berkeley v. Berkeley* (1) ([1946] 2 All E.R. 154 at p. 166), that the word ‘provision’ ‘is a word of diverse meanings which slide easily into each other. It has come sometimes to mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it’. We have come to the conclusion that there is nothing in the terms of the statutory provisions of which the phrase in question forms part to constrain us to adopt a limited meaning of the word ‘provision’. The word being wide enough to embrace the result ensuing from a written instrument, we do not feel justified in excluding that meaning.

“3. By virtue of cl. 4 of the deed of settlement the trustees have power, subject to certain conditions, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the specified class as defined in the schedule to the deed, with the limitation that the capital of the trust funds shall not be reduced below £100. This power of the trustees to remove from the settlement the whole of the property save £100 seems to us quite clearly to be a power to determine a provision of the settlement in the sense of the second of the two meanings given by LORD SIMONDS. The settlor’s wife is a member of the specified class referred to and in the event of the exercise of the discretionary power of the trustees she may become entitled to part of the property comprised in the settlement.

“4. For these reasons we hold that the appeal fails.”

That is supported by the judgment of WYNN-PARRY, J. ([1955] 3 All E.R. 274). WYNN-PARRY, J., upholding the decision of the Special Commissioners said (*ibid.*, at p. 276):

“. . . it appears to me that the problem is to be solved by considering the phrase ‘to revoke or otherwise determine the settlement or any provision thereof’. If the word ‘provision’ meant only a clause or proviso, a defined part of a written instrument, it would have been unnecessary to have included in the sub-section the words ‘or otherwise determine’, for the verb ‘revoke’ would have sufficed, that being from the conveyancer’s point of view the natural word to use, whether the revocation was to cover the whole of the settlement or only specific parts of it. The word ‘determine’ appears to me to be an inapt word to use where the object is to provide a power to bring to an end the operation of a defined part of a written instru-

A ment. On the other hand, if I can, I must give effect to the words 'or otherwise determine', because they are clearly put in deliberately for the purpose of achieving something more than the word 'revoke' alone. The word 'determine' seems to me to be an apt word to use where the power contemplated is to bring to an end some benefits provided by the settlement. As counsel for the Crown pointed out, that construction is reinforced by the proviso to s. 38 (2), which it is difficult to see as having any operation at all without it.

B "Looking merely at the sub-section, therefore, and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the Special Commissioners was correct. I can see nothing in the language of s. 38 (1), nor in the authorities cited on problems arising under that sub-section which would prevent the construction which I have placed on sub-s. (2) being placed on the language of sub-s. (1)."

C Section 38 (2) of the Finance Act, 1938, contains somewhat drastic provisions as to income arising under certain settlements. If the settlement is one to which sub-ss. (2) (a) and (2) (b) apply, the

D "... income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income . . . shall be treated as the income of the settlor for that year and not as the income of any other person."

E The question for determination arises under sub-s. (2) (a) and, in particular, under the words "or any provision thereof". Sub-section (2) reads:

"If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof . . ."

F It was urged on behalf of the taxpayer that in this context the word "provision" can only mean a written clause in the document. On the other side it was submitted by counsel for the Crown that "provision" in s. 38 (2) means the result ensuing from that which is provided by a written instrument or part of it: that one cannot determine a document while one can determine a provision made for someone, and it was claimed that the word "provision" as used in the section had different meanings—indeed, that it had different meanings in the two places in which it is used in sub-s. (1) (a). It was not suggested that there was any power to revoke the settlement or any provision thereof.

G In *Berkeley v. Berkeley* (1) there are passages on the meaning of the words "any provision, however worded" in s. 25 (1) of the Finance Act, 1941. Viscount SIMON said ([1946] 2 All E.R. at p. 157):

H "The crucial question is what is the meaning of the phrase 'any provision, however worded'. It may mean, as the Court of Appeal thought, the words which define a benefit and which are contained in the document or oral contract referred to in s. 25 (1). Or it may mean the benefit conferred by such a document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral contract and is necessarily of the same date, being in effect equivalent to a clause. If it means the second, its date will be the date when the benefit is conferred. Either meaning is possible in construing para. (a) and para. (c) of s. 25 (1), but I am forced to the conclusion that only the second meaning is possible when construing para. (b); and if this is so in construing para. (b), the same meaning must be given to the words when applying para. (a) and para. (c). Thus, 'any provision, however worded' must be understood in all cases to refer to a benefit conferred and not to the words conferring it."

I draw attention to the necessity of reading the words in the same sense throughout the section. A

LORD PORTER, in a dissenting speech, said (*ibid.*, at p. 163):

"It is true that the word 'provision' has more than one meaning. It may be used to indicate the thing provided or the words by which provision is made, and it was urged that in this section it bore the first meaning. It was, it was said, 'made' when it came into operation; until then it was but inchoate. No doubt it was 'contained' in the second codicil, but it was not 'made' until the testator's death. The argument is attractive, but takes, I think, too technical a view. 'Provision' in the section appears to be used in the second sense mentioned above. The expressions 'however worded', 'stated amount', 'contained in' all seem to point to the language rather than what the language brings about. The Court of Appeal so thought in *Re Waring, Westminster Bank, Ltd. v. Awdry* (2) ([1942] 2 All E.R. 250), and I agree with their view." B C

LORD SIMONDS said ([1946] 2 All E.R. at p. 166):

"That the section is not very artistically drawn I would be prepared to agree. In particular, little skill is shown in the use of the word 'provision'. That is a word of diverse meanings which slide easily into each other. It has come sometimes to mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it. Section 25 (1) opens with the words 'Subject to the provisions of this section', and in this phrase either or both of the meanings I have given may be intended. Then comes the phrase 'provision however worded', where the first meaning would seem more apt, though the second is well enough. Thirdly, the word is used in the context of (a) 'contained', (b) 'made', and (c) 'varied', and here, though either meaning is appropriate to (a) or (c), it is the second meaning only which is appropriate to (b). I have said enough to show that it is not safe to build upon the fine shades of meaning of the word 'provision', but the balance is, I think, in favour of giving to the expression, 'being a provision which was made before', the second meaning that I have indicated. For one does not speak of 'making' a provision, if by provision one means a clause or section." D E F

Counsel for the taxpayer drew our attention to two short passages from the report in the House of Lords in *Inland Revenue Comrs. v. Wolfson* (3) ([1949] 1 All E.R. 865). The first citation he made is from the speech of LORD NORMAND where the learned law Lord said (*ibid.*, at p. 869): G

"... but a power to 'revoke or otherwise determine the settlement or any provision thereof' points rather to a power to be found within the settlement than to a power to be found in external circumstances . . ." H

The passage in the speech of LORD MORTON OF HENRYTON which was cited to us is to be found at p. 870.

Now, I feel satisfied that the words "of any provision of the settlement" at the end of s. 38 (1) (a) and in s. 38 (1) (b) mean a clause in the document, as I have said in my judgment in *Inland Revenue Comrs. v. Countess of Kenmare* (4), p. 69, ante. The word "provision" ought to be given the same meaning throughout the section. For this reason I do not accept the submission of counsel for the Crown. I

A person who is given power to revoke a settlement or any provision thereof may do so by a document in writing. If he is also given power to determine the settlement, or any provision thereof, one way in which he can do that (assuming the power) is by taking away the whole of the settled fund, or the whole of the settled fund available for the purposes of the particular provision. That would be a determination. The power of trustees to pay out, or to withdraw, a part—

A I emphasise "a part"—of the capital fund is not a determination of the settlement or of any provision thereof: it is something envisaged by the terms of the settlement. The balance remains subject to the trusts of the settlement.

In the case under appeal the trustees are given power by cl. 4 to make payments of capital (subject to the consent of the settlor during his life) to persons within the specified class so long as the capital of the settled fund does not fall below £100 during the settlor's lifetime. The result is that, with the necessary consent, they may make payments out of £25,000, retaining only £100. It looks somewhat strange. Still, I cannot see that in principle there is any difference between such a case and one the other way round in which there is power to pay out only £100, so as not to reduce the capital below £25,000. It is obviously an effort to get round s. 38 (2) of the Act.

C In the circumstances of this case there was not, in my opinion, power to revoke or to determine the settlement or any provision thereof. I would allow the appeal.

MORRIS, L.J.: The question raised in this appeal is whether s. 38 of the Finance Act, 1938, applies to a settlement made by the taxpayer on July 25, 1951. The taxpayer transferred the sum of £100 to the trustees on the day that the settlement was made. The taxpayer had the power but not the obligation to transfer further sums to the trustees. The taxpayer did, in fact, transfer a further sum of £25,000 to the trustees on Aug. 13, 1951. The power of the trustees to release capital pursuant to cl. 4 is subject to the limitation that, during the life of the taxpayer, the remaining capital of the trust funds, after any exercise of the power, must be of a value of not less than £100.

D It does not seem to me that it can be said in this case that there is any power either to revoke or to determine the settlement during the lifetime of the settlor. The question which arises is whether there is in that period a power to determine any "provision" of the settlement. This raises the issue as to what the word "provision" means. In my judgment in *Inland Revenue Comrs. v. Countess of Kenmare* (4) (p. 69, ante), I expressed my opinion that there was in that case a power to determine the settlement. I further expressed my views as to the meaning in the context of s. 38 (2) of the word "provision". I do not repeat what I there expressed. Counsel for the taxpayer referred to the speeches in the House of Lords in *Inland Revenue Comrs. v. Wolfson* (3) ([1949] 1 All E.R. 865). Though no occasion there arose for submissions in regard to, and considered opinion in regard to, the meaning of the word "provision", it is of importance to note the way in which the word was read by LORD NORMAND (see p. 869) and by LORD MORTON OF HENRYTON (see p. 870).

G In the present case it is to be noted that the "trust funds" comprise the sum of £100 and any further sum or sums which the taxpayer might later transfer and the investments for the time being representing the same or any augmentations and additions and accretions. But it was not the income from the whole of the trust funds that would go, under cl. 3, to one or more of the members of the specified class. It was the income from the trust funds

"less any portion thereof the capital whereof shall have been appointed under the provisions"

H of cl. 4. Similarly, what the trustees were, at the expiration of the appointed period, to hold for certain persons pursuant to cl. 5 were the trust funds "or so much thereof as shall remain subject to the trusts". But cl. 4 limited the power of applying capital during the life of the settlor so that trust funds should remain which should be "of a value of not less than £100". If no further sums had been or were to be transferred, but if the original £100 had been invested and if the investments had appreciated, there could still be application of capital under cl. 4 always provided that during the life of the taxpayer trust funds remained which immediately after the exercise of the power were of a value of not less than £100. Therefore, the problem which arises does not arise merely because of the power of the taxpayer to transfer further sums to the trustees.

After the death of the taxpayer but during the appointed period, there would not seem to be any limitation imposed on the trustees in exercising their power to apply any part or parts of the capital to or for the benefit of one or more members of the specified class: if all was applied, then all the capital would be freed and released from the trusts. The operation of cl. 3 would then come to an end. Clause 5 would never come into operation. It seems to me, therefore, that the trustees will have power in the future to determine the settlement. They will also, I consider, have power in the future to determine a "provision" of the settlement, whether the word "provision" is used to denote that which is provided or to denote a clause or part of the settlement, deed or agreement. The terms of s. 38 (2) (a) are, therefore, in my judgment, satisfied. These unlimited powers cannot be exercised, however, during the lifetime of the taxpayer and so neither he nor his wife can in the event of the exercise of these unlimited powers become beneficially entitled. The terms of s. 38 (2) (b) are, therefore, not satisfied. If, therefore, the period after the death of the taxpayer is considered, the provisions of s. 38 (2) do not apply.

It is next necessary to consider the position in the period of the lifetime of the taxpayer. If during that time the trustees apply capital pursuant to their powers under cl. 4, they must leave capital of a value of not less than £100. They could exercise their power so that the taxpayer's wife became to some extent beneficially entitled. Section 38 (2) (b) would, on this footing, be satisfied. The real question which, therefore, arises in this appeal is whether the power which the trustees may exercise during the taxpayer's lifetime comes within the words of s. 38 (2) (a). The power would certainly not be one either to revoke or to determine the settlement. But would the exercise of the power determine a "provision" of the settlement? It seems to me that cl. 5 of the settlement would not be affected. So also the operation of cl. 3 of the settlement would not be affected if capital were withdrawn. The clause would merely operate in regard to less capital. If the word "provision" denotes a clause, then cl. 3 would not be determined. The Crown submit that the word "provision" refers to what is provided by or affected by the settlement: they submit that each £1 of the trust fund should be regarded as subject separately to the trusts, so that the withdrawal of any capital is a determination pro tanto of the "provision" of the settlement. But cl. 3 of the settlement only operates on the trust funds less any portion thereof the capital whereof shall have been appointed under the provisions of cl. 4: hence the "provision", even on the Crown's interpretation, must be the income of whatever trust funds there are. The submission of the Crown further fails if the word "provision" denotes, as in my judgment it does, a clause or part of the settlement deed or agreement.

For these reasons I consider that the case is not brought within the provisions of s. 38 (2), and I would allow the appeal.

ROMER, L.J.: On this appeal, as in *Inland Revenue Comrs. v. Countess of Kenmare* (4) (p. 69, ante), a question arises as to the applicability of s. 38 (2) of the Finance Act, 1938, to the income of a settlement. The settlement now in question was made on July 25, 1951, by the taxpayer and it originally comprised only £100. A further £25,000, however, was brought into the settlement by the taxpayer on Aug. 13, 1951, to be held on the trust thereof. Clause 3 of the settlement provided that during the period therein specified (which will in all probability last for a pretty considerable time):

"the trustees shall pay divide or apply the income of the trust funds (less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance support or benefit of any one or more to the exclusion of the other or others of the specified class as the trustees shall in their absolute discretion determine."

- A The "specified class" consists of a number of persons who were named in the schedule to the settlement, one of whom is the taxpayer's wife.

By cl. 5 of the settlement it is provided that:

"At the expiration of the appointed period the trustees shall hold the trust funds or so much thereof as shall remain subject to the trusts hereof . . ."

- B for the taxpayer's statutory next-of-kin as therein mentioned. Between cl. 3 and cl. 5 is inserted the clause on which the Crown rely. It empowers the trustees at any time or times during the appointed period but subject to the taxpayer's written consent during his lifetime to pay or apply any part or parts of the capital of the trust funds to or for the benefit of any one or more of the specified class freed and released from the trusts concerning the same; but subject to the limitation that, during the taxpayer's life, the capital of the trust funds remaining subject to the trusts of the settlement immediately after the exercise of the power should be of a value of not less than £100.

It is not contended for the Crown that under this clause (cl. 4) the trustees have any power of revocation, but it is said that they have power to determine the settlement or a provision thereof during his lifetime in such a way that the whole

- D trust funds (except £100) may become payable to the taxpayer's wife; and that, accordingly, s. 38 (2) applies, with the result that, for the purposes of surtax, the whole income from the trust funds falls to be treated as the taxpayer's income, except such as is properly attributable to £100. This contention succeeded both before the Special Commissioners and before WYNN-PARRY, J., on appeal from them.

- E For my part I am unable to accept the contention of the Crown. The settlement has obviously been very carefully and skilfully drawn and, in my judgment, the draftsman has succeeded in saving the taxpayer in this case from liability to tax under s. 38 (2). As no question of revocation arises, no part of the income of the trust fund can be treated under the sub-section as the taxpayer's income unless the trustees have power to determine the settlement or any provision thereof. Now, so long as any part of the fund remains in the hands of the trustees and subject to the operation of the trusts declared by cl. 3 and cl. 5 respectively, it cannot be said, in my opinion, that the settlement has been determined; and as at least £100 will always remain, during the taxpayer's lifetime, subject to the operation of those trusts, it follows that the trustees have no power to "determine" the settlement.

- G The question, therefore, narrows itself down to whether the trustees have power to determine any "provision" of the settlement. As in *Inland Revenue Comrs. v. Countess of Kenmare* (4), so in this, I find it unnecessary to come to any final view whether the word "provision" in s. 38 (2) means "clause" or "result"; for in my judgment the trustees have no power under cl. 4 of the settlement to determine in the lifetime of the taxpayer any part of the written instrument or

- H any benefit which the settlement confers. Even if the trustees were to exercise the power which they are given to its uttermost, neither cl. 3 nor cl. 5 of the settlement would be determined. For the former clause would continue during the taxpayer's lifetime to govern the income of the £100 which would still remain subject to the trusts of the settlement, whilst at the settlor's death the corpus of that sum would still be within the operation of the trusts declared by cl. 5.

- I Can it then be said that any result or benefit deriving from cl. 3 or cl. 5 would be determined if the trustees exercised their power to its fullest extent? It is true that, each time capital was withdrawn under the power, there would be less income in future available for the specified class and less capital available to the taxpayer's next-of-kin at the expiration of the appointed period. Under cl. 3, however, the specified class are only given the income from such capital as is not withdrawn by the trustees under cl. 4; the taxpayer has not provided any beneficial interest for them in the income of capital that is withdrawn and, therefore, any decrease of income which follows on a withdrawal is due rather to the

qualified terms in which the income was given than to the power conferred by cl. 4. A

Similarly, the beneficial interest of the statutory next-of-kin under cl. 5 is expressly confined to so much of the trust funds as shall remain subject to the trusts of the settlement at the expiration of the appointed period; and I cannot see how that interest is in any way determined by the withdrawal of capital in pursuance of cl. 4. The beneficial interest provided for the next-of-kin is, in my opinion, in no way affected by the exercise of the cl. 4 power, although such exercise naturally diminishes the value of the fund which the next-of-kin would otherwise have taken; in other words, withdrawals of capital quantify the beneficial interest but do not determine it. B

As, therefore, the trustees have no power, in my judgment, to determine either the settlement or any clause thereof or any beneficial result to which the settlement gives rise, the case does not, in my opinion, come within s. 38 (2) of the Act. C

I accordingly agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Henry Pumfrey & Son* (for the taxpayer); *Solicitor of Inland Revenue.* D

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

TEMPERLEY (INSPECTOR OF TAXES) v. SMITH.

[CHANCERY DIVISION (Vaisey, J.), June 19, 20, July 3, 1956.] E

Income Tax—Income—Voluntary payments—Medical practitioner—Surrender value of life insurance policies—Policies taken out by board of voluntary hospital in recognition of professional services given voluntarily—Whether surrender value of policies assigned to medical practitioner taxable—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D.

In 1937 the board of management of a hospital carried on by voluntary subscriptions adopted a scheme intended to give recognition of the professional services given voluntarily by members of the honorary medical staff. The scheme provided for endowment assurance policies to be taken out on the lives of the individual members of the medical staff, the board paying the premiums and the member receiving the guaranteed sum assured on attaining sixty years of age or the surrender value or a proportion of it on resigning after over ten years' service. In February, 1947, the board granted new contracts of service with increased salaries to the members of the medical staff from Jan. 1, 1947, the payment of premiums having been discontinued after Dec. 31, 1946, and the policies being subsequently assigned to the members. The taxpayer, one of the medical staff, was assessed to tax on the surrender value of his policy at the date of the assignment to him, which was in May, 1948. The General Commissioners of Income Tax were satisfied that the taxpayer did not join the medical staff with a view to any professional or pecuniary advantage, and they found that the scheme was intended as a gesture of appreciation for voluntary work done and not as remuneration. They held that the surrender value of the policy was not a profit of the taxpayer's profession. On appeal, F

Held: the taxpayer was assessable to tax on the surrender value of the policy, because he received it in virtue of his office or profession or vocation and not as a mere present, his services at the hospital being within the scope of his profession (see p. 96, letter E, post). G

Test stated by SIR RICHARD HENN COLLINS, M.R., in *Herbert v. McQuade* ([1902] 2 K.B. at p. 649) and by LORD LOREBURN, L.C., in *Blakiston v. Cooper* ([1909] A.C. at p. 107) applied. H

Appeal allowed. I

A [As to taxation of voluntary payments to the holder of an office or employment, see 17 HALSBURY'S LAWS (2nd Edn.) 213, para. 435; and for cases on the subject, see 28 DIGEST 85-88, 490-507.

As to charge on profits from a profession, see 17 HALSBURY'S LAWS (2nd Edn.) 174-177, paras. 363-369.]

B Cases referred to:

(1) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492.

(2) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper v. Blakiston*, 5 Tax Cas. 347; 28 Digest 86, 495.

(3) *Wing v. O'Connell*, [1927] I.R. 84; Digest Supp.

C (4) *Robinson v. Dolan*, [1935] I.R. 509; Digest Supp.

(5) *Mulvey v. Coffey*, [1942] I.R. 277; 2nd Digest Supp.

(6) *Mudd v. Collins*, (1925), 133 L.T. 186; 9 Tax Cas. 297; 28 Digest 87, 498.

(7) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; sub nom. *Reed v. Seymour*, 11 Tax Cas. 625; Digest Supp.

(8) *Stedeford v. Beloe*, [1932] A.C. 388; 101 L.J.K.B. 268; 146 L.T. 456; 16 Tax Cas. 505; Digest Supp.

D (9) *Hawkins v. Leahy*, [1952] 2 All E.R. 759; sub nom. *Leahy v. Hawkins*, 34 Tax Cas. 28; 3rd Digest Supp.

(10) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; [1955] 1 Ch. 284; 36 Tax Cas. 1; 3rd Digest Supp.

Case Stated.

E The respondent taxpayer appealed to the General Commissioners of Income Tax for Rugby against additional assessments to income tax made on him under Sch. D to the Income Tax Act, 1918, for the years 1947-48 and 1948-49, each in the sum of £650, in respect of profits as a physician, the amount in each case being the provisional surrender value of two endowment assurance policies taken out by the Board of Management of the Hospital of St. Cross at Rugby

F on the life of the taxpayer pursuant to a scheme adopted by the board in 1937. At that time the taxpayer was a member of the honorary medical staff of the hospital. Under the scheme the board, as a gesture of appreciation of the professional services given voluntarily to the patients of the hospital by members of the honorary medical staff, took out, in the name of the board, policies on the lives of individual members of the medical staff. The board paid the

G premiums on the policies until the end of 1946, and the taxpayer paid the premiums falling due on his policies thereafter. By a deed dated May 19, 1948, the taxpayer's policies were assigned to him by the board. The commissioners found that the surrender value of the policies was not a profit from the taxpayer's profession and allowed the appeals against the assessments. The Crown appealed from the decision of the commissioners.

H The facts found by the commissioners and the contentions of the parties appear in the judgment.

J. E. S. Simon, Q.C., and Sir Reginald Hills for the Crown.

F. N. Bucher, Q.C., and H. H. Monroe for the taxpayer.

Cur. adv. vult.

I July 3. VAISEY, J., read the following judgment: This is a Case Stated by the General Commissioners for the Rugby Division of the County of Warwick, and is an appeal by the Crown against a decision of the said commissioners which was to the effect that the respondent, Doctor Ronald Edward Smith [referred to hereinafter as "the taxpayer"], was not properly assessed for income tax in a sum of £650 under Sch. D for one or other of two years of assessment, 1947-48 and 1948-49. He was, in fact, assessed in that sum for both of such years, but it is, of course, admitted that the assessment cannot be made for more than one year. The sum in question is the provisional surrender

value of two life policies taken out by the Board of Management of the Hospital of St. Cross at Rugby in circumstances which are set out in the Case and which I must now summarise. A

The hospital was, prior to the inauguration of the national health service, carried on by means of voluntary subscriptions from the citizens of Rugby. Its affairs were administered by a board of management elected annually by the subscribers. The medical staff of the hospital, to whom I will refer as "the medical staff", had consisted for many years of the local doctors. The taxpayer was at all material times a member of the medical staff. He first became a member of it in 1931. The hospital's board of management adopted in 1937 a scheme designed to give recognition to the professional services given voluntarily for so many years previously by members of the medical staff. The Case finds that the scheme was intended, not as a means of remunerating the members of the medical staff, but rather as a gesture of appreciation for work voluntarily undertaken. B C

Under the scheme certain endowment assurance policies were taken out in the name of the board of management on the lives of individual members of the medical staff, and the board paid the premiums for each member so insured. This scheme was limited to members of the medical staff who were under forty-five years of age at the time when they joined it. The arrangement was that the guaranteed sum assured under his policy was to be paid to each member of the medical staff concerned on his attaining the age of sixty or to his personal representative if he died before attaining that age, and there were provisions as to the resignation of the members of the staff for whom policies had been taken out, namely, that in the case of policies being surrendered the surrender value should be the property of the board of management and should be at its disposal in the following manner: (i) members of the staff resigning within ten years of becoming members got nothing; (ii) members resigning after serving more than ten but less than fifteen years were to receive fifty per cent. of the surrender value; (iii) members serving more than fifteen but less than twenty years should receive seventy-five per cent. of the surrender value; while (iv) members completing twenty years of service were to be entitled to a grant of the whole amount or to have the option of taking over and maintaining the policy or policies at their own expense. It was provided by the scheme that, if the hospital ceased to be a voluntary hospital and the management were taken over by a state-controlled organisation, the policies were to become the sole property of the members of the scheme. Policies affecting seven members of the medical staff were taken out, the annual premiums payable in respect of the taxpayer's policies being £74 19s. 3d. None of the members has attained the age of sixty years or has resigned. All are still living. D E F G

In 1942 the board of management increased what the Case calls the members' total annual "recognition" to the sum of £125 to include the premiums paid under the insurance scheme, the balance of such sum over and above the amount of the premium being paid in cash. The revenue authorities took and acted on the view that the cash amounts then paid to the taxpayer should be included as income of his profession or vocation for the purposes of his assessment to income tax in each year. By an agreement dated Feb. 22, 1947, the taxpayer was granted a new "contract of service" with increased salary from Jan. 1, 1947, while other members of the medical staff were granted similar contracts on a new salary basis. No premiums were paid by the board of management in respect of the policies after Dec. 31, 1946, and, by resolution of the board of management and of the subscribers, the chairman of the board of management was authorised to execute assignments of the policies to the members of the medical staff. The deed assigning the policies to the taxpayer was dated May 19, 1948, the taxpayer having paid the necessary premiums falling due on and after Jan. 1, 1947. H I

- A It is stated in the Case that the commissioners were satisfied that the taxpayer did not join the medical staff with a view to obtaining "any professional or pecuniary advantage", and that, following nationalisation (which took effect on July 5, 1948) he did not want to take over the policies but found himself with no choice but to accept the surrender value or take over the policies and thereafter pay the premiums himself. I do not follow this because there was
- B no reason requiring the taxpayer to accept the policies or any benefits under them.

- The taxpayer's contention was that the benefit of the policies did not accrue to him as a result of any organised seeking after emolument, but as a testimonial, it being intended that the benefit should accrue to him on his retirement on his attaining the age of sixty years or on his previous death, and that, consequently, it did not form part of the profits of his profession as a doctor. On the other hand, it was urged on behalf of the Crown that up to the date of the assignment of the policies to the taxpayer he had no title to the policies or to the surrender value of them, that he received the policies under the assignment in the course of his professional practice and as a reward or remuneration for his professional services in the form of money's worth, the measure thereof
- D being the immediate cash surrender value of the policies at the date of the assignment, and that the amount of the surrender value was, therefore, income of his profession or vocation and chargeable to tax under Sch. D accordingly. The commissioners, having heard the appeal, found that the surrender value of the policies was not a profit from the taxpayer's profession and allowed the appeals against the assessments, and from that decision this appeal is brought.

- E The problem which arises here is a familiar one. It is exemplified by the cases relating to cricketers' benefits and clergymen's Easter or Whitsuntide offerings. A voluntary payment to the holder of an office or employment is a profit of that office or employment if it accrues to the holder in virtue of his office or employment, notwithstanding that there may not be any legal obligation to make the payment. If, however, a payment to the holder of an office or employment is in the nature of a personal gift to him, as in the case of a testimonial or a contribution for a specific purpose such as to provide a holiday, it is regarded not as a payment for services but as a mere present. The cases in the books are very numerous, and a number of them were referred to in the course of the argument. I propose to refer briefly to some of the more important of these. The assessment in this case is under Sch. D, and the sum in question
- G is alleged to be part of the annual profits or gains accruing to the taxpayer from his profession of a medical practitioner. Many of the authorities relate to assessments under Sch. E, but in my judgment the authorities under both Schedules all rest on the same general principles.

- The nearest case to the present perhaps is *Herbert v. McQuade* (1) ((1902), 4 Tax Cas. 489). In the course of his judgment SIR RICHARD HENN COLLINS, H M.R., makes this statement (*ibid.*, at p. 500):

"... a payment may be liable to income tax although it is voluntary on the part of the persons who make it, and ... the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office ..."

- I That case was followed by the well-known decision of the House of Lords in *Cooper v. Blakiston* (2) ((1908), 5 Tax Cas. 347), and the following words from the speech of LORD LOREBURN, L.C. (*ibid.*, at p. 355) are in my judgment relevant to the present case, substituting the words "medical practitioner" for the word "incumbent" and the word "clergyman":

"... where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office.

Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial . . . or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present . . . What you choose to call it matters little. The point is, what was it in reality ? ”

I was referred to three Irish cases, *Wing v. O'Connell* (3) ([1927] I.R. 84), *Robinson v. Dolan* (4) ([1935] I.R. 509), and *Mulvey v. Coffey* (5) ([1942] I.R. 277); but all of these depend on their special facts, and I do not think that they are immediately relevant to the present case. *Mudd v. Collins* (6) ((1925), 9 Tax Cas. 297) contains some useful observations by ROWLATT, J., and so does *Reed v. Seymour* (7) ((1926), 11 Tax Cas. 625), in which the question is asked as regards the money in question in that case: Is it in the nature of a personal gift or is it remuneration ? In that case the decision of ROWLATT, J., was reversed in the Court of Appeal and restored in the House of Lords, but the truth is that the authorities are only really helpful in a case such as the present in so far as they indicate the proper line of demarcation between taxable and non-taxable receipts, and each case has really to be dealt with on its own merits, applying well settled principles to particular facts. I can find nothing to help me in *Stedeford v. Beloe* (8) ((1932), 16 Tax Cas. 505). *Hawkins v. Leahy* (9) ([1952] 2 All E.R. 759) is surely rather near the present case, and finally there is *Moorhouse v. Dooland* (10) ([1955] 1 All E.R. 93).

The crucial test, in my judgment, is the character in which the recipient of a benefit takes it, and, if it came to him in virtue of his office or in virtue of his profession or vocation and otherwise than as a mere present, I think that it is liable to tax. I cannot accept the view that the taxpayer's services at the hospital were not within the scope of his profession, and in the circumstances of the case my decision here must be for the Crown, with costs, if asked for.

I allow the appeal and refer back to the commissioners the question of the proper year for which the assessment is to be made.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hempsons* (for the taxpayer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

LYCETT-GREEN v. LYCETT-GREEN AND DU PUY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (His Honour Judge Granville Smith, sitting as a special commissioner in divorce), June 25, 1956.]

Divorce—Costs—Co-respondent—Discretion—No evidence that co-respondent knew at time of adultery that respondent was a married woman—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 50 (1).

The husband petitioned for divorce on the ground of the wife's adultery with the co-respondent and prayed for an order for costs against the co-respondent. At the hearing of the suit the husband called evidence tending to show that the wife and co-respondent together frequented exclusive hotels and restaurants and moved in a small social circle; and that when served with the petition the co-respondent said nothing. The co-respondent, who formally denied the adultery, did not give evidence. The co-respondent having been found guilty of adultery, the husband applied for an order for costs.

Held: the question of costs was a matter for the court's discretion and, although there was no evidence that the co-respondent knew at the time of the adultery that the wife was a married woman, an order for costs would be made in the circumstances.

Smith v. Smith & Reed ([1922] P. 1) and *Langrick v. Langrick & Funnell* ([1920] P. 90) followed.

[As to order for costs against guilty co-respondent in absence of proof that co-respondent knew that respondent was married, see 12 HALSBURY'S LAWS (3rd Edn.) 402, para. 894, note (a); and for cases on the subject, see 27 Digest (Repl.) 561, 5129-5131.]

Cases referred to:

(1) *Smith v. Smith & Reed*, [1922] P. 1; 91 L.J.P. 9; 126 L.T. 350; 27 Digest (Repl.) 561, 5131.

(2) *Langrick v. Langrick & Funnell*, [1920] P. 90; 89 L.J.P. 114; 123 L.T. 94; 27 Digest (Repl.) 546, 4945.

Petition.

The husband petitioned for divorce on the ground of the wife's adultery with the co-respondent and included in the petition a prayer that the co-respondent be ordered to pay the costs of the suit. The wife did not defend the suit but the co-respondent denied the alleged adultery and opposed the prayer for costs. The case is reported on the question of costs. At the hearing of the suit, no evidence was adduced on behalf of the husband to show that the co-respondent knew at the time of the adultery that the wife was a married woman, but counsel for the husband cited *Smith v. Smith & Reed* (1) ([1922] P. 1) and *Langrick v. Langrick & Funnell* (2) ([1920] P. 90) in support of his application for costs.

D. Loudoun for the husband.

C. Sleeman for the wife.

HIS HONOUR JUDGE GRANVILLE SMITH: The evidence is short and it comes to this. Inquiry agents have been employed and they have seen two people together on the continent and in this country, in expensive hotels and at expensive restaurants. There is evidence given by an inquiry agent of seeing them at two hotels. In each case they have been travelling about in Rolls Royces. He gave evidence that they were the two people in the photograph before me, the wife and the co-respondent. The inquiry agent's assistant carries the matter further, because he gives evidence that very early on Sunday morning at a hotel in Liverpool he saw these two people with three other men having drinks in the bar of that hotel. About an hour later the three men left,

and the two persons in that photograph, the wife and the co-respondent stayed there and had a late supper, and then went upstairs in the lift together. There he leaves it for the moment, but the next morning, somewhere about half-past nine, accompanied by another inquiry agent, he goes to the room that is indicated to him and knocks on the door. The door is locked, but ultimately it is opened by a man whom he identifies as the co-respondent. They go into the room and there is the wife also. The co-respondent was in his pyjamas with a dressing gown over them, and the wife was in a nightdress, also with a dressing gown, having her breakfast. He tells me that there was a double bed and a single bed. The double bed had been slept in; the single bed had not been slept in, it was still made up. On that evidence, taking the whole picture of these two people travelling around together, the only possible inference is that they were living together as man and wife. I am asked to say that I am not satisfied as to the identity of the person she was with, because the co-respondent has not signed anything. We have heard the story about the efforts to serve the petition on him, wrapping the papers in an "Evening Standard"; in fact, he took them, and dropped them like the proverbial "hot cake". They must have come to his notice, because in this court he is represented by counsel. It is clear that the man on whom the petition was served knew what he was receiving.

It is submitted that if I do find that the wife and the co-respondent have committed adultery on numerous occasions, that I ought not to award costs against the co-respondent. The ground for that submission is that it is the practice, if an award of costs against a co-respondent is sought, to tender some evidence that the co-respondent knew that the lady in question was a married woman. Undoubtedly, where the petitioner asks for costs against the co-respondent he generally tenders evidence such as an admission by the co-respondent that he knew that the respondent was a married woman, and that evidence solves all difficulties. Although that is the general practice, I am satisfied on the authorities that have been cited to me (*Smith v. Smith & Reed* (1) ([1922] P. 1) and *Langrick v. Langrick & Funnell* (2) ([1920] P. 90)), that that practice is subject to the overriding discretion of the court in respect of costs given by the statute*. I know also that SIR HENRY DUKE, P., in *Smith v. Smith & Reed* (1) ([1922] P. 1 at p. 3) said that he thought that it was an unreasonable practice, that he could never see the justice of it. The cases clearly show that I have to consider the facts of the particular case before me, and in the exercise of my discretion award or not award costs against the co-respondent.

One other thing that struck me in the present case is that when one considers the position clearly occupied by these people, the wife and the co-respondent, the small world of exclusive hotels and restaurants in which they moved, where everybody would know as much as there is to know about everybody else, it would be astonishing if a man of the world such as the co-respondent would not know that the wife in the present case was a married woman. I am satisfied that it would not be safe to decide this question on what one knows or thinks one knows, but I am interested in the argument put forward by counsel for the husband that there are cases where the co-respondent has come to court and said that he did not know, and had no reason to know, that the respondent was a married woman. In the present case, however, the co-respondent has not come to court at all, but through his counsel asks me to assume in his favour that he had no idea what was her status. I have considered the facts which refer to the position of these people, and the fact that the co-respondent himself has not denied them, and I think that in the circumstances it would be shutting one's eyes to the way of the world if I held that he had no reason to know. The present is quite different from the case of a man who meets a woman who

* See the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1): 18 HALSBURY'S STATUTES (2nd Edn.) 486.

A is behaving somewhat like a prostitute. In those circumstances he may come forward and say: "I had no idea what she was, for I do not know her". There is nothing of that sort in the present case, and in those circumstances I think that it is right to make a finding of adultery against the co-respondent, and order him to pay the costs.

Decree nisi. Co-respondent ordered to pay the costs.

B Solicitors: *Withers & Co.* (for the husband); *Ashurst, Morris Crisp & Co.* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

C FLEET ELECTRICS, LTD. v. JACEY INVESTMENTS, LTD.
WILLS AND OTHERS v. JACEY INVESTMENTS, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.J.J.), July 4, 5, 1956.]

D *Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to demolish or reconstruct premises—Proposed expansion of company associated with landlord—No consideration by associated company—Whether firm intention to carry out reconstruction—When intention must be held—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).*

E On Oct. 4, 1955, the landlords (a limited company who held under a lease of a block of four shops, the tenancies of which were due to determine on Sept. 29, 1956, gave notice of the determination of the tenancies pursuant to the Landlord and Tenant Act, 1954, and intimated that they would oppose an application to the court under Part 2 of that Act for the grant of a new tenancy on the ground that they intended to carry out substantial work of reconstruction, it having been resolved at a meeting of the board of directors of the landlords held on Feb. 7, 1955, that the four shops should be converted into one store. Two of the three tenants (the third being a company associated with the landlords) gave notice to the landlords of their intention to apply for new tenancies. The books of the landlords contained no record of any further consideration of the reconstruction project other than that at the meeting of Feb. 7, 1955, but a small scale plan dated December, 1955, was prepared by an architect showing the proposed alterations. The planning authority approved the alteration in January, 1956, and in March, 1956, the freeholders consented to the proposed alteration. The two tenants applied for new tenancies and the landlords opposed the applications under s. 30 (1) (f) of the Act of 1954 on the ground that on the termination of the current tenancies the landlords intended to reconstruct the premises. The oral evidence disclosed that it was the intention of the directors of the landlords that the premises should be used for the improvement of the third tenant, the associated company. The matter had not at any time been considered by the latter. The cost of the scheme had similarly not been considered either by the landlords or the associated company. The county court judge found that there was no such firm and settled "intention" as would satisfy s. 30 (1) (f) and granted new tenancies. On appeal,

Held: the question whether the landlords had the necessary intention within s. 30 (1) (f) was one of fact, and there being evidence on which the judge could conclude that the landlords had not the necessary intention, the Court of Appeal would not interfere.

Edwards v. Bairstow ([1955] 3 All E.R. 48) considered.

Reehorn v. Barry Corpn. ([1956] 2 All E.R. 742) applied.

Per LORD EVERSHED, M.R.: it has been agreed by all the learned counsel that a landlord who gives a notice of opposition in which he says that on the termination of the tenancy he intends to reconstruct, etc., must at any rate prove that, when he gave it, he did in fact so intend. It would also appear (and again learned counsel agree) that he would have to show that the intention persisted up to the date of the hearing, and had not gone by that date (see p. 104, letter H, post).

Appeals dismissed.

[**Editorial Note.** In expressing the view quoted above concerning the date at which an intention to reconstruct must exist LORD EVERSHED, M.R., intimates that it is not a final conclusion. On this point, therefore, reference should also be made to *Rehorn v. Barry Corpn.*, [1956] 2 All E.R. 742, per DENNING, L.J., and *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, [1956] 2 All E.R. 497.

For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

- (1) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 3rd Digest Supp.
- (2) *Cunliffe v. Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, 5070.
- (3) *Rehorn v. Barry Corpn.*, [1956] 2 All E.R. 742.

Appeals.

These two appeals, which were by the landlords, Jacey Investments, Ltd., from orders of His Honour JUDGE NORRIS, Walsall County Court, dated May 10, 1956, related to premises comprising a block of four shops. Two of the three tenants applied to the court under the Landlord and Tenant Act, 1954, for orders that new leases be granted to them. The county court judge made the orders asked for by the tenants. The third tenant was a company associated with the landlords, and the landlords stated that they intended to reconstruct the block of shops for the benefit of that associated company.

R. E. Megarry, Q.C., and *J. Montgomerie* for the landlords.

F. W. Beney, Q.C., and *D. J. Stinson* for the tenants, Fleet Electrics, Ltd.

H. Heathcote-Williams, Q.C., and *P. H. Layton* for the tenants, the executors of Percy Newman, deceased.

LORD EVERSHED, M.R.: These two appeals, in which I shall deliver, as did the learned county court judge, a single judgment, arise out of applications for new tenancies under the Landlord and Tenant Act, 1954, to which applications the landlords, Jacey Investments, Ltd., common to both tenants, had objected on the specific ground set out in s. 30 (1) (f); that is to say, that

"on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises . . ."

The premises in question were two contiguous shops in Park Street, Walsall, bearing the numbers in that street 52 and 54. The former had been occupied, as we have been informed, for nearly twenty years by one Newman for the sale of furniture; and Mr. Newman having recently died, the tenants of those premises at all material dates were his executors. The other shop, No. 54, was and is occupied by Fleet Electrics, Ltd., and they sell on those premises such things as electric vacuum cleaners and the like. Their occupation has not been of so long a duration as that of Mr. Newman; I think we were told that they had been there some ten years. These two premises, Nos. 52 and 54, form part of a block of four shops owned by the landlords. The other two, Nos. 48 and 50, are and were at all material times in the occupation of a company called Stanley Martin, Ltd., about which I shall have a little more to say hereafter. They carry

A on at Nos. 48 and 50, as a single unit, the sale, I understand, of ladies' clothing of various kinds.

According to the evidence, the tenancies of all four of these premises—including, that is, the two occupied by Stanley Martin, Ltd.—were due to expire on Sept. 29, 1956. That fact was drawn to the attention of the board of directors of the landlords by its chairman (one other director besides himself being present) at a meeting on Feb. 7, 1955. The minute signed by him on the same day reads as follows:

C “It was pointed out by the chairman that the tenancy and leases of the shops owned by the company at Park Street, Walsall, would expire in September, 1956. After discussion, it was resolved that the company's property at Park Street, Walsall, Staffs., be developed by the conversion of the existing four shops into one store and that Mr. H. Werner Rosenthal, A.R.I.B.A., be instructed to prepare the necessary plans and the company's solicitors be instructed to take all the necessary preliminary steps in connection with the proposed reconstruction, and in due course to proceed to terminate the existing tenancies.”

D So far as the evidence in the case is concerned, no other board meeting at which any record was made pertaining to this matter appears in the books of the landlords.

E The next date which I will mention is that of Oct. 4, 1955, when, in pursuance of the machinery of the Act of 1954, the landlords gave a notice of termination of the tenancy in which there was set out under para. 3 that they “would oppose an application to the court under Part 2 of the Act for the grant of a new tenancy on the ground” stated, namely, that on the termination of the tenancies they intended to carry out “substantial work of reconstruction”. In due course, at a date in November and on Dec. 1 respectively, Mr. Newman's executors and Fleet Electrics, Ltd., gave notice to their landlords (the appellant company) that they would apply for new tenancies, and would not, therefore, be willing to give up possession on Sept. 29, 1956.

F Dealing for the present only with the written material, the next document to which I should refer is a plan—what I think has been called an eight-foot plan—which was prepared by the gentleman referred to in the minute which I have read, Mr. H. Werner Rosenthal, bearing date December, 1955. The plan shows on a rather small scale, but no doubt sufficiently, what the proposed alteration would amount to. There is a plan of the ground and of the first floor, and each of those floors is shown to be part of a single store or unit, skirts and gowns and various other things being sold on the ground floor, and coats and costumes and other things being sold on the first floor. The plan also includes a front and rear elevation, a block plan and a section. A plan which everyone has assumed (and I do not doubt correctly) to be a copy of that which I have described was in the middle of December put before the planning authority, the County Borough of Walsall, and that authority in due course in the following month intimated that there would be no planning objection to the alteration shown on the plan. Furthermore, in January, 1956, the landlords, whose interest was as lessees for a long term, made application to their superior landlords, namely, the British Transport Commission, for their consent to what again I assume, no doubt correctly, to have been the same plan, indicating a proposed alteration. In the case of the British Transport Commission, it was necessary for the solicitors for the landlords to write one or two letters of reminder, but ultimately on Mar. 20, 1956, the commission said that they consented, or would consent, to alterations in accordance with the plan. The case, I understand, had been stood over in the meantime at the request of the landlords, and it came on for hearing on May 10.

I have stated that outline of things done, as shown on the materials to which I have referred, because it has been the main burden of counsel for the landlords'

argument that the only criticism which could be made of the landlords is their failure to have done more—in other words, that they could be criticised only for acts of omission. Counsel said that the things done of themselves lead (and lead, as I understand it, inevitably) to the conclusion, in the absence of challenge of their bona fides, that there was here an “intention” within the meaning of the relevant sub-section and that the finding to the contrary of the county court judge cannot be supported; and moreover, that it does not in truth amount to a finding of fact.

In his reply, counsel for the landlords cited the recent decision in the House of Lords of *Edwards v. Bairstow* (1) ([1955] 3 All E.R. 48), which was a tax case. In that case the question for determination by the Special Commissioners had been whether a certain transaction constituted an adventure in the nature of trade. The Special Commissioners found that it had not constituted an adventure in the nature of trade, and this court was of opinion that that was a finding of fact which we could not disturb. The House of Lords, however, came to the conclusion that the facts found by the commissioners led inevitably to the conclusion that the transaction was an adventure in the nature of trade, and held:

“The finding that the transaction was not an adventure in the nature of trade must be set aside because the commissioners had acted either without evidence or on a view of the facts that could not reasonably be entertained, and the assessments must be confirmed.”

It has been counsel for the landlords' case that *Edwards v. Bairstow* (1) provides a close parallel to the present case, and that the facts which I have mentioned, lead inevitably to the conclusion that there was here the requisite intention, and that this court accordingly is entitled to controvert the county court judge's conclusion on that ground.

I must say at once that I am quite unable to accept that premise to the landlords' case. It is not now in doubt that the import of the word “intend” in s. 30 (1) (f) of the Act is that at the appropriate date or dates—a matter which I will mention later—there must be a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved “out of the zone of contemplation . . . into the valley of decision”. The language that I have just used is part of the felicitous language used by ASQUITH, L.J., in *Cunliffe v. Goodman* (2) ([1950] 1 All E.R. 720 at p. 725), a case concerning the Landlord and Tenant Act, 1927, s. 18 (1), in which in point of actual fact the word “intends” or “intention” did not appear at all. Recent decisions, however, under the present Act of 1954 have, I think, now laid it down for us to follow that the language which ASQUITH, L.J., used is appropriate to a question under s. 30 (1) (f). Indeed in more than one very recent case*—including particularly the last of them, *Reohorn v. Barry Corpn.* (3) ([1956] 2 All E.R. 742)—this court made it clear that the test for “intention” within the meaning of s. 30 (1) (f) is to be found in this language taken from ASQUITH, L.J.'s judgment in *Cunliffe v. Goodman* (2); and, indeed, it has been so accepted in this court by counsel for the landlords as well as by counsel for the tenants.

It follows, then, that the court, in a case such as this, has to decide whether the landlord has established that he had at the requisite dates a firm and settled intention so to reconstruct the premises. It is clear that when, as in the present case, the landlord is a limited company, the existence of the intention (and particularly the proof of the quality of the intention, that it is firm and settled) can be established only through the directors or other principal officers of the company. In the present case Mr. Joseph Cohen—who plainly is not only the chairman but the most important director of the landlords, and of a number of

* See, in addition to the case cited above, *Fisher v. Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. at p. 84, letter I, and *Betty's Cafés, Ltd. v. Phillips Stores, Ltd.*, [1956] 2 All E.R. at p. 506, letter B.

A other companies associated with them, as we understand—gave evidence before the county court judge.

Before I make some reference to Mr. Cohen's evidence I should explain, as I forecast, the position in the case of Stanley Martin, Ltd. We were told by counsel for the landlords that it is a company associated with the landlords. We understand that the company has two directors, Stanley Cohen (a son of B Joseph Cohen) and Martin Rose, who is also, we were told, connected by marriage or otherwise with the Cohen family, and Mr. Stanley Cohen was the managing director. I have said that the tenancy of Nos. 48 and 50, Park Street vested in Stanley Martin, Ltd., also expired on Sept. 29, 1956; but no doubt the closeness of the association between Stanley Martin, Ltd., and the landlords, would not in practice create any problem of conflict whether a new tenancy should or should C not be given (and if so on what terms) to Stanley Martin, Ltd.

That slight exposition about Stanley Martin, Ltd., will, I think, make clear what I am going to read from the notes of the evidence of Mr. Joseph Cohen. The point that I desire to make plain is this. Unlike the case of *Edwards v. Bairstow* (1), the question here is and was—Did the company, through its directors, or otherwise, have at the requisite dates an intention having the quality that I D have described? That matter is beyond a peradventure, I should have thought, a question of fact to be determined by the judge on all the evidence, including the oral testimony given by the principal officer of the company, Mr. Joseph Cohen.

What did Mr. Cohen say? He said, among other things: "We have in mind that Stanley Martins will be interested in the whole of the premises when reconstructed". That is what he said on May 10. "We have in mind that they will be". He went on to say: "Plans are for a ladies' gown shop. Stanley Martin, E Ltd., or a similar firm". He said: "We have no idea what the reconstruction will cost". He said later that he thought it would cost £10,000 to £12,000. In cross-examination he said: "It is a family arrangement to improve Stanley Martin, Ltd."

It is quite plain that the learned judge was not very impressed in certain F respects with Mr. Cohen's evidence. In the course of his judgment he commented on the fact that Mr. Joseph Cohen, when asked, could not really remember whether he was or was not himself a director of Stanley Martin, Ltd., though eventually he decided that he was not. Counsel for the landlords said that that was an unfair criticism. He told us that Mr. Joseph Cohen was a director of some thirty associated companies, and that it was not unnatural that G he could not really closely remember of which of a large number of associated companies he was or was not a director. I must say that I for my part sympathise with the learned judge over this, because after all Mr. Cohen had said that this proposed reconstruction was a family arrangement to improve Stanley Martin, Ltd. It is plain from what I have read (and I am not going to take time to comment further) that the statements of Mr. Joseph Cohen were not in all H respects entirely consistent.

The architect was called, and he was not in fact asked when he received any instructions in the matter. December, 1955, the date of his plans, is somewhat far removed from February, 1955, when the board, according to the minute, resolved that he be instructed as well as solicitors. Mr. Stanley Cohen, the managing director of Stanley Martin, Ltd., was not called at all. Mr. Martin I Rose was called, and a problem arose because an objection was taken, and I must say that this at one time troubled me somewhat. It appears that he was asked the general question: "What was the attitude of Stanley Martin, Ltd.?" I think that a question in that precise form might well have been objectionable on more than one ground; but I think that the objection was intended to be based on the contention that if it was proposed to prove what Stanley Martin, Ltd. were doing about it, then they should first produce the company's minutes. I am not satisfied that it would have been right to object to Mr. Martin Rose giving any

evidence at all about what he and his co-director were doing or thinking in the matter. However, the point was not pressed at the trial, and the judge himself asked Mr. Martin Rose a question as the result of which, according to the judgment, Mr. Rose said that the scheme had never been discussed by the board of Stanley Martin, Ltd.—this scheme which, according to Mr. Joseph Cohen, was a family arrangement for the improvement of Stanley Martin, Ltd. The result of the whole thing was that the learned judge, who commented on the various points in the evidence to which I have referred, eventually concluded thus:

“I have had great difficulty with this part of the case, but I do not think that at this stage this proposal has reached a firm and settled intention. It is too early a stage. The landlords have failed to make out their objection.”

I confess, having heard the argument of counsel for the landlords, to the feeling that the landlords might have made a very much better showing, and they may, therefore, deserve the sympathy of the unlucky. Nobody has suggested (and I do not want any of the criticisms that I have made of Mr. Joseph Cohen's evidence to be taken as suggesting) that there was any lack of good faith or false swearing in this case. It is also right to say that it is no objection to a scheme of reconstruction which a landlord intends to carry out that he was prompted to do it in order that he might meet a claim by the tenant (if made) for a new lease. But it seems to me plain on this evidence, and as I read this judgment, that the learned judge—though having difficulty with this part of the case—was not satisfied that the intention originally expressed in the formal resolution had the necessary quality of being firm and settled. In other words, he thought that the landlords had failed to satisfy him that this proposal had moved from the realm of aspiration or contemplation and had become a really firm decision.

It appears to me quite impossible for this court to say that there was no basis in the evidence to support the learned judge's conclusion. He heard the evidence, and without pressing one point particularly, the fact that Stanley Martin, Ltd., never proved that they had given a thought to a proposal which was, according to Mr. Joseph Cohen, a family arrangement for their particular improvement, is obviously an impressive point, to say no more, in determining the quality of the intention which the board of the landlords had formulated in February, 1955. Moreover, the fact that no consideration whatever had apparently been given to the cost or to the finances of the company which would under the scheme be the new tenant carrying on a business twice the size of its present business at a very much larger rent is to my mind no less impressive—all these matters were left in the air. I quite agree that if the landlord forms a specific intention, it does not necessarily require that a specific tenant should be in mind. In this case, however, the scheme was, according to the evidence, part and parcel of something being done for the improvement of this company, Stanley Martin, Ltd.

I have more than once used the phrase “at whatever are the requisite dates”. There has been in the cases some question whether the right date to look at for discovering the “intention” is the date when the landlord gives his notice of objection, or the date of the hearing. In this case it is not necessary to express final conclusions on that matter, but I think that it has been agreed by all the learned counsel that a landlord who gives a notice of opposition, in which he says that on the termination of the tenancy he intends to reconstruct, etc., must at any rate prove that, when he gave it, he did in fact so intend. It would also appear (and again learned counsel agree) that he would have to show that the intention persisted up to the date of the hearing, and had not gone by that date. If that is so (and it is only for this reason that I find it necessary to refer to it) evidence of what happened between the date of the notice and the date of the hearing will be relevant and admissible evidence both as throwing light on the nature of the intention at the former date, and as showing that the intention was a real and persisting intention up to the date of the hearing. No problem of dates

A arises here because the learned county court judge took into account, in arriving at his conclusion, all the material which I have mentioned from the originating resolution of the company in February, 1955, down to the very last matter of fact, viz., the arrival eventually from the British Transport Commission of their consent to the proposal indicated on the plans on Mar. 20, 1956, and including also the oral testimony given at the hearing.

B The case being of the nature that I have indicated, I think that in truth this is a question of fact, and if that is so then this court under the County Courts Act, 1955, cannot disturb the learned judge's finding unless it be established that there was in effect no evidence to support the finding. I confine myself accordingly to saying that in my judgment this court cannot disturb the conclusion at which the judge arrived.

C I have said, and I repeat, that it may be the landlords have been less than fortunate here, and that had their case been worked out and put forward somewhat otherwise (and by saying that I am not, of course, making any criticism of the learned counsel who was then appearing for them) and had the evidence adduced been somewhat different in character, it may be that the learned judge would have tipped the balance in the other direction. But if the landlords were

D unfortunate, there is no reason why that should be visited on the tenants. That the landlords were exceedingly unwise (I think) to have refused on the ground of alleged privilege to produce correspondence with the architect is again a matter for which they must blame themselves.

In all the circumstances, and bearing in mind that it may be that the fortunes of war went hard against the landlords, there remains the subsidiary question:

E Should this court vary the length of the tenancy which in each case the judge thought it right to grant, viz., five years? This is not, I think, a case at all like *Reohorn v. Barry Corpn.* (3) where the tenant was saying: "If and when this scheme of the corporation is ripe, then I am only too willing to support it, and I will let them have the premises". This is a case in which the tenants are themselves desirous of carrying on their respective trades as before. As counsel for

F Fleet Electrics, Ltd., pointed out, s. 33 of the Act of 1954 seems by its language to make this question of the length of the tenancy pre-eminently a matter for the discretion of the judge—"such a tenancy as may be determined by the court to be reasonable in all the circumstances"—and I am unable to find that there is here any material which would justify this court in altering the conclusion as to length of term at which the county court judge arrived. Certainly I am satisfied

G that it would not be right to do so by the exercise of a kind of unregulated benevolence towards the landlords.

I think, therefore, on the whole circumstances of the case this court can do no other than say that it is not open for us to interfere, and to dismiss the appeal.

H JENKINS, L.J.: I agree, and find that there is nothing that I can usefully add.

HODSON, L.J.: I also agree.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Beckingsales*, agents for *Joseph Cohen & Cowen*, Birmingham (for the landlords); *Kimbers* (for Fleet Electrics, Ltd.); *T. D. Jones & Co.*, agents for *W. Douglas Clark, Brookes & Co.*, West Bromwich (for the executors of *Percy Newman*, deceased).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COMMISSIONER FOR MOTOR TRANSPORT *v.* ANTILL
 RANGER & CO. PTY., LTD.
 STATE OF NEW SOUTH WALES AND OTHERS *v.*
 EDMUND T. LENNON PTY., LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen), June 18, 19, July 10, 1956.]

Privy Council—Australia—New South Wales—Transport—Freedom of inter-state trade—Charges made under New South Wales State Transport (Co-ordination) Act, 1931-1952 (No. 32 of 1931—No. 24 of 1952)—Charges illegal—Recovery of money paid—Right of action extinguished by State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954—Validity of Act—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), Constitution, s. 92.

In *Hughes & Vale Proprietary, Ltd. v. State of New South Wales* ([1954] 3 All E.R. 607) it was held that the provisions of the State Transport (Co-ordination) Act, 1931-1952, of the State of New South Wales ("the principal Act"), which required application to be made for a licence and all provisions consequential thereon, in so far as they purported to apply to, and to operators of, public motor vehicles operated in the course of and for the purposes of inter-state trade, were invalid as contravening s. 92 of the Commonwealth of Australia Constitution. The effect of that decision was that charges which under the principal Act had been imposed on and collected from the respondents had been unlawfully imposed and collected. The respondents commenced proceedings for the recovery of sums paid by them. By the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, s. 3, every cause of action against Her Majesty or the State of New South Wales for the recovery of any sums collected in relation to the operation of any public motor vehicle in the course of or for the purposes of inter-state trade before the commencement of the Act which were collected pursuant to the relevant provisions of the principal Act was extinguished.

Held: the appellants were precluded from relying on the Act of 1954 because the denial of the right to recover money paid in satisfaction of charges which were illegal by virtue of s. 92 of the Constitution offended equally against s. 92.

Deacon v. Grimshaw ((1955), 93 C.L.R. 83, 104) approved.
 Appeals dismissed.

[As to trade among States of Australia being free, see 5 HALSBURY'S LAWS (3rd Edn.) 513, para. 1123, text and notes (b)-(g); and for cases on the subject, see 8 DIGEST (Repl.) 753, 754, 299, 300.]

Cases referred to:

- (1) *Hughes & Vale Proprietary, Ltd. v. State of New South Wales*, [1954] 3 All E.R. 607; [1955] A.C. 241; 93 C.L.R. 1; 3rd Digest Supp.
- (2) *James v. The Commonwealth*, (1939), 62 C.L.R. 339.
- (3) *Commonwealth of Australia v. Bank of New South Wales*, [1949] 2 All E.R. 755; [1950] A.C. 235; 79 C.L.R. 497; 2nd Digest Supp.
- (4) *Deacon v. Grimshaw*, (1955), 93 C.L.R. 83, 104.

Appeals.

These were consolidated appeals, brought by special leave, by the Commissioner for Motor Transport (of New South Wales), the State of New South Wales, the New South Wales Minister of State for Transport and the Commissioner for Motor Transport, against orders of the Full Court of the High Court of Australia, dated June 9, 1955. The High Court held that the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 (No. 45 of 1954), was invalid on the

A ground that it contravened s. 92 of the Commonwealth of Australia Constitution Act, 1900.

B. J. M. MacKenna, Q.C., R. Else-Mitchell, Q.C. (of the Australian Bar) and *Anthony Cripps* for the appellants.

Sir Garfield Barwick, Q.C., J. D. Holmes, Q.C. (both of the Australian Bar), *R. A. Gatehouse* and *A. J. Rogers* (of the Australian Bar) for the respondents.

B **VISCOUNT SIMONDS:** These consolidated appeals raise a question of novelty and importance in regard to the operation and effect of s. 92 of the Commonwealth of Australia Constitution, but, having heard full argument on behalf of the appellants, their Lordships have no doubt that the conclusions of the High Court are right and their reasons unimpeachable. Section 92 provides that, on the imposition of uniform duties of customs, trade, commerce and inter-
C course among the states whether by means of internal carriage or ocean navigation shall be absolutely free.

In *Hughes & Vale Proprietary, Ltd. v. State of New South Wales* (1) ([1954] 3 All E.R. 607), their Lordships decided that the provisions of the State Transport (Co-ordination) Act, 1931-1952, of the State of New South Wales (sometimes called "the principal Act") which required application to be made for a licence and all provisions consequential thereon, in so far as they purported to apply to, and to the operators of, public motor vehicles operated in the course of and for the purposes of inter-state trade were invalid as contravening s. 92. The effect of that decision was that charges which under the Act had been imposed on and collected from the respondents had been unlawfully imposed and collected.
D The respondents accordingly commenced proceedings for the recovery of the sums so paid by them, and for the purpose of these appeals it is to be assumed for the reasons elaborated in the judgment of the High Court that they would have had a good cause of action but for the Act to which reference is next made. It is not material to the result, but may be observed that the respondents in the first of the consolidated appeals commenced proceedings before that Act was passed.

E The State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 (which will be referred to as "the Barring Act") on which the appellants
F rely, enacted, so far as material, as follows:

"3. Any and every cause of action, claim and demand whatsoever by any person whomsoever against Her Majesty or the State of New South Wales or any Minister or the Superintendent of Motor Transport or against any authority, officer or person acting or purporting to act in the execution of the principal Act—

G (a) for the recovery of any of the sums collected, received or recovered in relation to the operation of any public motor vehicle in the course of or for the purposes of inter-state trade before the commencement of this Act—

H (i) which were or purported to have been collected, received or recovered pursuant to the provisions of sub-s. (4) or sub-s. (5) of s. 18 or s. 37 of the principal Act; or

(ii) which were or purported to have been collected, received or recovered on, or pursuant to any condition imposed on, the issue of a licence under the principal Act or of a permit under the principal Act or of any document purporting to be a licence or a permit under the principal Act, or
I

(b) for or in respect of any act, matter or thing done or purporting to have been done before the commencement of this Act by any Minister or the Superintendent of Motor Transport or any authority, officer or person acting or purporting to act in the execution of the principal Act in relation to the operation of any public motor vehicle in the course of or for the purposes of inter-state trade, shall be and the same are hereby extinguished.

"4. No action, suit, claim or demand whatsoever shall lie or be brought or made or allowed or continued by or on behalf of any person whomsoever against Her Majesty or the State of New South Wales or any Minister or the Superintendent of Motor Transport or against any authority, officer or person for the recovery of any of the sums referred to in para. (a) of s. 3 of this Act or for or in respect of any act, matter or thing done or purporting to have been done as aforesaid.

"5. The provisions of this Act shall apply to proceedings pending at the commencement of this Act as well as to proceedings brought after the commencement of this Act."

There can be no doubt that this Act, if it is valid, is a complete answer to the respondents' claims. It is invalid only if it is struck by s. 92 of the Constitution. This is the issue, and their Lordships concur in the unanimous opinion of the High Court that s. 92 precludes the appellants from relying on it.

It was conceded by the appellants that the validity of the relevant provisions of the Barring Act would have been no greater and no less if they had been contained in the principal Act itself. Neither prospectively nor retrospectively (to use the words of FULLAGAR, J., 93 C.L.R. at p. 103) can a state law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-state trade should be imposed and that, if they were held to be illegally imposed and collected, they should, nevertheless, be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing state law. As their Lordships were often reminded in the course of the argument, the state is sovereign within its own territory. But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-state trade is invalid as an offence against s. 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted.

It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasised or too often repeated that, in the words of the High Court, the immunity given by s. 92 to trade, commerce and intercourse cannot be transient or illusory. Yet how fugitive would that protection be if effect were given to the argument of the appellants in this case. A trader desiring to engage in inter-state trade and confronted with the provisions of an Act which appear to him to deprive him of the freedom guaranteed by the Constitution may well be content to conform to its requirements, to accept the necessity of applying for licences and to submit, though it may be under protest, to pecuniary exactions in order that he may be able to carry on his business. But he may do so in the firm conviction that he can test the legality of the statutory requirements in a court of law and recover sums of money unlawfully exacted. And let it be supposed that he is right and that those sums were unlawfully exacted and that he can avail himself of the constitutional freedom afforded by s. 92. What is his situation if then he finds himself by a later provision of the same Act or by a subsequent Act once more subjected to the same exactions? The burden on his trade remains just what it was; the freedom of his trade has been in the same degree impaired. In letter and in spirit, s. 92 is in the same measure defeated.

The appellants called in aid the well-known passage from the judgment of DIXON, J., in *James v. The Commonwealth* (2) ((1939), 62 C.L.R. at p. 361), which was echoed in the judgment of the Board in *Commonwealth of Australia v. Bank of New South Wales* (3) ([1949] 2 All E.R. 755) to the effect that juristically s. 92 does not confer private rights on individuals. But it is a transparent misuse of this proposition to proceed to the further proposition that a

- A trader, who, but for the Barring Act, would have a right enforceable at common law, cannot plead that a defence raised under that Act is precluded by the section. In such a case, the trader does precisely what this Board has said he may do. He invokes the judicial power to help him resist legislative action which offends against the section. He assumedly has a common law right to recover money unlawfully exacted and he demurs to a plea founded on a statute which offends against s. 92. The demurrer must prevail.

- The same argument was advanced in a somewhat different form by counsel who urged that the effect of the Barring Act was not to impose a burden on trade but only (as their Lordships understood the argument) to interfere with a right of property, viz., the right to sue for money had and received, which accrued after the trading operation was concluded. In this form the argument has no greater validity. It has become a truism that s. 92 protects the subject only from legislation which takes as its criterion of operation an act of trade or commerce or an essential attribute of trade or commerce. This is a proposition couched in necessarily vague and general terms. To exclude from its scope an enactment whose only object is to validate an exaction which the section renders unlawful would in their Lordships' opinion be a mockery of the spirit of the Constitution.

Their Lordships do not think it desirable to deal at greater length with these appeals, important as are the issues they raise, because they agree so fully with the judgments immediately under review, and with that of FULLAGAR, J., in *Deacon v. Grimshaw* (4) ((1955), 93 C.L.R. 83 at p. 104).

- Their Lordships will accordingly humbly advise Her Majesty that these appeals should be dismissed. The appellants will pay the respondents' costs of the appeals.

Appeals dismissed.

Solicitors: *Light & Fulton* (for the appellants); *Baileys, Shaw & Gillett* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

F

DAVIS *v.* MILLER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), July 13, 1956.]

- G *Town and Country Planning—Enforcement notice—Notice served at time when appeal to the Minister against condition in planning permission pending—Whether invalid—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23.*

- H The respondent on Aug. 1, 1952, was granted permission by the local planning authority to use land for the purpose of garaging and washing down public service vehicles subject to a condition that the user should cease by Sept. 27, 1953. On Oct. 14, 1952, the respondent appealed to the Minister of Town and Country Planning against that condition but asked that no inquiry should be held pending negotiations with the local authority. On Nov. 10, 1953, the local planning authority served an enforcement notice under s. 23* of the Town and Country Planning Act, 1947, on the respondent requiring him to cease the user of the land by Mar. 23, 1954. On Dec. 3, 1953, the respondent requested the Minister to arrange a date for an inquiry and an inquiry was held on Mar. 2, 1954; the Minister dismissed the respondent's appeal on Apr. 20, 1954. The respondent had continued the user of the land and he was charged with an offence under s. 24 (3) of the Act by using the land in contravention of the enforcement notice. On the question whether the notice was a valid notice as, at the time it was served, there was an appeal pending to the Minister,

* The relevant terms of s. 23 (1) are printed at p. 111, letter D, post.

Held: the notice given under s. 23 was a valid notice because there was nothing in that section or in s. 16* limiting the right of a planning authority to serve an enforcement notice pending the hearing of an appeal.

Per LORD GODDARD, C.J.: where a person has appealed to the Minister and proceedings are taken against that person on an enforcement notice that has already been served, the justices should, in a proper case, adjourn the hearing pending the Minister's decision on the appeal (see p. 112, letter E, post).

Appeal allowed.

[For the Town and Country Planning Act, 1947, s. 16, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 513, 524.]

Case Stated.

This was a Case Stated by justices for the County of Gloucester in respect of their adjudication as a magistrates' court sitting at Cirencester. On Jan. 16, 1956, an information was preferred by the appellant, Guy H. Davis, acting on behalf of the Gloucestershire County Council, against the respondent, George James Miller, that whereas on Nov. 10, 1953, by virtue of s. 23 of the Town and Country Planning Act, 1947, the Gloucestershire County Council had served on the respondent, the occupier of land in Cirencester in the County of Gloucester, an enforcement notice requiring him within fifteen weeks after the expiration of the period of twenty-eight days after the service of the notice to cease using the land for the garaging and washing down of public service vehicles and to remove a coach shelter situate on the land, the respondent on Jan. 2, 1956, without the grant of permission under the Town and Country Planning Act, 1947, had used the land in contravention of the notice contrary to s. 24 (3) of the Act.

On Mar. 28, 1947, the respondent had applied for planning consent for the use of the land for coach parking and washing and on Apr. 30, 1947, the Urban District Council of Cirencester, the interim development authority for the purpose of the Town and Country Planning Act, 1932, refused consent for this development. The respondent had appealed to the Minister of Town and Country Planning against this refusal and on Sept. 27, 1947, the Minister issued his decision allowing the respondent to use the land for washing down and garaging public service vehicles for a period of five years expiring Sept. 27, 1952. On Dec. 10, 1947, the respondent had applied to the urban district council for consent to the erection of a temporary coach shelter on the land and on Jan. 20, 1948, consent was granted for the erection of a temporary coach shelter to be removed at the expiry of the consent for the use of the land, namely, Sept. 27, 1952. On June 17, 1952, the respondent had applied to the Gloucestershire County Council, the local planning authority for the purpose of the Town and Country Planning Act, 1947, for permission to retain the coach shelter and to continue to use the land for the purpose of a garage and the washing down of public service vehicles and on Aug. 1, 1952, the county council had granted consent for one year subject to the condition that the building should be removed and the use of the land discontinued by Sept. 27, 1953. On Oct. 14, 1952, the respondent had appealed to the Minister against the condition but had asked the Minister to postpone the arrangements for a local inquiry while he was negotiating with the county council.

The period allowed by the condition having expired on Sept. 27, 1953, the county council had on Nov. 10, 1953, served an enforcement notice on the respondent under s. 23 and s. 24 of the Town and Country Planning Act, 1947, requiring him to cease to use the land for the garaging and washing down of public service vehicles and to remove the coach shelter therefrom within fifteen weeks after the expiration of the period of twenty-eight days after the service of the notice on him. On Dec. 3, 1953, the respondent had requested the Minister

* Section 16 deals with appeals to the Minister from refusal of permission for the development of land.

A to arrange a date for the hearing of his appeal against the condition referred to. On Mar. 2, 1954, a local inquiry was held and on Apr. 20, 1954, the Minister had dismissed the appeal.

The respondent continued to use the land as a coach station and it was being so used on Jan. 2, 1956. It was contended for the appellant that the notice served on Nov. 10, 1953, was a valid notice under s. 23 of the Town and Country Planning Act, 1947, and was effective from Mar. 23, 1954 (being a date fifteen weeks after the expiration of a period of twenty-eight days after the service of the notice). It was contended for the respondent that the notice was invalid, as it was served at a time when there was outstanding an appeal to the Minister and no question of non-conforming user could arise until that appeal had been determined or withdrawn, and as the notice purported to take effect from Mar. 23, 1954, when the Minister's decision on the appeal was outstanding. The justices dismissed the information.

E. H. Blain for the appellant.

A. L. Mildon for the respondent.

D **DONOVAN, J.**, after stating the facts and referring to the contentions of the respondent continued: The question which is raised is purely one of construction of s. 23 (1) of the Town and Country Planning Act, 1947, which provides:

E "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

F The notice is named an enforcement notice by sub-s. (2), and such a notice was served in this case. What the respondent is saying is that it was served too soon, and therefore was a nullity because this appeal was pending. It therefore becomes material to see whether in the Act there is any express provision to the effect that once a notice of appeal has been lodged with the Minister against any conditions which are part of planning permission, that notice operates as a stay and prevents the planning authority from issuing an enforcement notice until the appeal is disposed of. Ordinarily as a matter of practice planning authorities wait, as one supposes, until an appeal has been disposed of. This, however, is rather an exceptional case and is obviously one which was not contemplated by the statute because the appeal had been outstanding for something like two years.

H It had been held up originally at the instance of the respondent and the planning permission which he had obtained had already expired before the enforcement notice was issued. This case is different, therefore, from one where the local planning authority might serve their enforcement notice very soon after the conditions had been decided on and before any appeal had been heard. Neither s. 16, which gives the right of appeal, nor s. 23 contain anything, however, which

I limits the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal. We have been pressed with the curious consequences which might follow, and one sees that in an ordinary case a pending appeal might well operate as a reason for holding that an enforcement notice had been prematurely served. Here, however, the appeal had been outstanding for some time and had been held up mainly by the action of the respondent himself, so that there is certainly no stimulus towards reading into s. 23 of the Act words which would postpone the serving of an enforcement notice until the appeal had been heard. If the appellant is asked to justify the enforcement

notice, all that he has to do is to point to s. 23. The respondent replies that that is not applicable because an appeal is still outstanding. But there is nothing in s. 23 which postpones the right of the authority to serve an enforcement notice until the appeal has been disposed of, and there is nothing in this case which induces me to read the implication into the section that the right of the authority is postponed. A

For these reasons, I think the justices came to a wrong conclusion in this case. B

ORMEROD, J.: I agree, and there is very little that I want to add. The only point which I wish to make is this. When I first considered the matter I was attracted to some extent by the anomaly which could arise if the appellant's interpretation of the Town and Country Planning Act, 1947, was a correct one (as I am satisfied that it is), in the following way. If the owner of the site, having been served with a notice under s. 23 of the Town and Country Planning Act, 1947, agrees to exercise his right under s. 23 (3)* there is nothing to prevent him from doing so and from making an application to the local authority to use the land, which would have the effect of postponing the operation of the notice until such application was determined. That must mean that he has the right to make an application, although he has already made an application which has been refused and although an appeal to the Minister from the refusal is pending. On first consideration that seemed to be such an anomaly as made it necessary to imply in the section some provision to the effect that an enforcement notice should be stayed while an appeal was pending, but I am satisfied on considering the section that that is not so. This anomaly has arisen because this was a situation which was not in the contemplation of the legislature and, in those circumstances, I am satisfied that this appeal must be allowed. C D E

LORD GODDARD, C.J.: I agree. I want to say only that I think that there is a perfectly simple way of safeguarding a person who has appealed to the Minister, where proceedings are taken against that person on an enforcement notice that has already been served, if the Minister has not given his decision. If those were the circumstances, he would submit to the justices before whom he was summoned that he was waiting for the Minister's decision, and that if the Minister gave him planning permission, it followed that he would have committed no offence because then the enforcement notice would have been invalid. On that the justices would decide, I should think, in a proper case to adjourn the case in order to hear whether the Minister allows the appeal. If that were the state of affairs I am quite sure that the Minister, if he were informed, would give his decision promptly. In this case nothing of the sort has happened. The Minister had dismissed this appeal in 1954. The respondent has been developing the land without permission and there is no reason why it should be necessary to serve another enforcement notice. As my brethren have indicated, the point is not dealt with in the Town and Country Planning Act, 1947, but there is nothing which entitles us because an appeal has been lodged, which may or may not be successful, to say that the enforcement notice is not of avail during the pendency of that appeal. F G H

For these reasons, I think the justices came to a wrong decision and the case must go back with a direction to convict.

Appeal allowed. Case remitted to the justices with a direction to convict.

Solicitors: *Field, Roscoe & Co.*, agents for *Guy H. Davis*, Gloucester (for the appellant); *Tarry, Sherlock & King*, agents for *Townsend's*, Swindon (for the respondent). I

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

* I.e., the right to apply for permission for the retention on the land of any buildings or works or for the continuance of any use of the land to which the enforcement notice relates. The sub-section provides that then the enforcement notice is of no effect pending the final determination of the matter.

A

Re BRADLEY (*deceased*).
BRADLEY v. BARCLAYS BANK, LTD.

[CHANCERY DIVISION (Upjohn, J.), July 17, 1956.]

B

Administration of Estates—Administration action—Whether maintainable by personal representative against creditor unwilling to be defendant—R.S.C., Ord. 55, r. 4.

C

A testator appointed his widow and another to be his executors and gave all his property to his widow. The second executor did not prove the will. The executrix found, after probate was granted to her, that the estate was likely to be insolvent, and that matters of difficulty would arise in the administration, a number of the debts being disputed. She desired to have the estate administered by the court, and being unable to find a creditor with an undisputed claim who was willing to be plaintiff, she issued an originating summons under R.S.C., Ord. 55, r. 4, and joined one of the creditors, who had an undisputed debt, as defendant. The creditor objected to being a party.

D

Held: the action was not properly constituted because an action for administration could not be maintained by a personal representative against a creditor who was unwilling to be joined as defendant.

Buckle v. Atleo ((1687), 2 Vern. 37) not followed.

Mandeville v. Mandeville ((1888), 23 L.R.Ir. 339) followed.

E

Per CURIAM: the plaintiff could petition for the estate to be administered in bankruptcy.

[**Editorial Note.** It seems that proceedings are not wrongly constituted if a personal representative, who is unable to join any next-of-kin, or find a creditor to be plaintiff, joins as defendant in proceedings for administration of the deceased's estate a creditor who is willing to be joined (see p. 116, letter I, post).]

F

As to the parties in administration proceedings, see 14 HALSBURY'S LAWS (2nd Edn.) 442, para. 842; and for cases on the subject, see 24 DIGEST 751-754, 764, 7794-7822, 7933-7939.]

Cases referred to:

G

(1) *Smith v. Baker*, (1864), 2 Hem. & M. 498; 71 E.R. 557.

(2) *Buckle v. Atleo*, (1687), 2 Vern. 37; 23 E.R. 634.

(3) *Rush v. Higgs*, (1799), 4 Ves. 638; 31 E.R. 329.

(4) *Mandeville v. Mandeville*, (1888), 23 L.R.Ir. 339.

(5) *Re Van Oppen, Roberts v. Gray*, [1935] W.N. 51; Digest Supp.

(6) *Re Richardson, Richardson v. Richardson*, (1880), 14 Ch.D. 611; 49 L.J.Ch. 612; 43 L.T. 279; 24 Digest 855, 8901.

H

(7) *Re Pink, Elvin v. Nightingale*, [1927] 1 Ch. 237; 96 L.J.Ch. 202; 136 L.T. 399; 39 Digest 157, 494.

Procedure Summons.

I

The plaintiff, Anne Bradley, widow and executrix of the will dated June 20, 1951, of Harold David Bradley, deceased, applied by originating summons for an order (among other orders) for the administration of the estate of the deceased with all necessary and proper inquiries and directions. The facts appear in the judgment.

Raymond Jennings, Q.C., and *P. S. A. Rossdale* for the plaintiff.

C. R. D. Richmond for the defendant.

UPJOHN, J.: This summons raises a point of some importance on the practice of this court in relation to summonses asking for the administration of the estate of a deceased where that estate is believed to be insolvent.

The testator died on Nov. 9, 1955, having by his will, dated June 20, 1951, appointed his widow, the plaintiff, and another to be executors, and having made the plaintiff his universal legatee. The widow proved the will on May 9, 1956, power being reserved to the other executor to prove. So far he has not done so. At the time of probate the estate was thought to be solvent; the assets were thought to be worth some £18,000 and the liabilities some £15,000; but since then matters have changed for the worse, because one asset, namely, the interest of the testator in the partnership business carried on by him in his lifetime, which was thought to be worth about £10,000, is now thought to be worth very much less; moreover, a large number of creditors have come forward since probate, and this increases the claims against the estate. The plaintiff in her affidavit now states her belief that the estate is insolvent.

It is plain, from looking at the schedule of debts, that a number of them are from moneylenders. They are disputed, and it is quite clear that matters of difficulty will arise in the administration of the estate; in particular one creditor has already taken proceedings to enforce a claim for money alleged to be lent, and the plaintiff desires to have directions with regard to the defence of that action. It is thought that there may be other actions of the same nature.

In those circumstances, the plaintiff issued this summons on June 12, 1956, against the defendant, Barclays Bank, Ltd., asking for administration of the estate. Barclays Bank, Ltd., is a substantial admitted creditor for something over £2,000. It is unwilling to be plaintiff; it is equally unwilling to be defendant; and the question I have to consider is whether, notwithstanding the defendant's objection to being defendant, the action is properly constituted and can proceed against it. That matter depends in part on the Rules of the Supreme Court, and in part on the practice of the court.

I must refer to a few of the rules. In R.S.C., Ord. 55, r. 3, it is provided that the executors or administrators of a deceased person, and a series of other persons such as creditors, may take out a summons asking for relief specified in the sub-paragraphs of that rule. R.S.C., Ord. 55, r. 4, provides:

"Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for—(a) the administration of the personal estate of the deceased: (b) the administration of the real estate of the deceased . . ."

So far no difficulty arises. Rule 5 provides who are to be served with the summons, and it is in these terms:

"The persons to be served with the summons under the last two preceding rules in the first instance shall be the following; (that is to say,)—A. Where the summons is taken out by an executor or administrator or trustee— . . . (e) for relief under sub-s. (a) of r. 4, the residuary legatees, or next of kin, or some of them; (f) for relief under sub-s. (b) of r. 4, the residuary devisees, or heirs, or some of them."

It is noteworthy that creditors are not included within those sub-paragraphs. Rule 6 provides:

"The court or a judge may direct such other persons to be served with the summons as they or he may think fit."

I should now turn to Ord. 16, r. 38, which provides:

"Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next-of-kin, or cestui que trust for the administration of the estate or the execution of the trusts."

A It is again noteworthy that creditors are not included in that rule. Rule 39 provides:

B “The court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding, to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.”

Finally, R.S.C., Ord. 70, r. 1, provides:

C “Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.”

A note in the ANNUAL PRACTICE, 1956, p. 1547, headed “Dispensing with strictness of rules” states:

D “Whenever the court is satisfied that substantial justice requires any of its own regulations to be waived, or any slip to be remedied, it will interfere for the purpose; but not where a matter is directly regulated by Act of Parliament.”

E That paragraph is taken from the case which is cited there, *Smith v. Baker* (1) ((1864), 2 Hem. & M. 498).

It is submitted on behalf of the plaintiff that the action is properly constituted; that there is power under R.S.C., Ord. 55, r. 6, for the court to add the bank or to make the bank a defendant, and having regard to the terms of R.S.C., Ord. 70, the fact that creditors are omitted from R.S.C., Ord. 16, r. 38, and R.S.C., Ord. 55, r. 4, does not render the proceedings void or open to other objection.

F The plaintiff has already tried to obtain a friendly creditor to institute proceedings against her; she has, apparently, been unsuccessful. Apart from a few small debts, the creditors are either secured, or have declined to become plaintiffs, or have disputed claims, which would make them unsuitable plaintiffs, and so she says, in those circumstances, the action is properly constituted and ought to be allowed to go forward, notwithstanding that the defendant objects to that course.

G I have been referred to a number of authorities. The first, *Buckle v. Atleo* (2) ((1687), 2 Vern. 37) is of respectable antiquity, have been decided in 1687, and heard before LORD JEFFERIES, L.C. The headnote is:

H “An executor being desirous to apply the assets, as far as they would go, in satisfying the debts, brings a bill against all the creditors, that they might, if they pleased, contest each others debts, and that their preference might be settled. Adjudged on demurrer to be a proper bill.”

The judgment is very short and does no more than restate the headnote. That authority, which is in favour of the course that the plaintiff is taking, was considered in a later authority of *Rush v. Higgs* (3) ((1799), 4 Ves. 638), where (ibid., at p. 643) LORD LOUGHBOROUGH, L.C., expressed doubts about *Buckle v. Atleo* (2). *Rush v. Higgs* (3) was, however, a very different case, for there the creditor was bringing an action at law against the executor, and there having been no decree for administration, the Lord Chancellor refused to grant an injunction restraining the creditor from proceeding at law.

I On the other side there is an Irish case, *Mandeville v. Mandeville* (4) ((1883), 23 L.R.Ir. 339), which is completely in point. The headnote is:

“An executor cannot maintain an action for administration against one

creditor as sole defendant, even where, from the executor being the universal devisee and legatee, no next-of-kin or cestui que trust could become plaintiff or be named defendant.”

That is exactly this case. That case went to the Court of Appeal and was heard by LORD ASHBOURNE, L.C., FITZGIBBON, L.J., BARRY, L.J., and NAISH, L.J.

Before giving judgment they caused a letter to be written to the senior Chancery registrar of the Chancery Division asking (*ibid.*, at p. 341):

“Has the question been raised or considered whether an executor can maintain a suit for administration against one creditor as sole defendant?”

The senior registrar of the Chancery Division replied (*ibid.*, at p. 342):

“In reply to your letter of Mar. 5, I beg to say that we know of no case in which the question to which you refer has been considered, nor can we find that a suit has ever been so instituted. Among other difficulties real estate is only made assets at the suit of a creditor suing on behalf of himself and all other creditors [that, of course, has no application today]. I may, perhaps, be allowed to add that the state of circumstances mentioned in your letter has arisen, and in such cases the course adopted was, that the devisee and legatee procured a friendly creditor to institute a suit on behalf of himself and all other creditors against the devisee and legatee, and the estate was, in this way, administered by the court.”

In the course of his judgment FITZGIBBON, L.J., said (*ibid.*, at p. 343):

“On principle, I cannot see that an executor has any equity to force a creditor to ascertain his legal rights in Chancery when he prefers not to do so.”

The practice has always been, so far as I know, that stated in the letter which I have just read from the senior registrar of this division to the Irish court that a friendly creditor is procured to institute proceedings. That is well illustrated in *Re Van Oppen, Roberts v. Gray* (5) ([1935] W.N. 51). The proceedings there started on the footing that the estate was solvent, and therefore residuary legatees or next of kin had been added, and it was then found that the estate was insolvent, and FARWELL, J., held that, by reason of the insolvency, the proceedings ought to be reconstituted by making the creditors plaintiffs and the executors becoming defendants along with the beneficiaries, the beneficiaries merely remaining defendants in order that their costs might at the proper time be provided for. That was the practice laid down in 1935. The earlier practice, as appears from *Re Richardson, Richardson v. Richardson* (6) ((1880), 14 Ch.D. 611), was merely to give conduct of the proceedings to a creditor. SIR GEORGE JESSEL, M.R., said (*ibid.*, at p. 612):

“The action was instituted by the administratrix against the next of kin: there is no objection to that: the action could not have been instituted by her in any other way. After it had been going on for some time, an order was made giving the conduct of the action to certain creditors of the intestate.”

I do not do more than mention *Re Pink, Elvin v. Nightingale* (7) ([1927] 1 Ch. 237), where CLAUSON, J., held that the action was originally wrongly constituted, but it does not appear whether it was wrongly constituted because the defendant was not a creditor, or whether, had he been a creditor, he would have been a wrong defendant.

In my judgment, the situation is this: If a personal representative cannot join any next of kin because there are none to join as in this case, and if the personal representative cannot find a creditor who is willing to be plaintiff, I do not say that the proceedings are wrongly constituted if a creditor is willing to be joined as defendant. It seems to me that R.S.C., Ord. 70, r. 1, would cover such a

A case where a plaintiff creditor cannot be found, but ought I to insist on an action proceeding against a creditor who is unwilling to be a defendant? In my judgment, I ought not, and I respectfully agree with the observations of FITZGIBBON, L.J., in *Mandeville v. Mandeville* (4) ((1888), 23 L.R.Ir. at p. 343), which I have already read. I cannot see that the personal representative has any equity to bring a creditor into this court against his will.

B It is said that the plaintiff will be exposed to much difficulty and doubt in the administration of the estate if I do not allow these proceedings to continue; but, indeed, s. 130 of the Bankruptcy Act, 1914, deals with the very case which has arisen today. Section 130 (9) provides:

C "A petition for the administration of the estate of a deceased debtor under this section may be presented by the legal personal representative of the debtor; and, where a petition is so presented by such a representative, this section shall apply subject to such modifications as may be prescribed by general rules made under sub-s. (11) of this section."

D Accordingly, the plaintiff is in no difficulty at all; she can petition for the estate to be administered in bankruptcy, and she will be completely protected. Therefore it would be wrong for me to allow this summons to proceed, and I must dismiss it with costs.

Summons dismissed.

Solicitors: *Sidney Pearlman* (for the plaintiff); *Durrant Cooper & Hamling* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

PRACTICE DIRECTION.

Case Stated—Lands Tribunal—Form of Case Stated—R.S.C., Ord. 58A.

G *Case Stated—Tribunal stating case for determination of question of law by Court of Appeal—Form of Case Stated—R.S.C., Ord. 58A.*

In cases in which a written decision has been given by a tribunal, containing all necessary findings of fact and indicating the question or questions of law to be decided by the Court of Appeal, a short and formal Case agreed by the parties, with a signed copy of the decision of the tribunal annexed, will be accepted in place of a Case Stated in the usual form.

H This procedure should be adopted wherever practicable, as tending to save both time and expense.

EVERSHED, M.R.

July 27, 1956.

A

WIGRAM FAMILY SETTLED ESTATES, LTD.
(IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Vaisey, J.), July 11, 12, 17, 1956.]

Surtax—Investment company—Apportionment of income—In accordance with the respective interests of members—Apportionment in proportion to dividend rights—Redeemable preference shares—Whether additional interest from contributions to redemption fund—Finance Act, 1922 (12 & 13 Geo. 5 c. 17), s. 21 (1), (8), Sch. 1, para. 8.

B

The capital of a company comprised one hundred thousand six per cent. cumulative redeemable preference shares of £1 each, reduced to twenty thousand by the operation of a redemption fund created out of the profits and maintained by annual contributions in accordance with the requirements of the company's articles; and other preference shares and ordinary shares. The Special Commissioners of Income Tax gave a direction that the income of the company should be treated as the income of the members for the purposes of surtax under s. 21 (1) of the Finance Act, 1922, and apportioned the income among the members under s. 21 (8) and Sch. 1, para. 8*, in proportion to the dividend rights of the shareholders. The company contended that a higher proportion should be apportioned to the owners of the redeemable preference shares because they had an additional interest in the sums carried to the redemption fund.

C

Held: the company's income had been properly apportioned "in accordance with the respective interests of the members" under Sch. 1, para. 8, since the contributions to the redemption fund represented an application of profits as capital to the redemption of the redeemable preference shares and not a bonus or premium constituting an additional interest in the income of the company.

D

Appeal dismissed.

E

[As to apportionment of a company's income among members, see 17 HALSBURY'S LAWS (2nd Edn.) 297, para. 590.]

For the Finance Act, 1922, s. 21 (1) and (8) and Sch. 1, para. 8, see 12 HALSBURY'S STATUTES (2nd Edn.) 237-240, 245; and for the corresponding provisions of the Income Tax Act, 1952, viz., s. 245, s. 246 (1)-(3), s. 248 (1), s. 249 (1), (2) (a), (b), see 31 HALSBURY'S STATUTES (2nd Edn.) 232-236.]

F

Case referred to:

- (1) *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.*, [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 2nd Digest Supp.
- H

Case Stated.

The appellant company appealed to the Special Commissioners of Income Tax against directions which they had made on it under s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939, in respect of the years 1949-50, 1950-51 and 1951-52 and against the consequential apportionments of the company's actual income for those years among the members of the company. The commissioners confirmed the directions and apportionments and the company accepted the decision on the directions but objected to the apportionments on the ground that they were not made in accordance with para. 8 of Sch. 1 to the Finance Act, 1922.

I

* The terms of the paragraph are printed at p. 121, letter B, post.

A The company was incorporated on Dec. 12, 1932, to acquire and deal in real estate, its authorised capital being £5,000, divided into 3,500 preference shares of £1 each and 1,500 ordinary shares of £1 each, all issued for cash. On Apr. 6, 1933, the authorised capital was increased to £7,500 by the creation of 2,500 participating cumulative preference shares of £1 each. Of these two thousand were issued for cash. By a special resolution on Dec. 12, 1934, it was further
B increased to £57,500 by the creation of fifty thousand six per cent. redeemable preference shares of £1 each, all issued for cash, and by a further special resolution on Apr. 14, 1936, to £107,500 by the creation of an additional fifty thousand six per cent. redeemable preference shares of £1 each, all issued for cash on Apr. 22, 1936, to the holders of the original issue of redeemable preference shares.

C The terms of issue of the first issue of redeemable preference shares were, *inter alia*, that they were to be repaid within five years from Mar. 31, 1935, and that the company was to set aside out of profits available for dividend in each year beginning with the year ended Mar. 31, 1936, a sum of £9,050, to be credited to a redeemable preference shares redemption fund until that fund amounted to £50,000. By the amendments effected by the special resolution of Apr. 14, 1936,
D provisions were incorporated in art. 14A of the company's articles of association requiring the hundred thousand six per cent. redeemable preference shares to be redeemed on the expiration of ten years from Mar. 31, 1935, and for the purpose of such redemption the company was to carry to the credit of a redeemable preference shares redemption fund out of the company's profits which would otherwise be available for dividend £9,050 for the year ended Mar. 31, 1936,
E and £7,797 for every subsequent year. Under art. 14A (c), the profits of the company were to be calculated for the purposes of the article without deduction of any sums payable to the principal shareholders, Mr. Wigram (who was a solicitor of the firm of Messrs. Wigram & Co.) and Mr. Winham (who was the unpaid general manager of the company and proprietor of Messrs. Royds & Co., estate managers), or any firm in which either of them was a partner, in respect
F of services as directors, solicitors, surveyors or otherwise. Both the first and second issues of redeemable preference shares were made to the Equity and Law Life Assurance Society which imposed the provisions as to redemption as a condition precedent to subscribing for the shares in cash. At all material times the company paid dividends on its preference shares but no ordinary dividends.

G By Mar. 31, 1949, the commencement of the first material accounting period of the company, a sum of £77,000 derived from the company's profits in accordance with art. 14A stood to the credit of the redeemable preference shares redemption fund. During the material years transfers to this fund out of taxed profits were made as follows: Year ended Mar. 31, 1950—£4,000; year ended Mar. 31, 1951—
H £10,000 (covering also some arrears); year ended Mar. 31, 1952—£4,000. On Aug. 30, 1950, eighty thousand redeemable preference shares were redeemed by applying £80,000 standing to the credit of the preference shares redemption fund, and thereafter the assurance society's holding of redeemable preference shares was twenty thousand only until the company was liquidated on May 31, 1952.

I The income of the company for the years in which directions were made was: year ended Mar. 31, 1950—£13,154; year ended Mar. 31, 1951—£21,885; year ended Mar. 31, 1952—£13,527. In apportioning this income, the Special Commissioners apportioned to the assurance society as a member of the company such proportion only of the income as was represented by its right to a six per cent. dividend on the amount of the redeemable preference shares held by it at the relevant time, *viz.*, one hundred thousand up to August, 1950, and twenty thousand thereafter.

The company contended: (i) that the apportionments of the actual income of the company to its members did not fully take into account the interest of the assurance society, because, in addition to its entitlement to a six per cent. dividend on its shareholding, that society had also an interest in the credit to the redemption fund made in each of the relevant years out of the company's profits otherwise available for dividend; (ii) that the sums transferred to the credit of the redemption fund were transferred as a matter of contract with the society constituting an interest of the society as a member within para. 8 of Sch. 1 to the Finance Act, 1922: and (iii) that the Special Commissioners ought to have apportioned to the society the sum of £4,000, £10,000 and £4,000, grossed up at the appropriate standard rate or alternatively not grossed up, for the three years in question, in addition to a dividend for each of the years at six per cent. on the society's shareholding. A B C

The Crown contended that the method of measuring the respective interests of the members by reference to dividend rights was in the circumstances the most equitable and fair, having regard not only to income rights and to voting rights but also to the interests of the ordinary shareholders on a winding-up; and in view of the redemption of the majority of the preference shares in August, 1950. D

The commissioners rejected the contention that in the apportionment insufficient account had been taken of the interest of the society as a member, and held that the society's interest was adequately measured by taking six per cent. of the amount of its preference shareholding in the material years and that the guarantee on which the society had insisted as a condition of subscribing for its shares was no more than a security for the eventual repayment of its capital and that it would have been wrong to impute a double interest to the society. They therefore affirmed the principle on which the apportionments had been made. E
The company appealed.

Cyril King, Q.C., and P. J. Sykes for the company.

J. Pennyquick, Q.C., and Sir Reginald Hills for the Crown. F

Cur. adv. vult.

July 17. **VAISEY, J.**, read the following judgment: This is an appeal from the Special Commissioners who on June 7 and 8, 1955, heard and decided an appeal by the company, Wigram Family Settled Estates, Ltd. (in liquidation), the respondents being the Crown, represented by the Inland Revenue Commissioners. There were then two points, of which only one remains. Now again, before me, the appellants are the company and the respondents are, as before, the Crown. G

The question arises under s. 21 of the Finance Act, 1922, to the terms of which in order to make this judgment intelligible I must allude briefly. The preamble to the section states the object of the enactment as being to prevent the avoidance of the payment of super-tax (now surtax) through the withholding from distribution of income of a company which would otherwise be distributed. The section then provides that, where it appears to the Special Commissioners that any company to which the section applies has not within a reasonable time after the end of an accounting period distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax a reasonable part of the actual income from all sources for the period in question, the Special Commissioners are entitled, by notice in writing to the company, first to direct that for purposes of assessment of surtax the income of the company should for the relevant period be deemed to be the income of the members and, secondly, to apportion the amount thereof among the members as therein provided. H I

A Pausing there, the company argued before the Special Commissioners that no direction at all ought in the circumstances of this case to have been given. That point has been abandoned by the company and is not now before me. The only point is as to the apportionment among the members, i.e., whether it has been done on a correct basis.

B Now s. 21 (8) incorporates Sch. 1 to the Act, and in particular para. 8, which is, so far as relevant, in these terms:

C “ The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members, and the income as apportioned to each member . . . shall, for the purposes of super-tax, be deemed to represent . . . income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require and shall be deemed to be the highest part of that income.”

D Paragraph 10 of the same Schedule provides for the service on the company of notice of any apportionment and enacts that a company which is aggrieved by any such notice shall be entitled to appeal to the Special Commissioners on giving an appropriate notice. It was under that provision that the appeal to the Special Commissioners was lodged, and it is from their decision rejecting such appeal on the sole remaining outstanding point that this case now comes before me.

E The company was incorporated on Dec. 12, 1932. Its original capital was increased from time to time as set out in detail in the Case, but at the relevant times down to the liquidation of the company, which took place on May 31, 1952, its capital structure was as follows:—

F First in order comes an issue originally of one hundred thousand of six per cent. cumulative redeemable preference shares of £1 each (which I will describe as “ Equity’s shares ” because they were at all material times held by the Equity and Law Life Assurance Society). Secondly, two thousand five hundred six per cent. participating cumulative preference shares of £1 each, were created. Thirdly, there was an issue of six per cent. cumulative non-participating preference shares and, finally, there were some ordinary shares. These various classes of shares ranked for dividend in the order in which I have named them.

G The next point to be observed is that the holders of Equity’s shares were contractually entitled under the company’s articles of association to the benefit of a redemption fund created out of the profits of the company’s trading for the purpose of providing for the redemption of Equity’s shares. By the operation of that redemption fund, eighty thousand of such shares had in fact been redeemed before Apr. 5, 1951, the amount of Equity’s shares issued and outstanding being thereby reduced to twenty thousand.

H Now the arguments advanced on behalf of the company can be very shortly stated as follows. It is said that the apportionments of the actual income of the company between its members ought to have taken into account two facts, that I is to say not only the fact that there was a first preferential six per cent. dividend on Equity’s shares but also the fact that the holders of Equity’s shares had an interest in the sums liable to be, and in fact, credited to the redemption fund in each of the relevant years. Seeing that such credits were made out of the profits of the company which would otherwise have been available for dividend and that the sums transferred to the credit of the redemption fund were so transferred as a matter of contract, the company argues that an interest accrued to the holders of Equity’s shares as members within the meaning of para. 8 of

Sch. 1, the sums in question being in fact £4,000 for 1950-51, £10,000 for 1951-52 and £4,000 for 1952-53. A

Counsel for the company put his case very attractively in the form of a series of four propositions, as follows: He said: (i) that by s. 21 of the Finance Act, 1922, the actual income of the company was deemed to be the income of the members and fell to be apportioned accordingly; (ii) that under para. 8 of Sch. 1 to the Act such apportionment had to be made in accordance with the interests of the members; (iii) that in each of the years under appeal the holders of Equity's shares had an interest in the company's income to the extent of six per cent. per annum on their paid-up capital and also an interest in the sums carried to the redemption fund; and (iv) that such last-mentioned interest must be taken into account as well as the six per cent. B

On the other hand, it was urged by the Crown that the simple method of measuring the respective interests of the members by their dividend rights was in the circumstances the fair and proper method, and attention was called to the fact that the voting rights belonged exclusively to the ordinary shareholders. The Special Commissioners rejected the company's contentions and held in favour of the Crown that it would have been wrong to take into account the redemption rights afforded to Equity's shares, and with that view I agree. C

It seems to me that the contractual guarantee providing for the creation of the redemption fund was, as the Special Commissioners put it, in essence merely a security for the eventual repayment of the capital and in no way and in no sense a double interest attached to the shares—double, that is, as consisting of the six per cent. dividend and also of the benefit of the credits to the redemption fund. It seems to me that the fallacy in the company's argument consists in treating the redemption fund as providing something in the nature of a bonus or premium to the holders of Equity's shares, whereas in truth all that it did was to provide for their payment off or redemption, which may or may not have been welcome or beneficial to such holders. When the credits were made to the redemption fund, Equity's shares remained six per cent. first preference shares, exactly as they were before. The holders of the junior classes of shares were all pro tanto benefited and, as it would appear that all the prior classes of shares were very well secured or covered, the only people who really gained by the application of the appropriate amounts of profits to the redemption fund were the holders of the ordinary shares. D

I was at first puzzled by this problem and it may be that my conclusions are unduly simple. However, it seems to me that the sums carried to the redemption fund, though they originated in income, were in fact converted into, and applied as, capital. The holders of Equity's shares could never have been liable either to income tax or to surtax except in regard to their six per cent. dividends. E

I was referred to *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (1) ([1945] 1 All E.R. 492). LORD RUSSELL OF KILLOWEN, after pointing out that everyone who falls within the extended definition of "member" is not necessarily to be included in an apportionment, said this (*ibid.*, at p. 497): F

"In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition, and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions." G I

Applying that principle, it seems to me that the holders of Equity's shares are perhaps less, and certainly not more, interested in the income carried to the redemption fund than any of the other classes of shares, and particularly the holders of the ordinary shares. I think the Special Commissioners applied the appropriate test and came to the right conclusion.

The result of this is apparently that there is now no disagreement as to the

A right figures, and nothing remains for me to do except to dismiss this appeal with the usual consequences as to costs.

Appeal dismissed.

Solicitors: *Wigram & Co.* (for the company); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

B

C

GREIG (INSPECTOR OF TAXES) v. ASHTON.

[CHANCERY DIVISION (Harman, J.), July 5, 6, 1956.]

D *Income Tax—Double taxation—Relief—U.S.A. tax allowable against U.K. tax—Alteration in rate of exchange between initial payment and refund of U.S.A. tax—Effect on U.K. tax liability—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 347, Sch. 16, para. 2 (1)—Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946 (S.R. & O. 1946 No. 1327), Schedule, art. XIII (2).*

E The taxpayer, an author resident in the United Kingdom, made profits from her vocation in the United States of America in 1946 and suffered United States tax thereon of \$24,476 in part by deduction by her employers and in part by payment. In 1949 the rate of exchange was altered from \$4.03 to the £ to \$2.80 to the £. In 1950 the taxpayer received a refund of \$12,862 in respect of this assessment, leaving her ultimate payment at \$11,614. The Crown computed the credit allowable to the taxpayer in respect of foreign tax on the income for income tax purposes under the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, at the difference between the United States tax initially suffered (\$24,476) converted at \$4.03 to the £ and the refund converted at \$2.80 to the £.

F **Held:** the credit allowable for the foreign tax was the amount ultimately found to be payable (\$11,614) converted at \$4.03 to the £, being the rate applicable in the year in which the tax became payable, the alteration in the rate of exchange thereafter being an extraneous circumstance having nothing to do with liability for tax.

Appeal dismissed.

H [For the Income Tax Act, 1952, s. 347 and Sch. 16, para. 2 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 333, 539.

For the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, Schedule, art. XIII, see 11 HALSBURY'S STATUTORY INSTRUMENTS 89.]

Case Stated.

I The taxpayer appealed against additional assessments to income tax under Case II of Sch. D to the Income Tax Act, 1918, in the sums of £1,362 for 1947-48 and of £664 for 1949-50. The only matter in dispute was the credit allowable for United States tax payable on her earnings in the United States of America. The taxpayer was resident in the United Kingdom in each of the material years and was assessable to tax under Case II of Sch. D in respect of her professional emoluments as script-writer, playwright and producer, whether those emoluments arose in the United Kingdom or elsewhere. In each of the calendar years

1946 and 1948 she earned professional emoluments in the United States and those emoluments were included in the profits assessed to income tax in the United Kingdom in first assessments for 1947-48 and 1949-50. The assessments the subject of appeal were additional assessments by which the inspector of taxes sought to reduce the amount of credit allowed to the taxpayer for United States tax against United Kingdom tax assessed in the first assessment, such credit being allowed under the schedule to the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946 (S.R. & O. 1946 No. 1327) reproducing arrangements specified in art. XIII of a convention made between the government of the United Kingdom and the government of the United States and in para. 2 (1) of Sch. 16 to the Income Tax Act, 1952. The United States tax payable by the taxpayer in respect of income from sources within the United States was \$11,614 in 1946 and \$16,438 in 1948. In 1946 the taxpayer's employer in the United States withheld \$21,250 from her earnings in respect of United States tax and the taxpayer paid a further \$3,226 United States tax before leaving for England in October, 1946, making a total of \$24,476 paid or suffered. In 1948 her employer in the United States withheld \$23,699 in respect of tax. On a date or dates in 1950 the taxpayer received a refund of \$12,862 plus interest for 1946 and a refund of \$7,261 plus interest for 1948. The net amount of United States tax borne by her was thus \$11,614 for 1946 and \$16,438 for 1948.

The rate of exchange in 1946 and 1948 was \$4.03 to the £ sterling. In September, 1949, the £ sterling was devalued in terms of United States dollars and in 1950 the rate was \$2.80. The Crown computed the amount of relief due to the taxpayer for 1946 at £1,480, being the difference between the total tax payments for that year of \$24,476 converted at the rate of \$4.03 to the £ and the refund of \$12,862 converted at \$2.80 to the £; and for 1948 at £3,287 similarly calculated. The taxpayer computed the amounts at £2,882 and £4,079 respectively, i.e., \$11,614 and \$16,438 converted at \$4.03 to the £.

The Crown contended that the amount of United States tax payable was not ascertained until the taxpayer's claims for repayment were approved by the proper authorities and the consequential repayments were made, and that accordingly the amount of the credit allowable was the difference between the sterling equivalent of the payments by her and the sterling equivalent of repayments to her. The taxpayer contended that: (i) the term "payable" in art. XIII (2) of the convention did not refer to a term of time but was used to measure the amount of foreign tax; (ii) that the foreign tax "payable" was constant throughout and the amount paid or suffered in the specific year did not enter into the computation; (iii) that the foreign tax "payable" within art. XIII (2) was never more nor less than the final figure after the refund, the amount of which was never a part of foreign tax payable because it belonged to the taxpayer (the United States authorities paid interest on it); and (iv) the \$11,614 and \$16,438 foreign tax ultimately found to be payable by the taxpayer, having been paid or suffered when the rate of exchange was \$4.03 to the £, the credit to be given in sterling against United Kingdom tax should be calculated accordingly. The commissioners held that the United States tax qualifying for relief was payable and was paid in 1946 and 1948 respectively, that no such tax was payable or was paid in 1950, and that the rate of exchange to be adopted was therefore \$4.03 to the £, which was in force in 1946 and 1948. They therefore allowed the appeal and discharged the assessments. The Crown appealed. The judgment and the headnote to this report are limited to the tax position arising out of the taxpayer's earnings of 1946. Both assessments were discharged as a result of the dismissal of the appeal.

J. G. Foster, Q.C., and Sir Reginald Hills for the Crown.

H. B. Magnus for the taxpayer.

A HARMAN, J.: I find this a confusing matter. The respondent taxpayer, Winifred Ashton, better known under her nom-de-plume of Clemence Dane, following her vocation as an author, made profits in the United States of America in 1946. In respect of part of those profits, sums were deducted by her employer, apparently under a system analogous to our P.A.Y.E., to the tune of some \$21,000. When she left the United States in October, 1946, she was required
B to pay a further \$3,000 odd. She had therefore suffered tax up to that point of \$24,000. However, that was not her true liability to the United States tax, as was proved by the fact that some years later she recovered through her United States agents \$12,000 odd over-assessed, the correct liability being thus ascertained at \$11,000 odd. This did not happen, however, until 1950.

Being resident in the United Kingdom, the taxpayer is liable to pay tax in
C the United Kingdom on her United States earnings, but there is between the United Kingdom and the United States one of these conventions which regulate double taxation, by virtue of s. 347 of the Income Tax Act, 1952, which re-enacted provisions* of the Finance (No. 2) Act, 1945, which were applicable to these transactions. The machinery is worked out in Sch. 16 to the Act of 1952, and the only part of that Schedule which is said really to affect this matter is the
D provision in para. 15 which permits reassessments in respect of foreign tax liability to be made within six years after any readjustment may have been made by the foreign tax authority.

The portion of the convention providing for double taxation relief with the United States appears in the Schedule to the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946 (S.R. & O. 1946 No. 1327), of which art. XIII (2)
E provides:

"Subject to such provisions . . . as may be enacted in the United Kingdom, United States tax payable in respect of income from sources within the United States shall be allowed as a credit against any United Kingdom tax payable in respect of that income."

F It is agreed that "payable" in one sense must mean "paid"; in other words, credit cannot be given in England for tax which has not been paid in the United States. So that anybody who, in respect of income from sources within the United States (i.e., here, the work done by the taxpayer in the United States), finds himself liable for tax to the United States is allowed a credit against the
G United Kingdom tax payable in respect of the same income. Here the ultimate tax for which the taxpayer was liable in respect of this source of income was \$11,000 and that is the credit for which she applied and which she obtained against her United Kingdom liability for these same profits.

That might have been the end of the matter but for the fact that when she got the relief in 1950 the rate of exchange between the United Kingdom and the United States had altered from that which it was in 1946 or 1947. In one case
H it was roughly \$4 to the £, in the other case \$2.80 to the £. That occurred in 1949. The result is that if the taxpayer gets a credit of \$11,000 at \$4 to the £, and by reason of the dilatory repayment made by the United States fiscal authorities gets repaid at a time when dollars are \$2.80 to the £, she will in a sense have made a profit on the exchange. It is that profit in effect which the Crown seeks to charge by way of additional assessment.

I To that her answer is that the credit to which she was entitled was credit against her United Kingdom tax of the year 1947 on her activities in 1946, that in fact she had too great a credit because she should have had only the credit for the final amount of the United States tax, not for the initial gross sum. What, therefore, ought to be done, she submits, is to make a readjustment in the amount

* The provisions so re-enacted were s. 51 (1), (4), (5) and (6) and s. 56 (5), (6). Orders in Council made under s. 51 of the Act of 1945 were continued in force by virtue of s. 528 (2) of the Income Tax Act, 1952.

of the credit; but as the whole transaction is one which was or should have been completed in 1947, then the state of things ruling in 1947 must be the governing factor. To that the Crown replies that there should have been two transactions. First, the credit of \$24,000 in 1947; then, her recovery of \$13,000 of those \$24,000. Then, the Crown argues, the \$13,000 are the Crown's because the taxpayer was given too much credit. When she received the \$13,000 the rate was \$2.80 to the £, and therefore, the Crown contends, that is the rate at which the Crown is entitled to treat itself as in credit against her.

All this is highly artificial, because in fact none of those things happened. There never was any claim by the taxpayer of a credit of \$24,000. As we know, fiscal wheels grind slowly. She claimed credit for \$11,000 at the rate of \$4 to the £, that was the credit she got and that was the right credit which she should have had, because that follows the words of art. XIII of the convention. The fact that the United States authorities were slow about repaying or that the exchange had altered in the meanwhile, so that when they repaid her what they repaid was worth more to her in pounds, when one looks at it carefully, seems to me to be entirely irrelevant. I do not think it has got anything to do with the Crown at all. The money might have been repaid earlier and left in the United States and the same profit would have been made, which is not a profit which the Crown could tax. It is a mere accident, in my judgment, and the Special Commissioners were quite right in upholding the taxpayer's contention, and the Crown's contention in this case is quite wrong.

I was told that some question of principle was involved, and that I ought to make some kind of rule that would apply to all cases. I am quite unable to do that. I think that the Special Commissioners came to the right conclusion. I reject the Crown's contention because the alteration in the rate of exchange is purely an outside circumstance which has nothing to do with the liability for tax nor the way in which the convention ought to be related to the law. What effect that has on other cases I need not consider. I dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Heald, Johnson, Garton & Co.* (for the taxpayer).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

NOTE.

FALLAIZE v. TROUGHTON & YOUNG, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), July 16, 1956.]

B

Building—Building regulations—Application to certain operations—Workman making hole in reinforced concrete with power-operated tool—Whether “cutting . . . concrete . . . by means of a . . . tool”—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 84, Sch. 2 (2).

C

[For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 84, Sch. 2, see 8 HALSBURY'S STATUTORY INSTRUMENTS 243, 247.]

Case Stated.

This was a Case Stated by justices for the petty sessional divisional of Coleshill, Warwickshire, in respect of their adjudication as a magistrates' court.

D

An information was preferred by the appellant, John Sidney Fallaize, one of Her Majesty's Inspectors of Factories, against the respondents, Troughton & Young, Ltd., who were electrical contractors undertaking operations to which the Factories Act, 1937, s. 107 and the Building (Safety, Health and Welfare) Regulations, 1948, applied. The information charged the respondents with a breach of reg. 84 in that suitable goggles or effective screens were not provided

E

to protect the eyes of persons employed in the process of cutting reinforced concrete by means of a portable tool driven by mechanical power, a process specified in Sch. 2* to the regulations, and that in consequence of the contravention one Arthur Beck (called in this report “the workman”) suffered bodily injury whereby the respondents were guilty of an offence and were liable to pay a fine in accordance with the Factories Act, 1937, s. 133. The workman,

F

who was employed by the respondents on the installation of electric cables in a power station, was drilling holes in a reinforced concrete ceiling: the holes were approximately three-eighths of an inch in diameter. He was using a portable tool driven by an electric motor, known as a Kango hammer. To perform the operation a chisel, pointed at the end, was fixed to the hammer.

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The chisel was fluted and had four cutting edges starting from the point and running down its sides. The chisel was fitted with an arm which was used to turn it round while the hole was being drilled. The effect of turning it round was that the cutting edges made the hole circular and cleared away waste material. The tool, when in action, moved the chisel with a series of quick hammer-like blows. The workman held the tool with the point of the chisel

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directed upwards against the place where the hole was to be drilled and while he did so an assistant moved the arm of the chisel so as to turn it in the hole. The arm had been moved forwards or backwards through one hundred and eighty degrees. No goggles or effective screens were provided to protect the workman's eyes. A piece of concrete and steel from the ceiling hit the workman in the eye and injured him. It was contended by the respondents that the operation was not “cutting” of concrete within the meaning of para. (2) of Sch. 2 of the regulations and that the word “cutting” was to be construed ejusdem generis with “dressing” and “carving” in that paragraph. The justices dismissed the information.

I

S. B. R. Cooke for the appellant.

John Thompson, Q.C., and E. G. H. Beresford for the respondents.

* See p. 128, letter B, post, for the terms of the relevant paragraph of Sch. 2.

LORD GODDARD, C.J.: The short point raised by this case is whether drilling a hole in concrete by means of a portable mechanical tool, that is, a tool driven by mechanical power which has cutting edges, is cutting within the meaning of para. 2 of Sch. 2 to the Building (Safety, Health and Welfare) Regulations, 1948, which schedule specifies the processes to which reg. 84 of the regulations applies. Paragraph 2 reads:

“(2) Cutting, dressing or carving of stone, concrete or similar materials by means of a portable tool driven by mechanical power.”

What happened in this case was that holes were being drilled into concrete by means of a straight tool having cutting edges. The justices thought that that process did not involve cutting. This court takes the view that it does involve cutting. The hole could not be made without cutting out the concrete. Counsel for the respondents concedes that the hole is cut but contends that what is done is to cut the surface and thereby make a hole because the hole is a void. I think that drilling holes in a concrete wall obviously involves cutting because the stone or concrete is cut out in order to put something else in.

For these reasons, I think that the justices were wrong, and the case must go back with a direction to convict.

ORMEROD, J.: I agree. The point is simply whether the process involves the cutting of concrete within the meaning of Sch. 2 (2) to the regulations. Having seen the tool, and the matter having been quite clearly described and set out in the Case Stated, I find it difficult to see how this process cannot be included in the word “cutting”. The tool in question has four sharp edges which are described as cutting edges. The tool is revolved in the concrete as it is hammered in and its purpose is to disintegrate the surface of the concrete so that a hole can be produced. I have not the slightest doubt that this process comes within “cutting” which is referred to in Sch. 2 (2).

DONOVAN, J.: I also agree. Counsel says that there is ambiguity, and with that one agrees but, like my brothers, I find no ambiguity in the word “cutting”; and on the other hand it is equally important that workmen’s eyes should not be put in greater peril by the narrow and technical meaning which is sought to be put on the word “cutting” in the regulations.

Appeal allowed. Case remitted to the justices with direction to convict.

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the appellant); *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the respondents).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

A

WALSH v. LORD ADVOCATE.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Goddard, Lord MacDermott, Lord Keith of Avonholm and Lord Somervell of Harrow), June 11, 12, 13, July 19, 1956.]

B *National Service—Person liable to be called up for service—Jehovah's Witnesses—Regular minister of a religious denomination—National Service Act, 1948 (11 & 12 Geo. 6 c. 64), Sch. 1, para. 2.*

The appellant, who was born in 1934, held the offices of "pioneer publisher" and "congregation servant" in the body called Jehovah's Witnesses. He claimed exemption from service in the armed forces of the

C

Crown on the ground that he was a regular minister of a religious denomination within para. 2 of Sch. 1 to the National Service Act, 1948. At first instance it was held that the body known as Jehovah's Witnesses constituted a "religious denomination" within para. 2, and, for the purposes of this case on appeal, the Crown conceded that the body was such. Jehovah's Witnesses

D

were a body of which the head was the president and directors of a non-profit making corporation incorporated in Pennsylvania in the United States of America. Every member was, by virtue of his membership, "a minister or servant of God and his gospel". When an individual determined to become a witness and minister, he first took courses of study with a congregation. His development was supervised by a company (or congregation) servant. When he was considered to be "truly dedicating his life to the service of God" a discussion was held with him concerning the meaning and responsibility attached to ordination. He was then baptised, and so became a minister. There was no lower age limit for ordination, and the appellant was baptised at the age of twelve years three months. At the age of fifteen years he was appointed pioneer publisher, and he was appointed congregation servant in the Dumbarton Congregation when he was nearly eighteen years old. Ministers might be appointed to any of some fourteen posts, while a congregation might number as few as ten persons.

E

F

Held: the appellant was not a regular minister within para. 2, because the constitution of the sect was not such as to create any such office as a "regular minister", which connoted the setting apart of a class forming part of the denomination in question and acknowledged by that denomination as having a distinguishing and higher status in spiritual matters.

G

[For the National Service Act, 1948, Sch. 1, para. 2, see 22 HALSBURY'S STATUTES (3rd Edn.) 103.]

H

Cases referred to:

(1) *Dickinson v. United States of America*, (1953), 346 U.S. 389.

(2) *Lord Advocate v. Ballantyne*, (1859), 3 Irv. 371.

(3) *Kipps v. Lane*, (1917), 86 L.J.K.B. 735; 116 L.T. 95; 81 J.P. 117; 19 Digest 537, 3974.

(4) *Guy v. Mackenna*, 1917 S.C.(J.) 59.

I

(5) *Saltmarsh v. Adair*, 1942 S.C.(J.) 58; 2nd Digest Supp.

Appeal.

Appeal by Douglas Walsh against an interlocutor dated July 21, 1955, of the Second Division of the Court of Session dismissing his appeal against interlocutors dated Jan. 7, 18, 1955, of the Lord Ordinary (LORD STRACHAN). The Lord Ordinary held that the appellant was not a regular minister of a religious denomination within the National Service Act, 1948, Sch. 1, para. 2. The facts appear in the opinion of LORD MORTON OF HENRYTON.

Sir Lynn Ungood-Thomas, Q.C., S. H. Noakes and G. C. Emslie (of the Scottish Bar) for the appellant. A

The Lord Advocate (W. R. Milligan, Q.C.), H. R. Leslie, Q.C., and M. Kissen, Q.C. (all of the Scottish Bar), for the respondent.

The House took time for consideration.

July 19. The following opinions were read. B

LORD MORTON OF HENRYTON: My Lords, the appellant was born on Nov. 1, 1934. He holds the offices of "pioneer publisher" and "congregation servant" in the body now known as Jehovah's Witnesses. Shortly before Jan. 10, 1953, the appellant had some discussion with officials of the Ministry of Labour and National Service as to his liability to be called on to serve in the armed forces of the Crown under the National Service Act, 1948. On Jan. 10, 1953, the Ministry sent him a letter in the following terms: C

"Consideration has been given to your claim to non-liability under the above-named Acts but this department is of the view that a member of the Society of Jehovah's Witnesses cannot be regarded as coming within the definition of a regular minister of a religious denomination for the purposes of exemption from liability under para. 2 of Sch. 1 of the National Service Act, 1948. I have, therefore, been instructed to inform you of this decision, and request you to attend at this office as soon as possible in order that your registration may be effected. Should you so desire, you can register as a conscientious objector." D

The result of this letter was that the appellant on Jan. 15, 1953, issued a summons asking E

"1. For a declarator (a) that the body of Christian people known as Jehovah's Witnesses forms and is a religious denomination for the purposes of para. 2 of Sch. 1 to the National Service Act, 1948, and (b) that the [appellant], by virtue of his appointments as pioneer publisher and company servant of the said body, is a regular minister of that religious denomination. F

"2. For an order, in terms of s. 21 (1) (a) of the Crown Proceedings Act, 1947, declaring that the [appellant] not being a person subject to registration for the purposes of s. 8 (1) of the National Service Act, 1948, the Minister of Labour and National Service has no power to serve or cause to be served upon the [appellant] a notice requiring him to submit himself for medical examination." G

The office referred to in the summons as "company servant" is now known as "congregation servant".

The relevant provisions of the National Service Act, 1948, are as follows:

"1. (1) Subject to the provisions of this Part of this Act, every male British subject ordinarily resident in Great Britain who has attained the age of eighteen years and has not attained the age of twenty-six years and is not a person mentioned in Sch. 1 to this Act shall be liable to be called upon to serve in the armed forces of the Crown . . . H

"6. (1) The Minister may from time to time by public notice require male persons who have attained such age as may be specified in the notice (not being less than seventeen years and eight months), being persons who if they had attained the age of eighteen would have become liable under this Part of this Act to be called up for service in the armed forces of the Crown, to be registered for such service under this Part of this Act. I

"8. (1) The Minister may from time to time cause to be served on any person subject to registration a written notice in the prescribed form requiring that person to submit himself to medical examination by a medical board at such place and time as may be specified in the notice . . .

- A "Schedule 1. Persons not liable to be called up for service . . . 2. A man in holy orders or a regular minister of any religious denomination."

When the case was heard by the Lord Ordinary (LORD STRACHAN) there were two issues to be determined—(a) Was the body of persons known as Jehovah's Witnesses a "religious denomination" within the meaning of the Act of 1948? (b) Was the appellant a "regular minister of any religious denomination" within the meaning of that Act?

- B

The Lord Ordinary thus describes the evidence given before him:

- C "A very great deal of evidence was adduced for the [appellant], the shorthand notes extending to no less than 762 pages. In my opinion the relevant evidence could have been stated within much shorter compass, but as this is a very unusual case, and is indeed a test case from the point of view of Jehovah's Witnesses, and as three of their headquarter's staff came specially from America to give evidence, I took the view that it was desirable to give them the fullest opportunity of putting forward their case and I was not disposed to curtail the evidence which they offered. I had in mind also that this is really the first opportunity in this country for an inquiry into the relevant facts in a civil process. A similar question has been raised in earlier cases but it has always previously been initiated in a summary prosecution with the consequent limitations upon a right of appeal."

- D

In his judgment the Lord Ordinary described the history, beliefs and organisation of the body now known as Jehovah's Witnesses, stated the facts relating to the appellant and to the offices which he holds, and arrived at the conclusion that

- E Jehovah's Witnesses were a religious denomination within the meaning of para. 2 of Sch. 1 to the Act of 1948. As to the appellant, the Lord Ordinary expressed his final views as follows:

- F "I therefore hold that the [appellant] is not a regular minister of a religious denomination by virtue of his appointment as a congregation servant, and that he is not such a minister by virtue of his appointment as a pioneer publisher. I am also of opinion that the combination of both appointments does not make him a regular minister because, as I have indicated, it seems to me that the pioneer appointment really adds nothing material which could bring him within the category of a minister. The [appellant's] case therefore fails."

- G The Lord Ordinary therefore granted decree of declaration in terms of conclusion 1 (a) of the summons but assolzied the respondent from conclusions 1 (b) and 2.

From this decision the appellant appealed, and at the hearing of the appeal by the Second Division the respondent did not seek to challenge the finding of the Lord Ordinary that the body known as Jehovah's Witnesses was a religious denomination. Counsel for the respondent, however, intimated to the court that this concession was only made for the purposes of the present case. The same attitude was adopted by the Lord Advocate in this House, and in his written Case the respondent stated that he desired to reserve his right, if so advised, to maintain in a subsequent case that Jehovah's Witnesses are not a religious denomination and, in any event, are not such within the meaning of the Act of 1948. Thus the only question which arose for decision in the Second Division and

- H now arises for decision in your Lordships' House is whether the appellant was, in January, 1953, "a regular minister of any religious denomination" within the meaning of the Act of 1948. The three learned judges of the Second Division—the Lord Justice-Clerk (LORD THOMSON), LORD PATRICK and LORD MACKINTOSH—concurred in answering this question in the negative and dismissed the appeal.

- I My Lords, notwithstanding a very able argument by counsel for the appellant, I find myself in agreement with each one of the three very powerful judgments delivered by the Second Division, and for this reason I have decided not to detain your Lordships by examining the whole matter afresh and stating my conclusion

in words which can be no improvement on the words chosen by these three learned judges. A

I feel, however, that I should give my own answer to a question which naturally arose in the course of the hearing—Who can be said to be a regular minister of this denomination, if the appellant does not answer that description? In my view the organisation of Jehovah's Witnesses is of such a kind as to create no such office as a "regular minister" in the sense in which these words are used in the Act of 1948. At the head of the organisation are the president and directors of the Watch Tower Bible and Tract Society, a non-profit making corporation incorporated under the laws of the State of Pennsylvania, U.S.A. To quote the appellant's condescendence 4: B

"All authoritative pronouncements among Jehovah's Witnesses throughout the world are made by the president of the society who is a witness and chief spokesman of Jehovah's Witnesses. The seven directors of the society, who are elected by the members, are for practical purposes, the spiritual governing body on earth of Jehovah's Witnesses." C

At the other end of the organisation is a person who has just become a member of the body of Jehovah's Witnesses by baptism, and I quote the appellant's condescendence 3: D

"It is one of the essential tenets of the body that every member of the body is by virtue of his membership a minister or servant of God and his gospel. Jehovah's Witnesses believe that, in fulfilment of biblical prophecy, they are members of the earthly part of a theocratic organisation. Each believes that having dedicated himself to do the will of God as evidenced by baptism in the presence of witnesses, his ministry and manner of witnessing is directed by Jesus Christ through his visible instrument on earth after-mentioned and that he must, as required by the scriptures, preach to all who will listen that the Kingdom of God is at hand. When an individual determines to become a witness and minister he first begins to take courses of study with a company (now congregation). He is then known as an adherent. The period of preparation is variable depending upon individual diligence, aptitude and concentration. The 'company servant' after-mentioned supervises his development as shown by his participation in classes held by the company and by his activities as a student gaining practical experience of field ministry. His general course of conduct, devotion to the church, the renunciation of the affairs and pleasures of the world are all factors considered to be indicative of the adherent's preparedness for ordination. When it is considered that an adherent is truly dedicating his life to the service of God, a discussion is then held with him concerning the meaning and responsibility attached to ordination. It is once more emphasised to the adherent that the individual who dedicates himself to the service of God and is ordained by God cannot turn back and that all his future life time, energy and assets become the property of God, following upon the binding covenant of dedication. The adherent then attends a baptism ceremony of Jehovah's Witnesses, which is held at each circuit assembly (twice a year), district assembly (once a year) and national assembly (once every three or four years). At the ceremony there are prayers and a discourse on dedication is given by the district servant or circuit servant who also questions the candidate. If he satisfactorily answers the questions put to him, he then proceeds to the final stage of the ceremony, complete immersion in water, which is the outward and visible symbol of the binding covenant of dedication. The adherent once thus ordained becomes a witness and a minister commissioned to preach the gospel of the Kingdom and is acknowledged as such by the governing authority of Jehovah's Witnesses. He thereafter is required to devote his life, or such part of it as is not occupied in the essential discharge of family responsibilities, to preaching the gospel in the same E F G H I

A way as did Jesus Christ and his disciples, by preaching from house to house, conducting home Bible services, preaching on the street corners, distributing literature containing printed sermons, delivering public lectures and preaching in the schools and congregations of Jehovah's Witnesses. There is no lower age limit for ordination laid down in the Bible and accordingly the body has no authority to impose one. In practice before a person is recognised by the body as ordained, i.e. having a commission to preach, he must bring himself into a fit condition by his studies, actions, and conduct as condescended on."

C I have set out this condescendence in full because it shows so clearly that in the eyes of this body every member of it becomes a "minister" and comes under very extensive obligations, as soon as he is baptised; and he continues to be a "minister" for life unless he is expelled from the body.

D The appellant was baptised at the age of twelve years and three months, nearly three years before he left school. He was appointed to the office of pioneer publisher when he was just over fifteen years of age and had just left school, and to the office of congregation servant in the Dumbarton Congregation on Oct. 20, 1952, when he was nearly eighteen years old. In the Dumbarton Congregation (to quote the Lord Ordinary) there are twenty-nine persons consisting of four male adults, eighteen female adults and seven children. Only nineteen of the congregation are baptised members of Jehovah's Witnesses. It is argued, on his behalf, that he became a "minister" on his baptism and a "regular minister", within the meaning of the Act, on his appointment as pioneer publisher or at latest on his appointment as congregation servant. I cannot accept this argument.

E Having carefully studied the evidence as to the organisation of this body, I think the true view is that while it contains a number of posts, no one of them is of such a kind as to bring the holder within the description of "a regular minister of a religious denomination" as these words are used in para. 2 of Sch. 1 to the Act of 1948. The reason why the organisation is of this kind may be found in the following passage from the judgment of the Lord Justice-Clerk:

G "The outstanding and distinguishing feature of the beliefs of this body is broadly speaking that in this generation Christ has already returned to this earth and set up his Kingdom. At some point within the lifetime of those now living, the end of the world as we know it will come. When that end comes, certain living members of the body who attain the character of the anointed will join in a Heavenly Paradise those of the anointed who are already dead. The other members of the body who do not number among the anointed will have conferred on them immortality on earth. Those members of the human race who fall into neither of these categories pass into death and oblivion. Two things follow from this belief. First, the only hope of any sort of salvation depends on becoming one of Jehovah's Witnesses. Second, time is short—we cannot tell how short—and there is a tremendous urgency if souls are to be saved. Accordingly the ruling impulse of the body is missionary zeal. The promulgation of the doctrine is of absolute and overwhelming importance. It is only thus that knowledge of the one way of salvation can be brought to the ignorant."

I No doubt the president and directors of the Pennsylvania corporation thought that the best way to carry out this urgent task was to make every witness a minister and a preacher and to create a large number of posts for the ministers such as branch servant, district servant, circuit servant, congregation servant, pioneer publisher and some nine other named posts within the congregation (which may number as few as ten persons). In so thinking they may have been right, but the result of setting up such an organisation is that which I have already stated. My views as to the true construction of the words "regular

minister of a religious denomination", having regard to the context in which they are found, and my reasons for thinking that, so construed, they do not apply to the appellant, are to be found in the judgments of the Second Division. A

Your Lordships were referred to a number of cases in the Courts of England and Scotland and to one case decided in the Supreme Court of the United States, *Dickinson v. United States of America* (1) ((1953), 346 U.S. 389). In that case the Supreme Court had to consider two sections of the Universal Military Training and Service Act. Section 6 (g) provided that B

"Regular or duly ordained ministers of religion, as defined in this title, . . . shall be exempt from training and service (but not from registration) under this title."

Section 16 (g) contained the definition, under three sub-headings. The language of these sub-headings is so far removed from the language which your Lordships have now to construe that I do not find *Dickinson's* case (1) of assistance in the solution of the problem before this House. Nor can I derive assistance in construing the Act of 1948 from the observations of Lord Justice-Clerk INGLIS in *Lord Advocate v. Ballantyne* (2) ((1859), 3 Irv. 371) as to the meaning of the word "ministers" in the Act 4 & 5 Will. 4 c. 28, dealing with the celebration of marriages in Scotland "by Roman Catholic priests or other ministers not belonging to the Established Church of Scotland." C D

Three cases were cited in argument which dealt with officials of the denomination to which the appellant belongs. They were *Kipps v. Lane* (3) ((1917), 116 L.T. 95); *Guy v. Mackenna* (4) (1917 S.C.(J.) 59) and *Saltmarsh v. Adair* (5) (1942 S.C.(J.) 58). In each of these cases, the official contended that he was a regular minister of a religious denomination. In each case that contention failed and in *Saltmarsh v. Adair* (5) (*ibid.*, at p. 64) the Lord Justice-General (LORD NORMAND) said "there was no such thing as a regular ministry of the denomination". E

I move that this appeal be dismissed with costs.

LORD GODDARD: My Lords, I agree that this appeal should be dismissed. While I agree with all the judgments delivered in the Court of Session, that of LORD MACKINTOSH so exactly expresses the opinion I have formed that it would be superfluous for me to give my reasons in detail. It is the spiritual or pastoral status and not the performance of functions that gives the right to exemption from military service. A clerk in holy orders is exempted whether or not he holds a benefice or preferment, so also is the minister, priest or pastor of any other religious body. While I will not attempt to define the expression "regular minister of any religious denomination", at the risk of uttering a platitude I would say that a man cannot be a regular minister unless he is first a minister. He cannot for the purpose of the National Service Act, 1948, be regarded as a minister merely because that term is applied to him by fellow members of his sect. Considering that among Jehovah's Witnesses every person baptised into the sect is a minister regardless of sex, age, education or any other qualification, it follows that the sect has no ministers within the meaning of the Act and consequently no regular ministers. A pioneer publisher in this persuasion is no more than a colporteur of its tracts and other literature and a congregation servant appears to me to be no more than an organiser or secretary, perhaps honorary at that, of a group of adherents be it large or insignificant. True he has a duty to preach, but so have all the other members to anyone whom they can persuade to listen. To put the appellant even though he is both a pioneer publisher and a congregation servant on a level with a clerk in holy orders, the pastor of one of the great nonconformist congregations or a Jewish rabbi would to my mind be fantastic. There have been several attempts in the courts to get young men of this connection exempted from their obligation of military service: they have all failed and now that the matter has been before your Lordships' House I hope this case will be the last. F G H I

A **LORD MACDERMOTT:** My Lords, the category within which the appellant could bring himself is set out in Sch. 1, para. 2, to the National Service Act, 1948, thus:

“A man in holy orders or a regular minister of any religious denomination.”

B These words are not easy to translate. A precise definition of either “holy orders” or “a regular minister” appears impossible, and to search for one is to wander about between the realms of interpretation and application. The reason for this seems to flow from the legislature’s manifest anxiety to avoid any semblance of religious discrimination. The language employed is accordingly wide in its scope and such as to embrace a great diversity of belief and organisation;

C so much so that I think the legislature must have used the expression immediately in point—“a regular minister”—to designate a fairly broad class rather than to describe the attributes of an individual. As I see it, therefore, the question of construction now to be resolved is as to the nature of this class. After that the issue ceases to be purely one of law and becomes substantially one of fact; the primary facts and circumstances must be weighed and considered and a finding

D reached whether or not they bring the person concerned within the ambit of the exemption. This course was followed in the courts in Scotland and I agree so fully with their conclusions on both branches of the inquiry that I do not propose to add more than a summary of my views on each.

E In my opinion the words “a regular minister” connote a class which forms but a part of the denomination in question and is acknowledged by that denomination as having a superior and distinct standing of its own in spiritual matters. The expression itself, the earlier reference to “a man in holy orders”, and the obvious desire of the legislature to attach the exemption to a circumscribed and identifiable category of some special quality, seem to me to justify this view which, to state it in another way, postulates the co-existence in the same denomination of at least two elements, namely, a ministering or clerical element and a lay

F element to which it can minister. If I may say so, LORD MACKINTOSH puts this requirement very clearly when, speaking of the “regular minister”, he says:

“... he must have by virtue of his appointment as a minister what might be called ‘a clergyman status’ which sets him apart from and places him over the laity of his denomination in spiritual matters.”

G I turn, next, to the finding of fact. To my mind the material offered by the oral and documentary evidence was more than sufficient to found the conclusion reached by the Lord Ordinary and the Second Division that the appellant was not within the class designated by the words “a regular minister”. This is not to say that each of the several considerations canvassed by the courts in coming to this conclusion must have a particular or constant cogency or carry the same

H weight with different minds. For my own part, for example, I would not be disposed to draw any very close analogy between “a man in holy orders” and “a regular minister”, or to build much on a lack of traditional forms and solemnities on appointment to office. But these and the other matters that have been regarded on this issue were all relevant to it, and I can see no good reason for impeaching the decision under appeal because they were taken into account.

I My Lords, what I have said is enough to dispose of the case; but its importance for the appellant and the denomination to which he belongs is such that I should make it plain that my concurrence in the decision of the Scottish courts rests on more than an inability to find any sufficient ground for disturbing it. Despite the full and careful argument submitted on behalf of the appellant, I am of opinion that no other decision was open on the evidence. Apart from anything else, the whole weight and tenor of the testimony, including that of the publications put in proof and regarded by this denomination as authoritative, appear to me to lead inevitably to the conclusion, so convincingly stated in the opinions of

LORD PATRICK and LORD MACKINTOSH, that in this particular body there is no distinction corresponding to that between the clerical and the lay and, accordingly, no class of regular ministers of which the appellant might claim membership. Disregarding mere adherents, this body considers itself to be a body of ordained ministers, its views as to the effect of baptism and the duties of the baptised being stated fairly and accurately, as I think, in a passage from the appellant's third condescendence which, after describing the baptismal ceremony, says:

"The adherent once thus ordained becomes a witness and a minister commissioned to preach the gospel of the Kingdom and is acknowledged as such by the governing authority of Jehovah's Witnesses. He thereafter is required to devote his life, or such part of it as is not occupied in the essential discharge of family responsibilities, to preaching the gospel in the same way as did Jesus Christ and his disciples, by preaching from house to house, conducting home Bible services, preaching on the street corners, distributing literature containing printed sermons, delivering public lectures and preaching in the schools and congregations of Jehovah's Witnesses."

The sense of urgency evoked by the tenets of this denomination goes some distance, I think, to explain the common standing in spiritual matters which is thus portrayed. But, be that as it may, this characteristic has not prevented the body from developing an elaborate structure for the furtherance of its objects, and it is clear that the opportunity and ability to serve may bring special duties and responsibilities to individual members either as congregation servants or in some other capacity. That, however, is something of a kind to be expected in any organised movement, and to my mind it falls far short of investing the appellant, and those chosen to discharge obligations such as his, with the distinguishing status in spiritual affairs which, as I would hold, the expression "a regular minister" signifies.

For these reasons I agree that the appeal fails and should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I have little to add to the full and admirable judgments of the courts below. What I think is fatal to the appellant's case is that all the members of this religious denomination are regarded as ministers of the gospel. It was conceded before the Lord Ordinary, as it was conceded at the hearing of this appeal, that this does not make them all regular ministers within the meaning of the statutory exemption. What distinguished the appellant as a regular minister, it was said, was his functions or vocation. The appellant was discharging full time spiritual functions as a congregation servant and pioneer publisher. This distinguished him from other members of his sect and made him a regular minister. The definition was satisfied by a person officially charged by his denomination with whole time spiritual functions which constituted his vocation for the time being. But that is not, in my opinion, the test. It would exclude many ordained ministers who were not discharging any, or at least full time, spiritual functions and who would according to ordinary conceptions be regarded in this country as regular ministers. I would not be prepared to accept LORD ANDERSON'S view expressed in *Guy v. Mackenna* (4) (1917 S.C.(J.) at p. 63) that in this field "regular" could be contrasted with "occasional". The judges of the Second Division were in my opinion right in regarding a regular minister under the statutory exemption as someone set apart from the other members of his denomination. This cannot be said of the appellant. He is no doubt functioning full time and performing more spiritual duties than the other members, but these are differences of degree and not of kind.

It was next said that if function was not the test the appellant could be held to be a regular minister by virtue of a regular appointment. This refers to his appointment as a pioneer publisher when he was fifteen years of age by the letter dated Dec. 28, 1949, from Watch Tower Bible and Tract Society to him and his

- A appointment as congregation servant by the letter dated Oct. 20, 1952, from the same society to him. But these letters did not make him a minister. He became a minister when he was baptised on Jan. 31, 1947. They merely appointed him to carry out the functions of pioneer publisher and congregation servant. These functions, as I have said, were not sufficient to make him a regular minister and a formal appointment to perform them did no more than stamp him as a person
- B prepared to carry out these functions. The method of appointment was no doubt in accordance with recognised procedure of the denomination but it did not confer on him any spiritual qualities or powers. In short it did not set him apart from his co-religionists and so was ineffectual to confer on him the status of a regular minister.

I would dismiss the appeal.

- C **LORD SOMERVELL OF HARROW:** My Lords, I agree.

Appeal dismissed.

Solicitors: *Gouldens*, agents for *Burns, Reid & Tilston*, Glasgow, and *Scott & Glover*, Edinburgh (for the appellant); *Solicitor, Ministry of Labour and National Service*, agent for *Macpherson & Mackay*, Edinburgh (for the respondent).

- D [Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NOTE.

- E The following are extracts from the opinions of the judges of the Second Division of the Court of Session in *Walsh v. Lord Advocate*, on July 21, 1955.

The **LORD JUSTICE-CLERK (LORD THOMSON)**, having reviewed the position of the pursuer as a member of a body of professing Christians known as Jehovah's Witnesses, said: . . . Where so many judges have feared to tread, I

F do not intend to offer a definition of "regular minister". All that is required of me is to say whether in the circumstances and against the background which I have sketched, a person like the pursuer, holding the appointment of congregation servant, can fairly be regarded as falling within the statutory exemption.

- It may be safely said that when Parliament lumped together the man in holy orders and the regular minister, it was thinking in terms of the ordinary religious denomination as it exists today. What in my view Parliament had in mind was
- G not the simplicity of the apostolic era but the complex structure of modern churches in which the dominant feature is a differentiation between clergy and laity. Once one has recognised that there is this differentiation there may arise difficult questions as to what constitutes the clerical category or whether particular individuals fall into the clerical category. In the early part of the
- H debate it was suggested that as the Crown had conceded that for the purposes of this case the body was a religious denomination, it must be accepted that their views of what constituted regular ministry must prevail. This was not insisted in and the case was put on the view that the pursuer in virtue of his appointment, his qualifications, his training and his duties, in this particular denomination occupied a position and indeed enjoyed a status comparable or analogous
- I to the man in holy orders. In my view the suggested analogy breaks down at the start. The body does not accept a distinction between the clerical and the lay. The first and cardinal distinction made by them is between those who are baptised and those who are not; those who are ordained ministers and those who are not of the flock. That is a difference in kind. Once one becomes a witness—leaving out of account the position of the anointed which is not relevant to this issue—the difference between the various types of servant is merely one of degree. It was strenuously argued that this was not so and that the evidence established that the congregation servant was "set apart" as a

spiritual leader. This argument could be developed to the extent it was, only because of the ambiguity lurking in a phrase so vague as "setting apart" even when it was qualified by the words as a spiritual leader. That the pursuer was "set apart" as a leader of his group is undoubted. That the appointment may have carried with it all the authority of the theocracy in the eyes of the congregation may be granted but so did the appointments of all the other servants. That the pursuer was under a duty to lead the members of his congregation in certain exercises and practices which may be conceded to be spiritual may also be granted. But his right and duty to do so did not spring from his having acquired a known or regular status, other than that enjoyed by his flock. It lasted only so long as the appointment remained in force. When it ceased, he remained what he had all along been, an ordained minister. It was suggested that when the appointment fell, the servant became what was inelegantly described as a "congregation servant ex" and that this showed that he had a permanent and recognised status. But all that this comes to is that the "congregation servant ex" goes on to the records as one who has held the office and is eligible for future consideration when a suitable vacancy occurs. The fact is that except for the terms of his appointment and for the purposes of his appointment, the congregation servant is just in the same position as the members of his unit. He is merely primus inter pares and his leadership even regarding it as a spiritual leadership has no exclusive character. He has no special function which cannot be delegated and which cannot be performed by one of the ordained of his congregation. His leadership is no more than the oversight of the unit. That his appointment to overseer is made by the board and is regarded by the congregation as divinely made does not confer on him any status which differs in kind from that conferred on other servants or indeed that conferred on witnesses generally. The various servants may occupy different ranks in the hierarchy and those in the higher ranks may exercise greater powers and carry wider responsibility but they are all so to speak commissioned officers in the army of Jehovah's Witnesses. Indeed the importance which the body attaches to the obligation of all witnesses to play an active part—a virtue which many other sects might envy and admire—emphasises that there is no fundamental difference between the various grades of servant.

Witnesses who have attained maturity are appointed to the various offices in the hierarchy. To that extent they are set apart but to describe their appointment as equivalent to a "laying on of hands" is merely to play with words and to beg the question. It assumes that promotion of one among a number of spiritual equals to a certain grade is the conferment of a status which differs in kind from that enjoyed by these spiritual equals.

Not only does the suggested analogy between congregation servants and men in holy orders or regular ministers break down on the essential matter of the distinction between clergy and laity but it has other weaknesses which readily can be inferred from the sketch of the organisation which I have already given. The congregation over which the servant has oversight has little in common with congregations in more conventional communions, whether one looks at its size, its composition or its activities. The office of congregation servant itself, while it is one of authority, savours much more of the group organiser than of the religious and spiritual leader.

While certain qualifications are required of a congregation servant, these are not essentially different from the qualifications required from the ordinary witness. What is specially required are administrative and executive qualities. It is not without significance that the letter of appointment—which as I have already said applies to some ten types of servant—stresses the Counsel of Theocratic Organisation which is to all intents and purposes an administrative handbook. Spiritually what is required is "maturity" and that is a quality which all witnesses have or ought to have, albeit in varying degrees.

A The general attitude of the body to more orthodox religious denominations is such as to make one doubt whether it is in their mouths to argue that comparison is possible between their officers and men in holy orders or regular ministers. The idea of a separate category of believers carrying out exclusive sacerdotal duties towards the remainder of the communion is foreign to their ideas and clearly does not meet with their approval. It is not enough to say that there are resemblances in function. The thing goes deeper than function. At bottom there is a sacerdotal status which once it is properly acquired remains with its holder independently of the particular functions which he is called on to perform. Something of that sort is at the root of the conception of being in holy orders or being a regular minister. In my view any such conception is inconsistent with the views of Jehovah's Witnesses. Their outlook, their beliefs, their organisation and their emphasis on preaching as against the devotional side, show that they neither need nor have any place for a priestly caste and even although the force of events has built up an elaborate structure with some ecclesiastical features any progress towards the formation of a regular priestly caste as such is still in an embryo state. In my view the congregation servant cannot be regarded as a regular minister . . .

D **LORD PATRICK:** It is the duty of the courts to decide whether the circumstances of a member of a religious denomination are such as to make him "A man in holy orders or a regular minister of any religious denomination". It is not the right of the denomination to determine who are its regular ministers within the meaning of that statutory definition. The denomination may determine for itself who shall be its functionaries, what qualifications they shall possess, and how their appointments shall be conferred and attested, but only the courts can determine whether that which has been done brings any particular functionary within the category which Parliament has chosen to exempt from the obligation to perform military service and has defined in the above terms.

E The definition is not self-explanatory. It requires construction. Certain preliminary findings may be made in order to clear the ground. The exemption is not confined to regular ministers of Christian denominations, but this is of little importance in the present case. It merely emphasises the fact that the beliefs and practices of religious denominations vary throughout so wide a range that it is probably impossible to give a comprehensive construction of the definition which will cover all cases. In this case the pursuer is a member of a Christian denomination, and the problem in his case is to determine what Parliament in 1948 intended the definition to comprise in relation to Christian denominations. Further, it will not aid in the solution of this matter to inquire what were the characteristics of the appointment of ministers in the primitive Christian church. Parliament in 1948 was dealing with the men in holy orders and the regular ministers of today, and the question is what in the ordinary use of language characterised such men.

H As to the first class mentioned in the definition there is no doubt. There are three holy orders, bishops, priests and deacons. Their qualifications, the manner of their appointments and the status conferred thereby, their functions and powers are certain. Now it is agreed that in seeking to find the characteristics of the men whom Parliament described as regular ministers of any religious denominations it is proper to infer that they were intended to be analogous to those possessed by men in holy orders. It therefore becomes right to inquire what are the outstanding features in the offices of men in holy orders. It is cardinal that such men are set apart in sacred matters as superiors of the rest of the religious community, the laity. It is for them and them alone to perform the important sacred rites. It is for them and them alone to preach and interpret the gospel and the doctrines of the church with authority. The laity may preach, but without that authority. This position, superior to the laity in sacred matters, is possessed even by the lowest of the three holy orders, the diaconate.

This office is conferred by ordination and is a step towards the priesthood. Deacons in the Church of England may perform any sacred office except those of consecrating the elements and pronouncing absolution. Moreover, when holy orders are conferred on a man, this superior position or status in sacred matters remains attached to him even though he betake himself to the practice of some other vocation, such as an appointment at a university or a schoolmaster. It is the man in holy orders who is exempted, not the beneficed clergy. It is the regular minister who is exempted, not the parish minister. This seems to indicate that the exemption was not conferred lest religious communities be deprived, even temporarily, of their spiritual leaders, but because the admission to holy orders or the appointment as a regular minister was regarded as conferring a special position or status in sacred matters which of itself attracted the exemption. A B

Now, since it is admitted that the "regular minister of any religious denomination" must hold a position which is broadly speaking analogous to that of "a man in holy orders", and since the outstanding characteristic of the man in holy orders is the possession of the above exclusive position in sacred matters, and since I cannot find that the pursuer holds any such position in the religious community to which he belongs, I do not find it necessary to consider what further characteristics, if any, must attach to the "regular minister of any religious denomination". C D

In this religious body there is no such laity as one finds in most others. Much information on this matter will be found in number 17 of Process, "Counsel on Theocratic Organisation for Jehovah's Witnesses". The witnesses constitute a "society or body of ministers". One is admitted to the society by baptism and thereupon becomes an "ordained minister". The supreme obligation of each and all is to devote as much time as possible to preaching, to preach at people's homes, on the streets, at public meetings and in other ways, to preach to one person, to small groups of two or three or many, to preach orally and by delivering literature at people's homes, so that they may study it, thereafter to call on them and conduct home Bible studies with them so as to educate them in God's word, to furnish Bible instruction to teach, explain, encourage and help others to serve the divine King. They call themselves "publishers", meaning thereby preachers of their beliefs. This prime duty of every one of them derives from their belief that the day of Armageddon is near, that all but Jehovah's Witnesses will then be destroyed, and that, if any of the unconverted have remained so through the failure of a Jehovah's Witness to carry the message, the blood of that witness will be required of him. E F

For this preaching no special qualifications are necessary. Indeed the society repudiates any such qualification in the passage: G

"True Christian preachers who follow and imitate their master Jesus need no university, college or seminary schooling, nor is any degree, title, diploma or ceremonious ordination by clergy operators of a theological seminary required by them. Religious clergymen have all such impressive things, but not one has fulfilled God's requirements for becoming one of his ordained, anointed preachers." H

Nevertheless much time is devoted by all to the study of the Bible and of the society's interpretation of the Bible and of the society's methods of preaching and of gaining converts.

[HIS LORDSHIP reviewed the composition of congregations, the types of meetings, sacred rites, admission and expulsion, and the position of the congregation servant, and concluded:] I conclude that in this community there is properly speaking no clergy and laity, that neither the congregation servant nor the pioneer is set apart from the rest of the community as peculiarly qualified or entitled to carry out the supreme functions of the man in holy orders or the regular minister of a religious denomination, the functions of preaching the word with authority and of performing the sacred rites. These supreme functions in I

- A this denomination may be performed as to some by all and as to the rest by many of the community, if only by virtue of delegation. Neither the congregation servant nor the pioneer is so set apart as superior in sacred matters over the rest of the religious body as to satisfy the conception of a man in holy orders or a regular minister of a religious denomination.
- B **LORD MACKINTOSH**, after referring to the pursuer's claim and contention and stating that the question falling to be determined was whether the pursuer qualified for exemption [from national service] as being a regular minister within para. 2 of Sch. 1 to the National Service Act, 1948, continued: This question is primarily one of statutory construction. What kind of person or class of persons did the legislature mean to designate when it saw fit by para. 2 of the relevant
- C Schedule to exempt from the call up for service *inter alios* "a man in holy orders or a regular minister of any religious denomination"? Little help in the construction of this paragraph of the Schedule can, I think, be got from the other three paragraphs of the Schedule except an indication from the Schedule as a whole that exemption from the call up for service imposed by the Act is regarded as being a most exceptional state or condition and that therefore only those who
- D quite clearly and definitely fall within one or other of the two alternative branches of para. 2 of the Schedule can claim exemption under it. The fact that para. 2 is stated alternatively does not, I think, imply that two quite separate and distinct classes were meant to be referred to by it. I think that the paragraph as a whole was intended by the legislature to be wide enough to cover and include within its scope the whole class of the clergy as distinct from the laity in any truly
- E religious denomination found to exist in our country at the present time, irrespective of the name or title given to the clergyman by his own denomination or the ritual required by it for his ordination, induction or appointment. "A man in holy orders" though descriptive of a class much more precise in its connotation than "a regular minister" would if it alone had been referred to in the paragraph have limited the exemption to clergymen of churches such as the Church of England
- F and the Roman Catholic Church, whereas it is clear from the use of the words "minister of any" (i.e., not only a Christian) "religious denomination" that Parliament meant the exemption to be very much wider. It clearly in my opinion was not contemplating when it enacted this paragraph of the Schedule the simple conditions of the primitive Christian community—often referred by certain of the pursuer's witnesses as a standard—but was legislating for the much more
- G complex situation existing among the vast majority of the religious denominations of the present day where a dominant feature is the differentiation between clergy on the one hand and laity on the other. I further think that the minister who was not a man in holy orders and yet was intended to be given the exemption must be one who holds a position broadly speaking analogous to that of a man in holy orders, i.e., he must have by virtue of his appointment as a minister what might be called "a clergyman status" which sets him apart from and places him
- H over the laity of his denomination in spiritual matters. I think that it was mainly to secure that this requirement would be sufficiently met that the word "regular" was introduced into the paragraph as qualifying "minister", though I am disposed to agree with the Lord Ordinary that the word "regular" may be used in the paragraph in more than one sense. It is just this "clergyman status" or anything fairly resembling it or corresponding to it which in my opinion the
- I pursuer has not got either in his capacity as a congregation servant or in that of a pioneer publisher. Consequently in my opinion he cannot by virtue of his holding these offices or either of them be fairly called a regular minister of this body which is now admittedly for present purposes a religious denomination. The tenets and beliefs of that denomination are such as to dispense with and do away with the essential distinction between clergy and laity which distinction as aforesaid is a dominating feature of almost all the religious denominations of the present day and must in my opinion be presumed to have been in the view of the legislature

when it enacted the second paragraph of this Schedule. According to the faith of the body known as Jehovah's Witnesses all duly ordained members of the body, that is, all who have been admitted to and have gone through the total immersion ceremony of baptism, are regarded as duly ordained ministers of Jehovah God and it is their duty equally with such officers as pioneer publishers and congregation servants to preach their gospel both orally and by going from door to door and leaving their tracts and other literature explaining the beliefs and tenets of the movement. It is also the duty of all the duly ordained members of the body equally with the officers of it to make follow-up or back calls on those with whom their literature has been left and to conduct informal Bible and other talks with those whom they find ready to listen. As has been pointed out by the Lord Ordinary it is not maintained by the pursuer or the movement which he represents that all their duly ordained members—"publishers" as they are called in the body itself—are regular ministers of their denomination within the meaning of the relevant Schedule to the Act of 1948 although they are all regarded in the body as being duly ordained ministers of Jehovah God with a duty to preach their gospel to their neighbours. It is just that concession, however, which seems to me to be fatal to the contention that certain officials of the body such as the congregation servant and the pioneer publisher can properly be regarded as "regular ministers" in the sense in which that expression was, according to my view of it, used in the said Act. The legislature did not in my opinion have in mind when it enacted the exemption Schedule now in question a religious denomination where all members of it considered themselves to be equally ministers and preachers of what they believed to be the gospel of the Kingdom. In my view Parliament had in view religious denominations where there was a clear and definite distinction drawn and preserved between the clergy and the laity and where a person could qualify as a "regular minister" within the meaning of the Schedule only if he belonged to the clergy class as distinct from the laity. In the denomination known as Jehovah's Witnesses that distinction simply does not exist. According to the evidence in this case and to the body's own publications—many of which were produced in the proof—the society or body known as Jehovah's Witnesses was a society or body of ministers all of whom had a duty to preach the gospel of the Kingdom as the same was laid down to and for them in the Watch Tower and other publications issuing from the Watch Tower Bible and Tract Society—a body incorporated in Pennsylvania but now operating from Brooklyn, New York, U.S.A., whose directors are believed by the body to be the sole interpreters to the world of the will of Jehovah God. This body of spiritually equal ministers of Jehovah God by the very nature of its fundamental beliefs does away with any distinction corresponding to that between the clerical and the lay and thereby in my opinion can have among its members no regular ministers in the sense of the statute unless indeed all duly ordained members of the body were to be regarded as such—a position not maintained by the pursuer and for other obvious reasons quite untenable.

At the hearing before us counsel for the pursuer (though by no means discarding the claim based on his being a pioneer publisher) relied mainly on his position as a congregation servant in order to make good his contention that he was a regular minister of his denomination within the meaning of the Act of 1948. It was claimed that the evidence established that the pursuer as congregation servant was the spiritual "overseer" of the congregation and performed many of the functions such as funeral services, marriage ceremonies (where permitted by the law of the land), conduct of the service meeting of the congregation, visiting of the sick and so forth which are performed by the pastors of the more ordinary religious bodies in this country. In my opinion it is status rather than function which is the determining factor in qualifying a man for being the holder of the position of "A man in holy orders or a regular minister of any religious denomination", but even in the matter of function I do not think that

A the congregation servant (or company servant as until recently he was called) in the Jehovah Witness body truly matches up to the position of a clergyman in a more ordinary type of religious denomination.

[His LORDSHIP reviewed the evidence concerning the question whether a congregation servant was a spiritual overseer of the members of the congregation and concerning the position of a congregation servant. After referring to a letter which appointed the pursuer company (congregation) servant and moved the then holder of that position to a lower office, and indicating that it was the office of company (congregation) servant which was said to constitute the pursuer a regular minister, His LORDSHIP continued:] That such changes in position and office can be made in such a way and for such reasons is sufficient in my opinion to show that the nature and tenure of the appointment of a congregation servant in the denomination of the body known as Jehovah's Witnesses is vastly different from the tenure on which a man in holy orders or a regular minister holds his sacred office. The latter does not lose his position and status as a regular minister because he might have for health reasons to give up his charge. He would still be entitled to claim exemption under the Schedule, because it is not only beneficed clergymen and placed ministers who are exempted but all who hold the positions of men in holy orders or regular ministers of religious denomination—positions which are held *ad vitam aut culpam* and yield a continuing status irrespective of the duties or functions, if any, which the holder may at any particular time be discharging. A clerk in holy orders or a duly ordained minister of a non-episcopal religious body would, I think, be entitled to the exemption given by the Schedule, if he chose instead of making the pulpit his profession to earn his living by becoming a schoolmaster. All this goes to show in my opinion that it is the status yielded by the position rather than the functions which may have to be performed in it which should be regarded as determinative of whether a man is a regular minister of a religious denomination in the sense of the statute. On that test the pursuer's case so far as his appointment of congregation servant is concerned clearly fails. His appointment was an *ad hoc* one held at the will of the society and it yielded him no continuing status which would persist if and when he ceased to perform the duties of the office to which he was appointed. In short I think that the pursuer *qua* congregation servant was a group organiser and a co-ordinator of the several activities of his congregation but was nothing more than that. In particular he was not in my opinion *qua* such servant a "regular minister" within the meaning of that expression as used in para. 2 of Sch. 1 to the said Act of 1948.

THE EMPIRE JAMAICA.

N. V. KONINKLIJKE ROTTERDAMSCH E LLOYD AND
OTHERS v. WESTERN STEAMSHIP CO., LTD.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Merriman, Lord Goddard, Lord Cohen and Lord Keith of Avonholm), July 2, 3, 25, 1956.]

Shipping—Limitation of liability—“Actual fault or privity of shipowner”—Insufficient complement of certificated officers—Breach of merchant shipping ordinance—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1).

The respondents were the owners of the Empire Jamaica, registered at Hong Kong from which port she sailed. In September, 1951, the Empire Jamaica collided with a ship owned by the appellants. At the time of the collision, the officer of the watch on board the Empire Jamaica was S., who was not a certificated officer but who was described in the ships “Particulars of engagements” as chief boatswain and who had been treated as, and performed the duties of, second mate. At the time of the collision, he had between eight and nine years’ watch-keeping experience. By Hong Kong ordinance, the Empire Jamaica should have been provided with a master and a first and second mate duly certificated, but, at the relevant time, there was a scarcity of certificated officers at Hong Kong. There was evidence from the Director of Marine of Hong Kong that, according to the general practice at the relevant time, the Empire Jamaica was properly manned in all respects, even though S. did not hold a certificate. The respondents admitted liability for the collision and were granted a declaration under the Merchant Shipping Act, 1894, s. 503 (1)*, limiting their liability. On appeal against this declaration,

Held: the respondents had discharged the onus of proving that the damage resulting from the collision occurred without their actual fault or privity, since they had good reason to believe that S. was fully competent to discharge the duties which, in fact, he was discharging on the voyage in question, and, even if they were in breach of the ordinance, that breach had no causal connection with the collision; accordingly, they were entitled to the declaration sought.

Observations on the requirements of s. 92 (1) of the Merchant Shipping Act, 1894, as amended by s. 56 of the Merchant Shipping Act, 1906, and on the meaning of the word “mate” (see p. 148, letter I, to p. 149, letter G, and p. 150, letters C to G, post).

Decision of the COURT OF APPEAL ([1955] 3 All E.R. 60) affirmed.

[As to actions to limit liability, see 1 HALSBURY’S LAWS (3rd Edn.) 63, para. 126.]

As to the limitation of liability without actual fault or privity, see 30 HALSBURY’S LAWS (2nd Edn.) 942, para. 1304, note (d); and for cases on the subject, see 41 DIGEST 919, 920, 8099-8103.

For the Merchant Shipping Act, 1894, s. 92, s. 503, see 23 HALSBURY’S STATUTES (2nd Edn.) 454, 656.]

Case referred to:

(1) *Truculent (H.M.S.), The Admiralty v. The Divina (Owners)*, [1951] 2 All E.R. 968; [1952] P. 1; 2nd Digest Supp.

Appeal.

Appeal by N. V. Koninklijke Rotterdamsche Lloyd, owners of the cargo on board the motor vessel Garoet, and by all persons claiming to have sustained damage by reason of a collision between the steamship Empire Jamaica, owned by the respondents, the Western Steamship Co., Ltd., and the Garoet on Sept.

* For the relevant provisions, see p. 145, letter F, post.

- A 1, 1951, from an order of the Court of Appeal, dated July 12, 1955, and reported sub nom. *The Empire Jamaica, Western Steamship Co., Ltd. v. N. V. Koninklijke Rotterdamsche Lloyd*, [1955] 3 All E.R. 60, affirming an order of WILLMER, J., dated Jan. 27, 1955, and reported sub nom. *The Empire Jamaica*, [1955] 1 All E.R. 452, whereby he granted the respondents a declaration that they were not answerable in damages in respect of loss of, or damage to, vessels, goods, B merchandise, property or other things beyond the aggregate amount of £8 per ton for each ton of the tonnage of the Empire Jamaica. The facts appear in the opinion of LORD MORTON OF HENRYTON.

R. F. Hayward, Q.C., and *D. H. Hene* for the appellants.

Kenneth Carpmael, Q.C., and *J. B. Hewson* for the respondents.

- C The House took time for consideration.

July 25. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the present appeal arises out of a collision between the steamship Empire Jamaica (now named Westway) belonging to the respondents and the appellants' motor vessel Garoet. The collision took place in the Java Sea early on the morning of Sept. 1, 1951, D and considerable damage was done to both vessels. At the time of the collision the officer of the watch in the Empire Jamaica was a Mr. Sinon.

On Oct. 8, 1951, the appellants issued a writ against the respondents claiming damages. The claim was resisted until after pleadings had been closed, but, on Dec. 5, 1952, the respondents admitted sole liability for the collision. On E Oct. 19, 1953, the respondents commenced the present action for limitation of their liability under s. 503 (1) of the Merchant Shipping Act, 1894, the relevant part whereof is as follows:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) . . . (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be F liable to damages beyond the following amounts; (that is to say,) . . . (ii) In respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

- G In their statement of claim, the respondents admit that the said collision and damage consequent thereon were caused by the improper navigation and/or management of the Empire Jamaica by their servants, but say that the collision occurred without the actual fault or privity of the respondents and, consequently, their liability in damage is limited to £8 per ton of the tonnage of the Empire Jamaica.

- H The Empire Jamaica is a vessel of some 3,538 tons gross, and, at the time of the collision, she was carrying a certificated master, a certificated first mate, and two other officers who were not certificated. These two officers were Mr. Sinon, who was described in the ship's "Particulars of engagement" as "chief boatswain", and a Chinese officer, who is described as "third officer". WILLMER, J., found that ([1955] 1 All E.R. at p. 453)

- I "The [respondents'] ship carried three de facto mates. I say 'de facto' because, although Mr. Sinon is not called mate, I am satisfied that three men were carried to perform the duties of mates, and were in fact employed and paid as such."

The contentions of the parties in your Lordships' House may be summarised as follows: the respondents allege that, in all the circumstances of the case, they had good reason to believe that Mr. Sinon was fully competent to perform the functions which would fall on him, including the keeping of a watch. Thus

the collision occurred without their actual fault or privity. The appellants contend that the evidence adduced by the respondents fails to prove this allegation. In addition to criticising the evidence of the respondents' witnesses, the appellants allege that the respondents were in breach of the provisions of s. 4 of the Hong Kong Merchant Shipping Ordinance, 1899 (No. 10 of 1899), as substituted by s. 4 of the Merchant Shipping (Amendment) Ordinance, 1949 (No. 2 of 1949). As to the last-mentioned allegation, the respondents say, first, that they were not in breach of the ordinance and, secondly, that, if they were in breach, the breach had no causal connection with the collision. A
B

The learned trial judge held that the respondents had good reason to believe that Mr. Sinon was fully competent to discharge the duties of second mate, which he was in fact discharging on the voyage in question, and the three members of the Court of Appeal agreed with this view. All the evidence has been read to your Lordships, and I understand that you all think, as I do, that, apart from the question as to the alleged breach of the Hong Kong ordinance by the respondents, there is no reason to differ from the view of the learned judge and the Court of Appeal. I, therefore, refrain from any detailed comment on the evidence. C

I now turn to the alleged breach of the Hong Kong ordinance. The relevant part of the ordinance is as follows: D

“ 4 (3). Every British ship . . . shall, when leaving any port of the colony, be provided with officers who possess certificates of competency of a grade appropriate to their stations in the ship or of a higher grade, according to the following scale:—(a) in any case, with a duly certificated master; (b) if the ship is one of one hundred tons or upwards, with at least one officer besides the master holding a certificate not lower than that of only mate, or of second mate in the case of a sailing ship of not more than two hundred tons; (c) if the ship carries more than one mate, with at least the first and second mates duly certificated; . . . ” E

Section 4 (19A) of the Merchant Shipping Ordinance, 1899, as added by reg. 3 of the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951, provides as follows: F

“ The Governor in Council may, if he thinks fit, and upon such conditions (if any) as he thinks fit to impose, exempt any ship from any specified requirement contained in, or prescribed in pursuance of, this ordinance, or dispense with the observance of any such requirement in the case of any ship, if he is satisfied that that requirement has been substantially complied with in the case of that ship, or that compliance with the requirement is unnecessary in the circumstances of the case, and that the action taken or provision made as respects the subject-matter of the requirement in the case of the ship is as effective as, or more effective than actual compliance with the requirement.” G
H

Counsel for the appellants contends that the Empire Jamaica carried more than one mate; that only the first mate was duly certificated, and that the respondents committed a breach of s. 4 (3) (c) in shipping as second mate a man (namely, Mr. Sinon) who was not duly certificated. They say further (and this is not disputed) that the respondents had not obtained any exemption under s. 4 (19A) at the relevant period, though they did obtain an exemption in March, 1954, when Mr. Sinon was still serving as second mate. They go on to submit that, if the respondents had applied for exemption, Mr. Sinon would have been examined by an officer of the Marine Department in Hong Kong as to his fitness to discharge the duties of second mate, and he might have been found unfit to discharge these duties; or at least his attention would have been directed to the regulations for preventing collisions at sea, one or more of which he must have neglected when the collision occurred. I

- A My Lords, I fully appreciate the importance of a strict compliance with s. 4 (3) of the ordinance, but the argument of the appellants is met by counsel for the respondents as follows. They submit, first, that they were not in breach of the regulations, because s. 4 (3) (b) permits a ship of one hundred tons or upwards to sail "with at least one officer besides the master holding a certificate not lower than that of only mate", and the master and first mate of the Empire
- B Jamaica both held the requisite certificate. They further submit that Mr. Simon was not a "mate" or a "second mate" within the meaning of s. 4 (3) (c). Finally they submit that, if there was a breach of the sub-section, that breach had no causal connection whatsoever with the collision.

- The first two of these submissions were never put forward in the courts below, but they are, I think, covered by the reasons to be found at the end of the
- C respondents' printed Case on this appeal. My Lords, I am not impressed by either of these submissions, having regard to the terms of s. 4 (3) (c), but I find it unnecessary to express any opinion on them, because I am satisfied that the respondents' final submission is well founded. It is based on the affidavit of Mr. James Jolly, sworn on Dec. 3, 1954, and the affidavit of Mr. Leung Yew, sworn on Dec. 2, 1954. Mr. Jolly's affidavit must be quoted in full:

- D "1. I am the Director of Marine of Hong Kong appointed on June 17, 1941, and I have held this position since.

- "2. My duties are those of the head of the Marine Department in Hong Kong and I am charged with carrying into effect in the Colony of Hong Kong the provisions of the Merchant Shipping Act of the United Kingdom
- E in so far as it is applicable to Hong Kong and the Hong Kong Merchant Shipping Ordinance. I am currently, by reason of the provisions of the Hong Kong Merchant Shipping Ordinance, Superintendent of the Mercantile Marine Office. I myself and my department acting under me are responsible for (inter alia) opening and closing ships' articles, the engagement and discharge of seamen, the granting of certificates of competency, the clearance
- F of vessels and are concerned that the provisions of the said Act and ordinance are duly complied with. If not satisfied in any case that the Act (in so far as applicable) and/or the ordinance have been duly complied with, I or my department as circumstances require would refuse to grant a clearance permitting a vessel to proceed to sea.

- "3. I have examined the official records in my office and from these I
- G am able to certify that articles of agreement with the crew of the Empire Jamaica were opened in my office on July 3, 1951, and terminated on Oct. 1, 1951, during which period no changes whatsoever were made in the entire crew.

- "4. At the material time there was a shortage of British certificated officers in Hong Kong and it was the general practice to grant an exemption in
- H accordance with sub-s. (19A) of s. 4 of the Hong Kong Merchant Shipping Ordinance No. 10 of 1899 in respect of ships registered in Hong Kong.

- "5. It was also the practice in Hong Kong to sign on uncertificated men, described in the article as boatswain or chief boatswain or as a mate, but owners were not required by my department to do other than comply with
- I s. 4 (3) (b) of the ordinance and were not required to comply with sub-s. (3) (c).

- "6. At the time when the articles were opened in July, 1951, I was under the impression that the Empire Jamaica had already been included in the lists of vessels submitted by me for inclusion in an exemption by the Governor-in-Council under sub-s. (19A) and I was satisfied that the Empire Jamaica was properly manned.

- "7. At the time such articles were opened I was aware that the Empire Jamaica was to carry only one certificated mate in addition to the certificated master, and I was satisfied that this was proper compliance with the law of Hong Kong.

"8. Accordingly I was and still am satisfied that in July, 1951, the Empire Jamaica was properly manned in all respects and I would have so certified to her owners."

The relevant portions of Mr. Leung Yew's affidavit are as follows:

"1. I am the managing director of the Western Steamship Co., Ltd. I have been engaged in the shipping business since about 1929 or 1930."

"2. The company usually acts in accordance with decisions which I make in the ordinary course of business, though from time to time decisions on matters which are not in the ordinary course of business will be referred to the board of directors."

"3. The opening of articles is not a matter which requires my personal attention. It is in fact a matter only concerning the captain and crew members and the Mercantile Marine Office. Without hesitation I can say that it is not the usual practice in Hong Kong for managers or managing directors of shipping companies to attend at the opening of articles."

"4. I had always understood from the Marine Department of Hong Kong that if a ship carried more than one mate and the first mate was certificated it was not necessary for the other mates to be certificated. I know that the Marine Department sometimes suggested the signing on of a chief boatswain and no second officer. I was well aware that the signing on of a first mate, chief boatswain and a third mate, possibly even a fourth mate, was a practice which satisfied the officials in the Mercantile Marine Office at Hong Kong."

My Lords, in view of this evidence I am satisfied that if the respondents were in breach of the ordinance in shipping Mr. Sinon as second mate without obtaining exemption, under s. 4 (19A), from the provisions of s. 4 (3) (c), that breach had no causal connection whatsoever with the collision. It is clear that, if the respondents had applied for exemption, Mr. Jolly, acting for the governor, would either have granted exemption at once or (more probably) would have said "you do not need any exemption, as you comply with s. 4 (3) (b)" —see para. 5 and para. 7 of his affidavit. Mr. Jolly's construction of the ordinance may have been wrong, but the result is that, if the respondents had taken the step which, according to the respondents, they ought to have taken, Mr. Sinon would still have been on duty in the early morning of Sept. 1, 1951, and the collision would still have occurred.

For these reasons, I am of opinion that the learned judge and the Court of Appeal arrived at the right conclusion, and I move that this appeal be dismissed.

LORD MERRIMAN: My Lords, I have had the advantage of reading the opinion of LORD MORTON OF HENRYTON. I so fully agree with his conclusions that I might not have thought it necessary to add anything but for the fact that the two points which, as my noble and learned friend has said, were argued for the first time in your Lordships' House, seem to me to raise questions of general importance.

The judgments in the courts below are based on the assumption that there was a breach of the Merchant Shipping Ordinance, 1899, s. 4 (3) (c)*, which reads as follows:

"if the ship carries more than one mate, with at least the first and second mates duly certificated; . . ."

In substance this requirement is to the same effect as is provided by the Merchant Shipping Act, 1894, s. 92 (1) (c). It is important, therefore, to remember that the decision of this case may have a wider application than if it were limited

* Substituted for the original s. 4 by the Merchant Shipping (Amendment) Ordinance, 1949.

A to British ships sailing from the port of Hong Kong. In the course of the argument, however, it was suggested that the above assumption was misconceived, and that the requirement governing the case is para. (b) of s. 4 (3)* of the Merchant Shipping Ordinance, 1899, which reads as follows:

“ if the ship is of one hundred tons or upwards, with at least one officer besides the master holding a certificate not lower than that of only mate,
 B or of second mate in the case of a sailing ship of not more than two hundred tons . . . ”

Provisions relating to ships of one hundred tons burden were substituted in s. 92 of the Merchant Shipping Act, 1894, in somewhat different terms by s. 56 of the Merchant Shipping Act, 1906. The precise differences are irrelevant for the present purpose. The point, it was suggested, is that the Empire Jamaica,
 C being a vessel of over one hundred tons burden, and both the master and the first mate being duly certificated, the ship was properly manned with regard to the certification of her officers, and the requirements of para. (c), therefore, do not arise. Alternatively, it was suggested that, even if the requirements of para. (b) and para. (c) are not alternative but cumulative, the requirements of para. (c) do not apply to this case because the Empire Jamaica could not be
 D said to carry more than one mate, since, it was suggested, the description of a person as “ mate ” assumes that he holds a certificate as such, and the ship carried only one officer, namely, the first mate, thus certificated.

As regards the question whether the requirements of para. (b) and para. (c) are alternative or cumulative, the very fact that the test in the one case is the ship's burden and in the other case is the number of mates she carries, may
 E suggest that the requirements are not alternative. However that may be, it seems to me to be important to remember that the Merchant Shipping Act, 1894, was a consolidating Act, and that s. 92 is derived from s. 136 and s. 291 of the Merchant Shipping Act, 1854, as regards masters and mates, and from s. 5 of the Merchant Shipping Act, 1862, as regards engineers. In s. 136 of the Act of 1854, the requirements depending on the ship's burden and on the number
 F of mates carried, though placed in the opposite order, are coupled by the word “ and ”, which leaves no room for inferring that they are alternative provisions. Likewise, in my opinion, the corresponding provision of the Merchant Shipping Act, 1894, as amended, and of the ordinance in question, are cumulative.

As to the question whether para. (c) applies to a ship which, in fact, carries only one certificated mate, it is important to note that “ mate ” is not defined
 G in the Merchant Shipping Act, nor, so far as appears in the papers in this appeal, in the ordinance. Moreover, the words “ at least the first and second mates duly certificated ” themselves seem to imply that there may be one or more mates, in addition to the duly certificated first and second mates, who need not be certificated.

With reference to s. 4 (1) of the ordinance, the various grades for which
 H certificates of competency may be granted to masters, mates and engineers are set out in s. 93 (1) of the Merchant Shipping Act, 1894, sub-s. (2) of which reproduces the corresponding provisions of s. 137 of the Act of 1854. A certificate of competency for a foreign-going ship is deemed to be of a higher grade than the corresponding certificate for a home-trade passenger ship, and the holder of the former certificate may go to sea in the corresponding grade in the last-mentioned
 I ship, but not vice versa. This seems to imply that, merely because he does not qualify for inclusion in the complement of certificated officers in a particular ship, a person is not disentitled to serve in a subordinate capacity as a mate. Moreover, as WILLMER, J., pointed out ([1955] 1 All E.R. at p. 454), many of the smaller ships plying in the coastal trade carry no certificated persons at all, and are not required to do so. Apart from the fact that there is no definition of the term “ mate ”, the Merchant Shipping Act, 1894, itself is inconclusive.

* See footnote p. 148, ante.

Manifestly s. 469, s. 470 and s. 471, dealing with the power of the Minister of Transport and Civil Aviation to suspend or cancel the certificate of any master, mate or engineer, assume that the officer in question is in possession of a certificate. On the other hand, in the case of an application to the High Court under s. 472 to remove a master, the application may, by sub-s. (2), be made, amongst others, by "any certificated mate". By s. 138 (1), dealing with the power of a superintendent to require production of ships' papers, he may require, amongst others, "any mate" or other member of the crew to produce any log-books or other documents in his possession or power relating to a matter in question in the proceedings; and by s. 222 (1) and s. 223 (1), in the case of a seaman or apprentice being guilty of the offence of desertion or of absence without leave or otherwise absenting himself from his ship without leave, "any mate", amongst others, may, with or without the assistance of the local police, convey him on board his ship, or, with or without the like assistance, may arrest him.

In these circumstances, I think that it is a legitimate inference that Parliament and the draftsman of the ordinance used the word "mate" as it is used in common parlance. ANSTED'S DICTIONARY OF SEA TERMS, in the revised edition of 1951, repeats the definition given in the first edition of 1897 in the following words:

"Mate (in a ship).—Literally, the master's assistant. There may be in a merchant vessel as many as four or five mates; they are officers under the captain. In the Royal Navy there are various mates who are petty officers."

In the NEW ENGLISH DICTIONARY, mate is defined, so far as is relevant, as follows:

"4. Nautical uses. (a) An officer (now only on a merchant vessel) who sees to the execution of the commands of the master or commander, or of his immediate superior, and in the absence of the master takes command of the ship. In the Royal Navy the title has been changed to sub-lieutenant; and in the merchant-service, mates hold functions not greatly inferior to those of lieutenants in the Royal Navy. Formerly called *master's mate* (see Master)."

In my opinion WILLMER, J., was fully justified in finding as a fact that Mr. Sinon, though signed on as "senior boatswain", was treated as acting second officer in a ship which, de facto, carried three mates; and in finding that, although he and the third officer, unlike the first officer, were uncertificated, the ship carried these three men to perform the duties of mates, and that they were employed and paid as such. It follows, in my opinion, that he was right in holding that s. 4 (3) (c) was violated and that it was violated with the privity of the respondents.

I dissent, with respect, from JENKINS, L.J.'s description of this as a "technical breach" of the regulations ([1955] 3 All E.R. at p. 69). This requirement of the Merchant Shipping Act and of the ordinance in question is, in my opinion, a safety regulation designed to secure the lives of passengers and mariners, and, incidentally, the safety of cargo and of other shipping, and has no less force than, for example, the collision regulations governing lights to be exhibited by ships (cf. *H.M.S. Truculent, The Admiralty v. The Divina (Owners)* (1) ([1951] 2 All E.R. 968). Further, I should deprecate any encouragement of the idea that it is open to owners at their own instance to substitute for the prescribed complement of certificated officers some lesser complement which they choose to consider as sufficient. In this case, however, it must be remembered that there is an important distinction between the Merchant Shipping Act and the ordinance, inasmuch as no dispensing power is provided under the Act comparable with that given by s. 4 (19A)* as regards Hong Kong. It may be doubtful (see ARNOULD

* Added by reg. 3 of the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951.

A ON MARINE INSURANCE (14th Edn.) vol. 2, s. 722, and MACLACHLAN ON MERCHANT SHIPPING (7th Edn.), p. 148) whether breach of the regulation is of itself sufficient to render unseaworthy a ship putting to sea insufficiently manned with the prescribed complement of certificated officers. However that may be, I am of opinion that WILLMER, J., directed himself correctly in posing the question whether the respondents had satisfied him that the breach on their part of the

B Hong Kong ordinance had no causal connection with the collision.

In his judgment ([1955] 3 All E.R. at p. 63), the Master of the Rolls (SIR RAYMOND EVERSHED) said that the respondents had to prove that the damage or occurrence took place without their actual fault or privity; but that, in his judgment, they could establish that fact if they proved to the satisfaction of the court, that, in all the circumstances of the case, they had good reason to believe

C that the man whom they did engage in the capacity nominally of chief boatswain, but actually and in practice as second mate, was fully competent to perform the functions which would fall on him to perform. The Master of the Rolls held that WILLMER, J., had concluded that the respondents had, as a matter of fact, established that case to his satisfaction, and held that there was no sufficient ground for disturbing that finding of fact. The other members of the Court of

D Appeal have come to the same conclusion. Thus your Lordships are presented with concurrent findings of fact, from which, for my part, I see no reason to differ.

I think that this conclusion can be tested by analogy to the terms of s. 4 (19A)*, bearing in mind, of course, that the dispensing power thereunder had not been invoked at the material time. In my opinion, the effect of the judgments

E below is that, in the circumstances of the case, namely, the recognised shortage of certificated officers, and the practice of the Marine Department of Hong Kong, it has been established that the requirement of s. 4 (3) (c) of the ordinance had been substantially complied with, or at least that the provision made by the employment of Mr. Sinon as second mate had been proved to be as effective as actual compliance with the requirement that the second mate should be duly

F certificated.

For these reasons, I agree with my Lord that this appeal be dismissed.

LORD GODDARD: My Lords, I have had an opportunity of reading the opinion of my noble and learned friend, LORD MORTON OF HENRYTON, with which I am in complete agreement and to which I do not think I can usefully add anything.

G I agree that this appeal should be dismissed.

LORD COHEN: My Lords, the question for determination in these proceedings is whether the respondents are entitled under s. 503 of the Merchant Shipping Act, 1894, to limit their liability for the damage occasioned by a collision which occurred in the Java Sea on Sept. 1, 1951, between their ship, then known as the Empire Jamaica, and the appellants' ship Garoet, on the

H ground that the collision occurred without their actual fault or privity. Both WILLMER, J., and the Court of Appeal have answered this question in favour of the respondents.

The respondents admit that the collision was entirely due to the fault of one Henry Sinon, who had been signed on as chief boatswain of the Empire Jamaica, and was at the time of the collision acting as second mate.

I The ship's articles of the Empire Jamaica for the voyage in question were opened in Hong Kong on July 3, 1951. At that time the relevant Hong Kong ordinances and regulations were the Merchant Shipping Ordinance, 1899, as amended by the Merchant Shipping (Amendment) Ordinance, 1949, and the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951. Section 4 of the Ordinance of 1899, so far as material, provided as follows:

"(1) The name of a master, first, only, or second mate, or first or second

* See footnote p. 150, ante.

engineer shall not be attached to the register or articles of agreement of any British ship, unless such master, mate, or engineer possesses a certificate of service or competency granted in the United Kingdom under the Merchant Shipping Acts, or a colonial certificate of competency declared by any Order of His Majesty in Council to be of the same force as if it had been granted under the said Acts.

“(3) Every British ship, and every foreign ship holding a passenger certificate under s. 10 shall, when leaving any port of the colony, be provided with officers who possess certificates of competency of a grade appropriate to their stations in the ship or of a higher grade, according to the following scale:—(a) in any case, with a duly certificated master; (b) if the ship is of one hundred tons or upwards, with at least one officer besides the master holding a certificate not lower than that of only mate, or of second mate in the case of a sailing ship of not more than two hundred tons; (c) if the ship carries more than one mate, with at least the first and second mates duly certificated; . . .”

Section 4 (19A)* of the Ordinance enables the Governor in Council to exempt any ship from any of the above provisions subject to his being satisfied on certain points. No application for exemption under this provision had been made in respect of the Empire Jamaica before the collision occurred.

The articles, opened on July 3, 1951, show that the Empire Jamaica had signed on a certificated master (Laurence Nelson Beer), a certificated first officer, Mr. Sinon as chief boatswain, and a third officer. Neither Mr. Sinon nor the third officer signed as mates, but the trial judge has found that the ship carried them to perform the duties of mates. He therefore held that s. 4 (3) (c) of the ordinance had been violated. It was not argued before him or before the Court of Appeal that that paragraph had no application, since neither Mr. Sinon nor the third officer signed on as mates. That point was taken before us, but I do not find it necessary to construe the difficult language of s. 4 (3) (c), since I am satisfied that, even if that paragraph was violated, the breach neither caused nor contributed to the collision.

I agree with the Master of the Rolls (SIR RAYMOND EVERSHED) ([1955] 3 All E.R. at p. 63) that the respondents will have discharged the onus of proving that the damage resulting from the collision occurred without their actual fault or privity if they prove that, in all the circumstances of the case, they had good reason to believe that Mr. Sinon was fully competent to perform the functions which would fall on him when acting as second mate. I will not weary your Lordships by reviewing in detail the evidence which was before the trial judge. Suffice it to say that, in my opinion, the oral evidence of Captain Beer and para. 6 of the affidavit of Mr. Leung Yew, sworn on Dec. 2, 1954, establishing as they do that Captain Beer had complete confidence in Mr. Sinon based on about eight years' experience of him, and that Mr. Leung Yew sanctioned his employment in the faith amongst other things of Captain Beer's recommendation, amply justify the conclusion of the trial judge and of the Court of Appeal that the respondents had discharged the onus which rested on them. I am fortified in the conclusion that the failure to provide a certificated second mate was not a contributing cause of the collision by the affidavit of Mr. James Jolly, the Director of Marine of Hong Kong. As I read his affidavit, apart altogether from the question of exemption under s. 4 (19A)*, owing to the shortage of British certificated officers in Hong Kong, it was the general practice of his department to sign on uncertificated men described in the articles as “boatswain” or “chief boatswain” or as “mate” and not to require owners to comply with s. 4 (3) (c) but only with s. 4 (3) (b). The articles of the Empire Jamaica conformed to this practice, and in these circumstances I do not think it can be said

* See footnote p. 150, ante.

A that the fact that Mr. Sinon was not certificated was a contributory cause of the collision.

For these reasons, I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, I have had the advantage of reading the speech of my noble and learned friend on the Woolsack, in which I concur.

Appeal dismissed.

B Solicitors: *Waltons & Co.* (for the appellants); *Hill, Dickinson & Co.* (for the respondents).
[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

PRICE AND OTHERS v. SUNDERLAND CORPORATION.

C [QUEEN'S BENCH DIVISION (Barry, J.), July 11, 12, 13, 1956.]

Education—School meals—Whether teachers under duty to collect money for school meals service—Education Act, 1944 (7 & 8 Geo. 6 c. 31), s. 49.

D Under statutory powers a school meals service had been provided for schoolchildren on a considerable scale since the outbreak of the war in 1939. Schoolteachers had co-operated in the running of this service and had continued to do so after the war ended. By s. 49 of the Education Act, 1944, the Minister of Education was empowered to make regulations imposing on local authorities the duty of providing meals and providing for the manner in which services in connection with the meals were to be rendered by teachers, but the regulations were not to impose on teachers duties in respect of meals other than the supervision of pupils. Regulations made under this section* contained similar limitations. Schoolteachers throughout the country had supervised children while they were having meals and had, on a voluntary basis, collected and recorded the money which the children were required to pay under the school meals scheme. In 1956, as a protest against a Superannuation Bill then before Parliament, the National Association of Schoolmasters decided to ask its members to cease to collect the money for the school meals service and the Sunderland branch of the association informed the defendant council, the education authority, that its members would not in future (reasonable notice being given) receive school meals money. The defendant council thereupon passed a resolution that those members of the Sunderland Association of Schoolmasters who refused to collect money for school meals should have their employment by the council terminated, the council having previously informed the members of the association that the practice of collecting school meals money was an accepted term of employment of schoolteachers. The plaintiffs, who were schoolmasters employed by the defendant council and five of whom had been given notice of dismissal, claimed a declaration that the resolution was ultra vires the council.

H **Held:** (i) the collection of money for school meals was a duty in respect of meals and other than the supervision of pupils within s. 49 of the Education Act, 1944, and therefore was a duty which by virtue of that section might not be imposed by the defendant council on teachers in their employ; and

I (ii) since the resolution passed by the defendant council did, in effect, require teachers to collect money for the purposes of the school meals service on pain of dismissal, it was in contravention of s. 49 and was ultra vires.

[As to the school meals service, see 13 HALSBURY'S LAWS (3rd Edn.) 643, para. 1332.

For the Education Act, 1944, s. 49, see 8 HALSBURY'S STATUTES (2nd Edn.) 193.]

* See p. 160, post, for the regulations.

Claim for a declaration.

The six plaintiffs, Philip Preston Price, James Taylor Robson, George Adamson Stafford, Ralph Forster, James Cathcart Hamilton Cowen, and Frederick Carr, claimed certain declarations against the defendants, the Sunderland County Borough Council. The defendant council had passed on Apr. 11, 1956, a resolution adopting a recommendation that those teachers employed by the Sunderland Education Authority who were members of the Sunderland and District Association of Schoolmasters and who refuse to collect money for school meals in school hours be given notice to terminate their engagements on Aug. 31, 1956. The declarations claimed by the plaintiffs, five of whom had subsequently been given notice pursuant to the resolution, were that the resolution was ultra vires the defendant council and that the council were not entitled to impose on teachers in their employ at any school duties in respect of meals other than the supervision of pupils, namely, the duties of clerks and cashiers.

Gerald Gardiner, Q.C., and N. N. McKinnon for the plaintiffs.

Charles Russell, Q.C., and R. J. Parker for the defendant council.

BARRY, J.: The history of the matter can be stated quite shortly. In 1906, by the Education (Provision of Meals) Act, 1906, Parliament first enabled local education authorities to provide meals for schoolchildren, but that Act expressly provided [by s. 6] that no teacher was to be required to take any part in the duties connected with the provision of those meals. The enactments which then existed relating to education were consolidated by the Education Act, 1921, and the provision of school meals was dealt with in ss. 82-85 of that Act. Section 85 of the Education Act, 1921, re-enacted the earlier section in the Education (Provision of Meals) Act, 1906, and read thus:

"No teacher seeking employment or employed in a public elementary school shall be required as part of his duties to supervise or assist, or to abstain from supervising or assisting, in the provision of meals, or in the collection of the cost thereof."

The provision of meals for schoolchildren remained on a relatively small scale until after the outbreak of the last war when, for various reasons, local education authorities were encouraged by the government to provide meals on a very much wider scale; but, so far as the legislative position is concerned, the position of teachers remained unaltered and continued to be governed by s. 85 of the Education Act, 1921. As part of their war effort the teachers throughout the country wholeheartedly co-operated in the work of providing meals for schoolchildren during the war. The teachers did not, of course, actually prepare the meals, but they supervised the children while they were partaking of the meals provided by the local education authorities, and they did collect the money which the children or their parents were required to pay for the meals which were provided. It was, I think, made abundantly clear throughout the whole of the war period that the duties which the teachers were undertaking in connection with the provision of meals for the pupils under their care were purely voluntary and that the teachers expected that the whole situation would be reviewed and, if necessary, revised after the termination of hostilities.

The plaintiffs are all members of the Sunderland and District branch of the Association of Schoolmasters, which is one of the four major associations into which the teaching profession is organised. In 1943 in Sunderland a joint consultative committee was formed, and on that committee there were represented the director of education and his staff and also delegates from the various associations of teachers, including the association of schoolmasters to whom the six plaintiffs belong. I have seen the minutes or notes of what occurred at various meetings of this consultative committee. I do not think that any question arises as to their accuracy. To take one of these so-called minutes as an example, there was a meeting of this joint committee on Apr. 13, 1943, and

A during that meeting the question of school meals was under discussion. The director of education referred to

B “reports received in respect of school feeding, and said the reports could be divided into six parts: (1) General attitude (2) Place (3) Time (4) Paid staff (5) Supervision and (6) Odd items. Under (1) the director said it appeared that every association was willing to co-operate and that every association wished the arrangements made to be for hostilities only. The director agreed that the scheme should be carried out under the conditions agreed on until the end of the war and then as soon as possible after the war proper plans should be made. Nothing the associations acquiesce in now should prejudice the position when the permanent position was considered.”

C So the matter stood when the Education Act, 1944, was passed. That Act repealed the earlier Acts to which I have referred, and provided by s. 49:

D “Regulations made by the Minister shall impose upon local education authorities the duty of providing milk, meals and other refreshment for pupils in attendance at schools and county colleges maintained by them; and such regulations shall make provision as to the manner in which and the persons by whom the expense of providing such milk, meals or refreshment is to be defrayed, as to the facilities to be afforded (including any buildings or equipment to be provided) and as to the services to be rendered by managers governors and teachers with respect to the provision of such milk, meals or refreshment, and as to such other consequential matters as the Minister considers expedient, so, however, that such regulations shall not impose upon teachers at any school or college duties upon days on which the school or college is not open for instruction, or [and these are the material words] duties in respect of meals other than the supervision of pupils, and shall not require the managers or governors of a voluntary school to incur expenditure.”

F At the time when the Education Act, 1944, became law, the local education authorities were bound to provide milk, meals and other refreshments for their children if the Minister made regulations to that effect. Very shortly after the Act came into force regulations* were made and local education authorities then became entitled to require teachers to supervise the children at meals. That result of the Education Act, 1944, is not in dispute. What other requirements could be placed on teachers forms the subject-matter of the present dispute.

G The Association of Schoolmasters did not take altogether kindly to the change in the law, nor did they think it proper that their members should be required during their spare time to supervise the children at meals without some additional remuneration, and from 1945 onwards there was a considerable amount of dissatisfaction among the members of that association with regard to the part which, by law, they were then compelled to play in the service of providing meals for schoolchildren. Various circulars were issued by the Minister of Education dealing with the meal situation created by the Education Act, 1944. The very much wider extent on which meals were then being provided considerably increased the amount of clerical and other work required in connection with the collection of the moneys which the children's parents were required to contribute towards the cost of the meals. Children were not bound to take their meals at school, but if the parents wished them to do so the local education authority were under an obligation to provide the meals, and, except in the case of necessitous children, were also under an obligation to collect a contribution from the parents towards the cost of the meals.

* The Provision of Milk and Meals Regulations, 1945 (S.R. & O. 1945 No. 698), see further p. 160, post.

As time went on the administration of the scheme received further consideration and no doubt quite properly from the accountancy point of view the teachers were asked (I will not say "required") to make a number of somewhat complicated returns showing the number of meals served, the number of payments made and covering other matters which were required to enable the accounts of the meals service to be kept in proper order. In later days those accounts became fairly complicated, and I am quite satisfied that the members of this association did continue to collect the money and did fill up the various forms which the local education authority considered were necessary; but they did so, I am quite satisfied, as a voluntary service. No specific complaints as to the actual collection of the money from children were made between 1944 and the date of the matters now in dispute. Such complaints as were made related to the part which teachers were required to play as a whole in the provision of meals for children, including in particular the supervision of the children during the mid-day luncheon hour. A B C

It is sufficient for me to say that it is clear that the teachers, knowing, of course, that they were required to supervise, did feel that they were being somewhat ill-used in having that duty imposed on them, and also were dissatisfied with the amount of work as a whole which was involved in connection with the meals service. [HIS LORDSHIP reviewed the evidence concerning the amount of time involved in correlating accounts and preparing returns and concerning the system adopted by the defendant council and concluded that it did impose a considerable amount of work on the teachers in the schools administered by the defendant council. HIS LORDSHIP continued:] D

Not very long ago a Superannuation Bill was introduced into Parliament* E and, rightly or wrongly, the members of the Association of Schoolmasters considered that its terms were unfair to the teaching profession. Although there has been no evidence to this effect, I think I am entitled to take judicial notice of the fact that for some time past they have, again rightly or wrongly, considered that their remuneration was inadequate having regard to their responsibilities and to the important part which they play in the life of the country. The F immediate effect of the Superannuation Bill appeared to be not to increase but to reduce the net remuneration of schoolmasters; and this fact caused a considerable amount of dissatisfaction. Dissatisfaction was expressed at the time by all the associations into which the teaching profession is organised, but the steps taken by the Association of Schoolmasters went a little further than those taken by any of the other associations. Indeed, the defendant council considered G that they went a great deal further and unjustifiably further than was warranted by the facts.

As a result of a decision made by the association as a whole, certain local branches of the association took some drastic action as to the part which they were prepared to play in future in the administration of the meals service. On Mar. 23, 1956, the local secretary of the Sunderland and District branch of the Association wrote to the director of education of the defendant council, in these H terms:

"Dear Sir, At a meeting held tonight it was decided that members of my association, in accordance with the wishes of the National Association of Schoolmasters, will not be able to receive school meals money from the commencement of next term, that is, Monday, Apr. 9, 1956. We shall I continue to supervise school meals as at present and shall carry out other duties connected with the service but we shall not handle money. This ban does not apply to special schools at this stage. For your convenience I enclose a list of our members and the schools in which they serve. This course of action has been decided upon to show our opposition to the Teachers

* I.e., the bill which, on receiving the royal assent on July 5, 1956, became the Teachers (Superannuation) Act, 1956.

A Superannuation Bill which was given its third reading in the House yesterday. We regret having to take this step and hope that we shall be able to resume normal working very soon."

The letter gave reasonable notice, viz., from Mar. 23 to Apr. 9, of the intention of the association to the defendant council. The defendant council reacted somewhat sharply to the letter. On Mar. 26, 1956, the director of education B wrote a letter to the secretary of the local branch of the association, and said:

"Your letter of Mar. 23, 1956, was this evening reported to the School Health and Welfare Sub-Committee of the Education Committee. It was pointed out that the collection of payments for school meals is carried out in school hours and has been done in this manner for many years. Similar C collections, as you know, have been made in connection with the sales of needlework, etc. In these circumstances the committee took the view that your proposed action is quite unwarrantable having regard to the terms of your employment, and would take a very serious view of the position if such action is carried into effect. I am, therefore, instructed to request you to consult your members immediately with a view to the withdrawal of D your letter. I must ask for your reply by Thursday morning, Mar. 29, 1956."

In his reply, dated Mar. 28, 1956, the secretary of the association said that the letter from the director of education

"... was considered by a general meeting of my association held this evening, and I am instructed to state that as the action we have taken has E been in accordance with the wishes expressed by the National Association of Schoolmasters, after thorough investigation of the situation, we must abide by the terms of our letter of Mar. 23."

In response to that letter the director of education, as he was quite entitled to do, directed a circular letter to all the members of the Sunderland and District F Association of Schoolmasters. That was dated Apr. 4. [His LORDSHIP read the opening paragraphs of the letter and stated that the important part of the letter was the following:]

"... As you know, money for school meals is always collected during normal school hours, as moneys for other purposes are collected, this being G done in pursuance of arrangements made by the authority after full consultation with (inter alia) the representatives of your association. This practice has been pursued for some years now and is a clearly recognised and accepted term of employment of all teachers. Because of this, the authority take a most serious view of the proposal of your association not to collect money for school meals from the schoolchildren. This would appear to be quite H contrary to your terms of employment. The fact that only seven county boroughs out of the many local education authorities throughout the country have been selected for this action adds greatly to the seriousness of the matter. There can be no justification whatsoever for your taking such action against schoolchildren or indeed the local education authority, who have taken no part in the present superannuation dispute between the teachers and the government. Under these circumstances, therefore, the I committee expect you to carry out the recognised arrangements and to refrain from following a course of action which might prove detrimental to all concerned."

Other letters were sent to other bodies by the director of education but I need not refer to them in detail. I should point out that, until this action had been proceeding for some time, the defendant council persisted in the view that the action proposed by the Sunderland branch of the association was contrary to the terms of the teachers' employment and that it was a contractual obligation on the

part of every schoolteacher to collect moneys from schoolchildren and to carry out other work in addition to supervision, which work had in fact been carried out by teachers during the years subsequent to the passing of the Education Act, 1944. This view was one of the principal grounds on which the defendant council based their answer to the plaintiffs' claim. Counsel for the defendant council expressly withdrew that defence during the present proceedings and did not seek to establish that at any time the six plaintiffs in this action, or indeed any other schoolmasters, were, as part of the terms of their service with the defendant council, under an obligation to collect money from schoolchildren in payment for meals provided at the schools by the local education authority.

The next incident to which I need refer occurred on Apr. 11, 1956, when the defendant council passed the resolution which the plaintiffs now ask the court to declare invalid on the ground that it was outside the powers of the defendant council. The record of the meeting of the defendant council reads:

"the education committee reported and recommended (inter alia) . . . That having been informed by the Sunderland Association of Schoolmasters that in order to show their opposition to the Teachers Superannuation Bill, the association members employed in the borough schools proposed to cease collecting moneys for school meals as from the beginning of the new school term (Apr. 9) similar action having been taken in six other county boroughs, and as the local education authority have had no part in the drawing up of the terms of the Bill, the committee recommended the council to register their objection to such action by the said schoolmasters and adopt the following recommendations:

"That those teachers employed by the Sunderland Education Authority who are members of the Sunderland and District Association of Schoolmasters and who refuse to collect money for school meals in school hours be given notice to terminate their engagements on Aug. 31, 1956. Resolved that that report be approved and adopted."

The news of the passing of that resolution was conveyed by the director of education on Apr. 13, when he wrote to all the members of the local branch of the Association of Schoolmasters a letter in these terms:

"Dear Sir, In my letter to you dated Apr. 4, 1956, I informed you that I had received a letter from the honorary secretary of the Sunderland and District Association of Schoolmasters stating that members of the association would cease to collect dinner money from schoolchildren as from Apr. 9, 1956, to show their opposition to the Teachers Superannuation Bill.

The majority of the members of the association who normally collect dinner money accordingly refused to collect this money, and the council have therefore passed unanimously the following resolution."

Then the resolution adopted by the defendant council is set out. The director of education goes on to say:

"I am instructed to ascertain the position with regard to each member of the association and to request you to answer the following two questions:

(i) Do you normally collect dinner money in school during normal school hours? (ii) Are you prepared to carry out this collection of dinner money? I enclose a stamped addressed envelope and shall be pleased if you will let me have your reply by Wednesday, 18th instant."

On Apr. 14 the general secretary of the National Association of Schoolmasters wrote to the director of education of the defendant council a letter in which he referred to the previous correspondence with the Sunderland and District Association, and he went on to say that he was instructed to inform the director

". . . that each member of the association who has hitherto been voluntarily collecting money for school meals has been asked to do so no longer

- A pursuant to the notice to you of Mar. 23, 1956. We have taken the opinion of leading counsel upon the letter of Apr. 13, 1956, which in his view constituted an imposition upon teachers of duties in respect of meals other than the supervision of pupils inasmuch as it publishes to each member a resolution of the council that schoolmasters who refuse to collect money for school meals will be dismissed; such an imposition is directly contrary to the terms of s. 49 of the Education Act, 1944. As this is a pure question of law upon which a decision of the court would alone be binding, our members propose to apply to the court without further notice to you for such a decision. In the event of such a decision being adverse to our members they will of course loyally accept it, and we assume that in the contrary event you will do the same. Since therefore the court's decision as to the respective rights of the parties to this unfortunate dispute is to be taken without delay, you will doubtless agree that no precipitate action in the form of dismissal or otherwise should be lodged whilst the matter is sub judice. The reference in your letter dated Apr. 4, 1956, to the collection of money for school meals as a clearly recognised and accepted form of employment of all teachers is disquieting because it suggests that every voluntary service undertaken by schoolteachers becomes for the local education authority a contractual obligation on teachers. It is true that during their normal working, teachers voluntarily undertake many extra duties but there is no contractual obligation upon them to continue to perform such duties. However, no useful service would be performed by arguing the teachers' case to you now beyond informing you of the nature of that case, and I should be obliged for your kind confirmation that you will take no further action until the court's decision be announced, and I on my part undertake that my members will apply for an early trial."
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Further correspondence ensued, and, in the result, the defendant council did in fact issue notices of dismissal to five out of the six plaintiffs. They were unable to dismiss the sixth plaintiff, because, as I understand it, he was a head master and required a longer period of notice than could be given to him after the correspondence to which I have referred had passed.

- [HIS LORDSHIP stated that he was satisfied this action was not taken in order to prejudice the issue or to punish the six plaintiffs who brought this action in order to obtain the ruling of the court on the extent of their obligations. After accepting the assurance of counsel that the plaintiffs would not be singled out for unfavourable treatment HIS LORDSHIP continued:] Those, shortly, are the facts. Two questions arise and require consideration. The first is whether, on the true construction of s. 49 of the Education Act, 1944, these plaintiffs could be required by the defendant council, as a term of their employment, to carry out the particular duty of collecting money from the children when brought to the school as payment for meals. If s. 49 of the Act does not prohibit the defendant council from making any such requirements, then clearly the resolution of the council was warranted by the facts and is a valid resolution. Counsel for the plaintiffs did not seek to argue the contrary. If, on the other hand, the correct interpretation of s. 49 of the Act is that it prohibits local education authorities from requiring their teachers to take any part in the administration of the school meals service other than the mere supervision of the children at the time when they are having their meals, then there arises a further question whether the resolution of the defendant council was ultra vires ?
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- H
- I

Counsel for the defendant council contends that, even if he is wrong in his submission as to the true effect of s. 49, none the less the defendant council were perfectly entitled to dispense with the services of these six teachers by giving them the appropriate period of notice in accordance with their contract of service.

Those are the two issues which have to be determined and it is essential to

consider the first of those issues first. Until the true legal position has been ascertained, it appears to me to be quite impossible to approach the solution of the second problem. A

Section 49 of the Education Act, 1944, does not of itself impose any obligations on local authorities to provide school meals, nor does it empower them to do so. It is a section which requires the Minister to make regulations imposing on local authorities such a duty, and clothing them with the necessary powers to carry it out. In that respect it is different from the sections in the earlier Acts to which I have referred*. B

Regulations were made by the Minister under s. 49, dated June 6, 1945, and entitled the Provision of Milk and Meals Regulations, 1945 (S.R. & O. 1945 No. 698). I need not read the whole of the regulations; but they require local authorities to establish what is termed a school meals service. The regulations provide that a school meals service shall be available for the benefit of day pupils in attendance at all schools maintained by the authority. Then the regulations lay down various provisions as to the nature and quality of the meals to be provided, and by the original reg. 10 (1) provide that C

"where milk, meals or other refreshments are provided for any pupil, the parent of the pupil shall defray such part of the expense for providing the benefits as may be charged upon him under this regulation, provided that if, in the opinion of the authority, a parent is unable without financial hardship to pay the whole or part of any sum payable by him the authority may remit that sum or part thereof as the case may be." D

A new reg. 10 was substituted by regulations made in 1949† and the new reg. 10 was amended in 1951 and 1955†, but for present purposes I do not think that it is necessary for me to refer to the amending regulations. Regulation 10 both in its original form and in its amended form, provides that any sums payable by a parent by virtue of this regulation may be recovered summarily as a civil debt. E

The two regulations most applicable to the present dispute are regs. 13, 14 and I think that there is some virtue in reading first reg. 14. Regulation 14 reads: F

"The authority shall ensure that suitable arrangements are made for the supervision and social training of pupils during meals and may require teachers of any school to supervise pupils partaking of dinners upon days on which the school is open for instruction."

So that regulation clearly empowers the authority to require their teachers to supervise pupils while taking dinners, but only on days on which the school is open for instruction, thereby, of course, following the terms of s. 49 of the Education Act, 1944. G

Then there are two provisos which are immaterial for present purposes, and a third proviso which reads:

"(c) No service by way of supervision shall be required of any teacher, and no voluntary assistance to the school meals service shall be given by any teacher, if in the opinion of the authority it would adversely affect the quality of the teaching given by that teacher." H

There again, that proviso refers to a requirement of supervision, and, in contradistinction to that, refers to voluntary assistance to the school meals service which may be given by a teacher. I

Regulation 13 reads:

"(1) The authority shall employ an officer as organiser of school meals and such other officers as are necessary for the efficient conduct of the

* See p. 154, letter E, ante.

† The Milk and Meals (Amending) Regulations, 1949 (S.I. 1949 No. 2280); the Milk and Meals (Amending) Regulations, 1951 (S.I. 1951 No. 340) and the Milk and Meals (Amending) Regulations No. 2, 1955 (S.I. 1955 No. 320).

A school meals service; the organiser of school meals shall, subject to any directions of the Minister, possess suitable qualifications in dietetics and cookery and adequate experience in the planning, preparation and service of meals on a large scale. (2) The authority shall employ a suitable and adequate staff other than teachers—(a) for the preparation, cooking, service and, where necessary, transport of meals and for washing up and other incidental matters; and (b) to such extent as may be needed, having regard to the power given to the authority by the next following regulation [i.e., reg. 14, which I have read] to require teachers to supervise pupils, for supervising pupils at meals.”

C That means that, in addition to the services of teachers which the local authority can require in relation to supervision, other employees may be taken at the discretion of the authority to assist the teachers in the supervision of the children or to supervise the children in place of the teachers if the authority thinks fit not to require the teachers to supervise.

D Counsel for the plaintiffs puts his case very simply. He says that s. 49 of the Education Act, 1944, means what it says, namely, that a local education authority or borough council may not impose on teachers at any school duties in respect of meals other than the supervision of pupils. He says that the collection of money paid by parents for meals provided is quite clearly a duty in respect of meals and, on the clear wording of the section, no teacher can be required, as part of his conditions of service, to undertake that duty. That is how he puts the plaintiffs' case; and I am bound to say that it has a simplicity and a clarity which, at first sight at least, adds considerable conviction to his argument.

E The argument of counsel for the defendant council, as I understood it, was based on the submission that the words “duties in respect of meals” mean merely duties in respect of meals understood in the narrow sense, that is to say duties in respect of the period during which the children are actually consuming the food which is placed before them by the local authority. He refers, of course, to the wording of the earlier Acts, particularly s. 85 of the Education Act, 1921*, and points to the phrase contained in that section “supervising or assisting in the provision of meals or in the collection of the cost thereof”. He says, as I understand his argument, that this expression “duties in respect of meals” means something different from duties connected with the provision of meals, and that, on the true construction of the section, such duties as the collection of the cost of the meal, which was separately dealt with by s. 85 of the Education Act, 1921, can still be imposed on the teachers as not being a duty in respect of a meal in the narrow sense for which he contends, but possibly a duty in connection with the service of the meal or the provision of the meal. He points out, with some force, that it is, on the face of it, strange that the section does not place any similar limitation on the powers of the authority in relation to their duties connected with the provision of milk or other refreshment and is confined to the question of meals alone. His argument is reinforced by the fact that, at the time the Act was passed (and, incidentally at the time when the regulations under s. 49 were made) a charge was made for the provision of milk, and the regulations do in fact deal with the charges to be made both for milk and for other refreshments.

I It is not for me to explore the motives which may have actuated the legislature in framing the Act in the widest terms; but I am bound to say that I find it quite impossible to place such a narrow construction on the words “in respect of meals”. If s. 49 of the Education Act, 1944, had repeated the words “assisting in the provision of meals” I think it might well have been right to say that those words would not cover the work of collecting the cost of the meals, which was, of course, treated by the Education Act, 1921, as an entirely separate duty and not as part of the service of assisting in the provision of meals.

* See p. 154, letter E, ante for s. 85.

It is on account of the very much wider words, namely, "in respect of meals",^A used in the Act of 1944, that I do not think I can cut down the meaning of those duties in respect of meals to say that they exclude the collection of money held by the children or their parents for those meals. I feel bound to accept the submission that the collection of that money is beyond argument a duty in respect of meals. The money is payable for the meals. It would not be if the meals were not provided or if the children did not partake of them, but on any reasonable construction the words "duties in respect of meals"^B must include the collection of money payable for the meals.

I have therefore come to the conclusion, not without some hesitation, that the plaintiffs' contention as regards s. 49 is the correct one, and that under that section the local education authority may require their teachers to supervise the pupils during meals. That does not mean that the defendant council cannot,^C with the teachers' consent, carry out the full scheme which is at present being carried out; but it does mean that the services rendered by the teachers in the carrying out of that full scheme are voluntary, and that the defendant council cannot require the teachers, as a condition of their employment, to undertake them.

Teachers, as everyone knows, do undertake a number of voluntary services,^D and I for one sincerely hope that nothing in the present decision of the court will prevent that happy state of affairs from continuing. None the less, I am quite satisfied that under the clear provisions of s. 49 of the Education Act, 1944, any services rendered by teachers in connection with what the Minister in the Provision of Milk and Meals Regulations, 1945, described as the school meals service, other than that of supervision, are services voluntarily undertaken. That is the view of the Act for which these plaintiffs and their association have always contended,^E and it is a correct view.

Having reached that conclusion, I have to consider the second question which requires consideration in view of the fact that teachers cannot be required to give services to the school meals service other than the work of supervision of the pupils during meal time, namely, have the authority power to pass the resolution which is now called in question?^F

It has long been held that the courts will not inquire into or interfere with the decisions and actions of local authorities and other statutory bodies so long as their decisions are reached bona fide and within their statutory powers. It is conceded by counsel for the defendant council, and indeed it is abundantly clear on the authorities, that, in relation to the dismissal of servants, a statutory body such as a borough council stands in a somewhat different position from that of a private individual. Under the law of this country a private individual can engage and dismiss servants at his will, and if he engages a servant on terms that that servant's employment can be terminated at a month's notice, the master, if he be a private individual, can give a month's notice and no court can inquire into the motive for his doing so.^G

The position is somewhat different in the case of statutory bodies. A local authority or any statutory body cannot either employ or dismiss servants except under statutory authority: their powers are derived from the statute or statutes under which they are created. And it is a very well-known principle of law that statutory powers can only be exercised for the purposes for which they are granted. Therefore there may be cases where a local authority in resolving to dismiss a servant or to take any other action, can have its decision called into question in the courts if those who call it into question can establish that that decision was taken either mala fide or that it was a decision which did not lie within the local authority's statutory powers.^H

The burden rests on those who call into question any decision of a local authority, and it is a heavy burden. I have not here to decide whether it was right or wrong that the local authority in this case should have decided to dismiss^I

A these six teachers and the other members of the association. What I have to inquire into is whether it was within their statutory powers to do so in the particular circumstance now under consideration.

Counsel for the defendant council puts his case in this way. He concedes that if his construction of s. 49 of the Education Act, 1944, be wrong, the authority would not then be entitled to say to a teacher in their employment that the
B teacher either must carry out duties in connection with the school meals service in addition to the duty of supervision, or must go; and that, if the teacher refused to carry out the duties, a notice of dismissal given on that ground would be outside the powers of the authority. Counsel seeks, however, to distinguish the facts of the present case and to say that is not the true position here in the case before the court. His argument is that, rightly or wrongly, but bona fide,
C his clients came to the conclusion that this practice under which teachers did collect money and perform other duties and services in connection with school meals had been going on for many years, that it had been the subject-matter of certain discussion arising out of certain complaints; that it had all been dealt with in a reasonable way by both the local authority and the teachers; that there had been no specific objection to the particular task of collecting the children's
D money; and that in those circumstances an employee who, for some entirely extraneous purpose unconnected with the actual collection of the money, says that in future he will not carry out that service is irresponsible, unfaithful, unfair and an inconsiderate employee to whom the defendant council are entitled to say that they will no longer employ him. Counsel says that the defendant council are not requiring these plaintiffs to provide services other than supervision in respect of school meals; all they are doing is dismissing, with proper
E notice, employees who, for the reason which I have indicated, they think are irresponsible and inconsiderate and no longer worthy to be employed.

There is, of course, a very real distinction between the two situations, and if the position here had been that the defendant council were saying that members of an association who took this sort of action, not because they had any dispute
F with the defendant council, but because they objected to some Act of Parliament for the terms of which the defendant council were in no way responsible, were the type of men whom they did not want to employ, then, as I see it, they would be perfectly entitled to give them the requisite notice to terminate that employment.

I do not think, however, that that is the true position here. If the resolution of Apr. 11, 1956, had declared that all members of the association on whose
G behalf the letter of Mar. 23, 1956, had been sent, must go, that would have been a resolution which it would have been within the defendant council's power to make. But that is not what was provided by the resolution. The resolution was that those teachers employed by the defendant council who were members of the association and who refused to collect money for school meals in school hours were to be dismissed.

H There are the dual requirements: membership of the association and refusal to collect money. That clearly does not refer to some past refusal. It means a continuing refusal to collect money by virtue of the notice given on Mar. 23. It is abundantly clear that the defendant council were saying that unless the teachers withdrew their refusal to collect the children's money, they had got to go. That seems to me, without any shadow of doubt, to be a requirement that
I the teachers shall undertake a duty in respect of meals other than the supervision of pupils. If that be so, I find it very difficult to attribute any other meaning to the resolution—either read alone or in conjunction with the letters preceding it and following it—than one which indicates that it is ultra vires. It cannot be within the powers of the local authority to resolve to take an action which the Act of Parliament under which their powers are derived clearly prohibits.

There can be no doubt that this resolution does require the teachers to collect the school meals money under pain of dismissal. That is the only way in which

such a requirement can be enforced; and a threat of dismissal unless a teacher carries out that duty is the clearest possible contravention of the express wording of s. 49 of the Education Act, 1944. A

In those circumstances I have come to the conclusion that, although no one suggests that the defendant council were not acting in a sense bona fide, or that they were actuated by a malicious motive, their decision to dismiss the plaintiffs merely because they decided to withhold voluntary service, when the Act of Parliament expressly prohibits the defendant council from requiring that service, was ultra vires. The plaintiffs are therefore entitled in substance to the relief claimed. B

[After discussion the declaration was made in a form declaring that the duties of collecting and recording the cost of school meals were duties in respect of meals other than supervision within the meaning of s. 49 of the Education Act, 1944, and that the defendant council were not entitled to impose such duties on teachers in their employ.] C

Judgment for the plaintiffs. Declaration in terms agreed.

Solicitors: *Craigen, Wilders & Sorrell* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *G. S. McIntire*, Sunderland (for the defendant council). D

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

Re ULVERSTON & DISTRICT NEW HOSPITAL BUILDING FUND. E

BIRKETT AND OTHERS v. BARROW AND FURNESS HOSPITAL MANAGEMENT COMMITTEE AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.J.J.), June 21, 22, 25, 26, July 13, 1956.]

Charity—Cy-près doctrine—Fund for erection and maintenance of new voluntary hospital—Contributions received from identifiable and anonymous donors—Total failure ab initio of purpose of fund—No general charitable intention on part of identifiable donors. F

The Ulverston cottage hospital having become inadequate for the needs of the locality which it served, it was resolved at the annual general meeting of the hospital in 1924 that a movement for a new hospital be initiated, and in 1927 a fund was opened for the building of a new hospital with an adequate margin of upkeep. In 1928 the chairman of the management committee made a personal appeal by letter to persons resident in the locality, and the appeal was carried on by committees in the district served by the cottage hospital and by a sub-committee of the hospital management committee. Contributions were received, partly from subscribers and donors who gave their names, partly from anonymous donors, and partly from the proceeds of whist drives, rummage sales and entertainments. Contributions to the fund dwindled to less than £8 in 1937 and ceased in 1942 and the total was insufficient to finance the building of a new hospital. On application to the court it was decided that the fund was not held on a general charitable trust and that so much thereof as was subscribed by identifiable donors was subject to a resulting trust for them, no declaration being made in relation to the proceeds of gifts from unidentifiable donors in expectation of waiver of any claim to them as bona vacantia and the consequent bringing in of a scheme for their application. On appeal, G

Held: so much of the fund as represented the contributions of identifiable subscribers was subject to a resulting trust in favour of the donors because H

(a) a subscriber who gave money to a fund raised for the sole and exclusive purpose of building a new hospital at a certain place, there being nothing I

- A but the bare fact of the gift to indicate his intention, must be taken to have given the sum for that sole purpose and not with a general charitable intention (dictum of PARKER, J., in *Re Wilson*, [1913] 1 Ch. at p. 322, applied) and
- B (b) even if a general charitable intention should be imputed to donors whose identity was not indicated with their gifts (since, as it would be impracticable to return the gifts, the donors might be taken to have given them out and out to charity), yet in the present case, where there was a total failure ab initio of the particular purpose for which the fund was raised and the circumstances were not such as to leave in doubt whether contributions were for a general as distinct from a particular charitable purpose, the fact that the fund had included gifts from unidentified donors did not justify a general charitable intention being imputed to identifiable donors (*Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655 and *Re Wokingham Fire Brigade Trusts*, [1951] 1 All E.R. 454 distinguished).
- C

Re Hillier ([1954] 2 All E.R. 59) considered and explained (see pp. 173 to 175, and p. 175, letter C, to p. 176, letter E, post).

Appeal dismissed.

- D [As to failure of specified charitable purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 285, 325, paras. 589, 666; and for cases on the subject, see 8 DIGEST (Repl.) 468, 1694-1698.]

Cases referred to:

- (1) *Re University of London Medical Sciences Institute Fund*, *Fowler v. A.-G.*, [1909] 2 Ch. 1; 78 L.J.Ch. 562; 100 L.T. 423; 8 Digest (Repl.) 388, 811.
- E (2) *Biscoe v. Jackson*, (1887), 35 Ch.D. 460; 56 L.J.Ch. 540; 56 L.T. 753; 8 Digest (Repl.) 461, 1621.
- (3) *Re Wilson, Twentymen v. Simpson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest (Repl.) 422, 1132.
- (4) *Re Welsh Hospital (Netley) Fund*, *Thomas v. A.-G.*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest (Repl.) 467, 1681.
- F (5) *Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; 8 Digest (Repl.) 322, 62.
- (6) *Re Wokingham Fire Brigade Trusts*, *Martin v. Hawkins*, [1951] 1 All E.R. 454; [1951] Ch. 373; 115 J.P. 159; 8 Digest (Repl.) 345, 264.
- (7) *Re Hillier*, *Hillier v. A.-G.*, [1954] 2 All E.R. 59; 3rd Digest Supp.

Appeal.

- G This was an appeal by the Attorney-General of the Duchy of Lancaster and the Queen's Attorney and Serjeant within the County Palatine of Lancaster from a judgment given by SIR LEONARD STONE, V.-C., in the Chancery Court of the County Palatine of Lancaster, on Feb. 10, 1956, on a petition by the trustees of the Ulverston & District New Hospital Building Fund for the determination of the questions (i) whether the whole or any and, if so, what
- H part of the fund was held on a general charitable trust and fell to be administered cy-près, and (ii) whether the whole or any and, if so, what part of the fund was held by the trustees on a resulting trust for any and, if so, which of donors to the fund.

- The fund, which was opened in 1927, was raised for the purpose of building and maintaining a new voluntary hospital to serve the districts then served by the Ulverston District Cottage Hospital. Between 1928 and 1942 contributions to the fund were received by way of donations from local people and local institutions, bequests, collections in churches, and money raised by dances, exhibitions, rummage sales, whist and bridge drives, etc. Among the contributors was the Swarthmoor & Ulverston Co-operative Society, Ltd. In 1936 the fund stood at nearly £20,000, but in the following years the contributions were almost negligible. Since 1942 no contribution had been received, and, as the funds collected were insufficient to build a hospital, the scheme had become impracticable before the National Health Service Act, 1946, was enacted. The
- I

trustees invested the fund and, at the time of the hearing, the value of the fund was about £32,000. The petition was served on the Barrow & Furness Hospital Management Committee, the co-operative society (as one of the identifiable subscribers to the fund) and the Attorney-General of the Duchy of Lancaster. The Barrow & Furness Hospital Management Committee, which was established under the Act of 1946, made no claim to the fund and took no part in the proceedings. The co-operative society claimed the return of its donations if the fund was not capable of being devoted to the purpose for which the donations were made.

SIR LEONARD STONE, V.-C., found that the subscriptions and donations were given on the faith of a local appeal made for a purely local object, the building and maintaining of a new local hospital to replace the old cottage hospital which had become inadequate, and held that the subscribers were entitled to the return of their donations. Accordingly, he declared (i) that the co-operative society was entitled out of the assets representing the fund to be repaid such proportion of the fund remaining after payment of all proper costs and expenses thereout as £500 (the total amount of the society's subscriptions) bore to the total funds collected; and (ii) that all the persons or bodies who had made individual subscriptions to the fund which could be ascertained were entitled to be repaid such proportion of the fund remaining as aforesaid as the total of their subscription thereto bore to the total funds collected; and it was ordered that the matter be referred to the registrar to make an inquiry what were the subscriptions to the fund, the amounts and sources thereof.

The Attorney-General of the Duchy of Lancaster (Milner Holland, Q.C.), and P. A. Ferns for the Attorney-General of the Duchy of Lancaster.

R. C. Seddon for the trustees of the fund.

Raymond Jennings, Q.C., and H. C. Easton for the Swarthmoor & Ulverston Co-operative Society.

Cur. adv. vult.

July 13. The following judgments were read.

JENKINS, L.J.: This appeal concerns the destination of a fund known as "the Ulverston & District New Hospital Building Fund" which now amounts, with accumulations of income, to some £32,000. The history of the fund goes back to the year 1924, by which time it had been long apparent that the cottage hospital at Ulverston in Lancashire, built in 1872, had become inadequate for the needs of the districts which it served, namely, the Urban and Rural Districts of Ulverston and the Urban Districts of Dalton-in-Furness and Grange Over Sands. At the annual general meeting of subscribers to and friends of the hospital held on June 19, 1924, resolutions were passed to the effect that a movement be initiated for a new hospital, and that the management committee be asked to consider the matter and as soon as practicable submit a scheme to a special meeting of such subscribers and friends. Largely owing to a period of trade depression in the area, which made the time inopportune for the raising of funds, little or nothing was done to implement these resolutions until 1927. At the annual general meeting held on July 20, 1927, the chairman declared the fund open under the name of the Ulverston & District New Hospital Building Fund, and invited the help of the people of the district. He pointed out, however, that the real effort had to be further postponed owing to the depressing trade conditions. It appears that in 1928 the chairman made a personal appeal by letter to persons resident in the Ulverston urban and rural districts; and at the annual general meeting held on May 23, 1928, he was able to announce that he had received promises of subscriptions amounting to £2,721. The observations attributed to him in the minutes of this meeting show quite plainly that the object for which the fund was being raised was, as its name implied, the building of a new hospital, with an adequate margin for upkeep.

- A Thereafter fairly substantial sums were contributed year by year, partly by subscribers who gave their names, partly in the form of bequests, and partly from anonymous sources, which expression I use as including subscriptions from persons who did not give their names and also the proceeds of whist drives, rummage sales, entertainments, and the like. The appeal was carried on by committees formed in the four districts served by the cottage hospital and by
- B a sub-committee of the committee of management of that hospital. Due publicity was given in the local press to the proceedings and activities of the various committees concerned, but apparently no text is now extant of any written or printed appeal, with the exception of the letter of Sir Mathew Fell issued to the press in support of the appeal early in 1930, to which I will later refer.

- C The response to the appeal, though by no means negligible, was never on anything like the scale required to finance the building of a new hospital. In 1937 there were negotiations between the Lancashire County Council and the organisers of the fund with a view to the providing of a new hospital as a joint venture. These negotiations, however, came to nothing, and thereafter contributions to the fund rapidly dwindled, amounting to under £8 in 1937 and ceasing altogether in or about 1942. The inadequacy of the response to the
- D appeal, coupled with the failure of the negotiations with the Lancashire County Council, made it reasonably plain by 1937 that there was no practical possibility of carrying out the purpose for which the fund had been raised, that is to say, the provision of a new hospital, and any scintilla of hope to the contrary which could have been entertained by the most optimistic promoter of the project was finally dispelled by the passing of the National Health Service Act, 1946.

- E Some nine years later the trustees of the fund applied by petition to the Chancery Court of the County Palatine of Lancaster for the determination (with consequential relief) of the questions, (i) whether the whole or any and, if so, what part of the fund was held on a general charitable trust and fell to be administered *cy-près*; and (ii) alternatively, whether the whole or any and, if so, what part of the fund was held by the trustees on a resulting trust for any
- F and, if so, which of the donors to the fund. There were joined as defendants to the application the Barrow and Furness Hospital Management Committee established under the Act of 1946, who made no claim to the fund and, therefore, passed from the case, the Swarthmoor & Ulverston Co-operative Society, Ltd., as a representative of the individual (as distinct from anonymous) donors to the fund, and the Attorney-General of the Duchy as representing the interests of
- G charity generally.

- The learned Vice-Chancellor, whose more detailed statement of the facts, with one minor qualification hereinafter referred to, I gratefully adopt, was of opinion that the building and maintenance of a new hospital was and remained the sole purpose for which the fund was raised. Accordingly, in his view, there was no room for the *cy-près* application of the fund, so far, at all events, as
- H it represented the contributions of identifiable subscribers. He, therefore, applied the general principle, authority for which, if authority be needed, is to be found in the judgment of FARWELL, L.J., in *Re University of London Medical Sciences Institute Fund*, *Fowler v. A.-G.* (1) ([1909] 2 Ch. 1 at p. 8) to the effect that, where a fund has been raised for a particular charitable purpose which fails, the subscriptions received from identifiable donors become subject
- I to a resulting trust for the persons by whom they were contributed, and are returnable to those persons accordingly. In conformity with that principle he declared in answer to the questions above set out, (i) that the co-operative society was entitled out of the assets then representing the fund to be repaid such proportion of the fund remaining after payment of all proper costs and expenses thereout as £500 (being the total amount of the co-operative society's subscription to the fund) bore to the total funds collected; and (ii) that all the persons or bodies who had made individual subscriptions to the fund were

entitled to be repaid such proportion of the fund remaining as aforesaid as the total of their subscriptions thereto bore to the total funds collected. No order was made as to the destination of contributions to the fund received from anonymous sources, I gather in the expectation that on a further hearing of the petition the Attorney-General of the Duchy would, as is usual in such cases, waive any claim he might have to that part of the fund as bona vacantia and bring in a scheme for its cy-près application for the approval of the court. An inquiry was directed to ascertain what were the subscriptions to the fund and the amounts and sources thereof, and the further hearing of the petition was adjourned with liberty to any of the parties to restore the same on seven days' notice.

From that order the Attorney-General of the Duchy now appeals to this court. He submits that there must be imputed to all subscribers to the fund a general charitable intention to secure the improvement of the facilities for medical and surgical treatment in the districts served by the Ulverston cottage hospital, the project of building a new hospital being merely a mode—though, no doubt, the mode primarily contemplated—of carrying out that general intention; and, accordingly, that a scheme should be settled for the cy-près application of the entire fund. This submission he seeks to support in three ways. First, he says that on the facts of the case the fund was raised for the general purpose above described, and not solely and exclusively for the particular purpose of building a new hospital. I cannot accept this argument. The Attorney-General admits that no support can be found for it in the evidence apart from Sir Mathew Fell's letter published in the local press on Mar. 15, 1930, to which I have already referred. This was a long letter in the course of which the writer adverted to needs over and above the actual building and maintenance of the new hospital. I do not propose to burden this judgment with quotations from it, for I am in complete agreement with the view expressed by the learned Vice-Chancellor, who said:

“ . . . in my opinion it adds nothing to the only purpose for which the appeal was originally made, namely for the building of a new hospital at Ulverston and its maintenance. That remained the sole objective.”

Secondly, says the Attorney-General, even if the fund were raised for the particular purpose of providing a new hospital adequate to the needs of the districts served by the Ulverston cottage hospital, that purpose, being for the benefit of the district concerned, in itself involved the more general charitable purpose of benefiting the inhabitants of those districts in other ways within the broad field of medical and surgical relief. For this proposition he relied on *Biscoe v. Jackson* (2) ((1887), 35 Ch.D. 460), where a testator made a bequest for the establishment of a soup kitchen and cottage hospital for a particular parish. This object proved impossible of fulfilment because no land available for the purpose under the law of mortmain as it then stood could be obtained within the parish in question. It was, however, held in the Court of Appeal, affirming *KAY, J.*, that the gift disclosed a sufficient general intention of charity for the benefit of the poor in the parish to entitle the court to execute the trust cy-près, and to direct a scheme for that purpose to be settled. I do not think that that case affords any real assistance to the Attorney-General's argument. As was observed by *PARKER, J.*, in *Re Wilson, Twentyman v. Simpson* (3) ([1913] 1 Ch. 314 at p. 322):

“ Of course, where there is a particular gift for charitable purposes, if you come to analyse the intentions of the testator, the intentions of the testator must have been to benefit those persons who will, if the particular direction is carried out, take the benefit of that particular direction, and, if from that you draw an inference that the general and paramount intention was to benefit those persons, it enables you to disregard the particularity of the gift and to give effect to that general intention as opposed to the

A particular intention. I do not think that that can be the effect of *Biscoe v. Jackson* (2). It seems to me that there the court was able to gather—whether I should have come to the same conclusion myself I do not know, because in cases like that different minds may very well take different views—that there was a general paramount intent for the benefit of the poor of a certain parish, although the particular directions were to establish a soup kitchen and a cottage hospital for the parish.”

B

It is to my mind one thing to hold, on the language of a particular will, that a testator who constitutes a trust of his own devising, for the purpose of relieving the poor of a given parish in some special way, has by the terms of his gift manifested a general intention of charity for the benefit of the poor of that parish; and quite another thing to impute to a testator or subscriber who bequeaths or subscribes money to a particular existing fund, raised solely and exclusively for some particular charitable object, an intention to devote the sum bequeathed or given to some general charitable purpose over and above the sole and exclusive object of the fund to which it is bequeathed or given. It is to my mind not open to doubt that a testator who bequeaths or a subscriber who gives money to a fund raised for the sole and exclusive purpose of building a new hospital at X, with nothing beyond the bare fact of the gift to indicate his intention, must be taken to have bequeathed or given the sum in question for that sole and exclusive purpose and nothing else. Accordingly, I think that the Attorney-General's second argument also fails.

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Thirdly, the Attorney-General raises an argument based on the inclusion in the fund of sums received from anonymous sources. That argument is of this nature. People who contribute to a fund of this sort by putting cash into a collecting box, paying the entrance fee for a whist drive or entertainment, or the like, or, indeed, people who send money direct to the organisers with nothing to indicate the identity of the donor, contribute in circumstances in which it is, for all practical purposes, impossible that their money should be returned to them in the event of the failure of the avowed object of the fund. Such persons, obviously, do not expect to see their money back, whatever the fate of the appeal may be, and must thus be taken to have parted with it out and out. If they have parted with their money out and out, they must be taken to have done so with a general charitable intention, or, in other words, to have devoted their money irretrievably to charity. If, however, that is the case as regards anonymous contributors, it follows that subscribers who give their names and are aware that their subscriptions will be mixed with non-returnable contributions from anonymous sources must be taken to have contributed with a similar general charitable intention. I am not sure whether this imputation of a general charitable intention by way, as it were, of infection from the anonymous contributors, is to be regarded as applying to all subscribers or only to those who subscribe after the first anonymous contribution has been made, or only to those who subscribe after the first anonymous contribution has been made and who can be shown to have known that it has been made. Perhaps it should extend to all subscribers, on the footing that all subscribers to a fund of this type know, or must be taken to know, as a matter of common knowledge that such funds are almost invariably made up in part of sums derived from anonymous sources. So far as the particular subscriber joined in the present case, namely, the co-operative society, is concerned, it is clear from further evidence read with leave in the course of the appeal that, although the learned Vice-Chancellor had understood otherwise, the first anonymous contributions had, in fact, come in before the co-operative society had made its first payment to the fund under a resolution passed at the society's half-yearly meeting on Aug. 20, 1928, to the effect that the society should subscribe £500 by ten half-yearly instalments of £50. Whether the society knew at the date of such resolution that anonymous contributions had been made to the fund does not, however, appear.

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What does clearly appear from the evidence filed on behalf of the society is that, so far as actual, as distinct from imputed, intention goes, the society's intention was to subscribe towards the cost of building the proposed new hospital and nothing else. A

If the matter were free from authority I would have little hesitation in rejecting the Attorney-General's third argument. I appreciate that anonymous contributors cannot expect their contributions back in any circumstances, at all events so long as they remain anonymous. I appreciate also the justice of the conclusion that anonymous contributors must be regarded as having parted with their money out and out, although I would make a reservation in the case of an anonymous contributor who was able to prove conclusively that he had, in fact, subscribed some specified amount to the fund. If the organisers of a fund designed exclusively and solely for some particular charitable purpose send round a collecting box on behalf of the fund, I fail to see why a person who had put £5 into the box, and could prove to the satisfaction of the court that he had done so, should not be entitled to have his money back in the event of the failure of the sole and exclusive charitable purpose for which his donation was solicited and made. That, however, is a minor point. I find a more serious difficulty in the proposition that, because the anonymous donors have given their money out and out, therefore a general charitable intention must be imputed to them, however exclusive and specific the avowed purpose of the fund may be. I should have thought it at least arguable that such persons intend to subscribe to the avowed purpose and nothing else, and simply assume that the avowed purpose will, in fact, be carried out, without forming any intention at all as to what is to be done with their money in the event of that purpose becoming impossible of fulfilment. On that view of the state of mind of the anonymous contributor, it might well be held that, in the event which happened, the anonymous contributor had simply abandoned his contribution so that it became bona vacantia on the failure of the purpose for which it was contributed. This, however, is of little practical importance if, in accordance with the usual practice, the Attorney-General waives the claim of bona vacantia and brings in a scheme for the *cy-près* application of the part of the fund derived from anonymous sources. B C D E F

It is, however, at the third and final step in his argument that I wholly part company with the Attorney-General. Speaking for myself, I entirely fail to see why the imputation of a general charitable intention to anonymous contributors (if rightly made) should afford any ground for imputing a general charitable intention to subscribers who give their names. Suppose subscriptions are solicited for a fund expressly announced as a fund to be raised for the purpose of building a new hospital at X and to be applied exclusively for that purpose alone. Suppose further that certain persons contribute to the fund by putting cash into collecting boxes sent round on behalf of the fund, and later some other person who knows that money has been subscribed in that way sends a subscription to the fund with a covering letter giving his name and address. Prima facie, the subscriber who gives his name intends to subscribe for the particular and exclusive purpose for which his subscription has been solicited and none other, and there will be a resulting trust in his favour if that purpose fails. Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes, neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that way, seems to me to have any bearing on the intention of the named subscriber. G H I

The matter, however, is not free from authority. The Attorney-General referred us to *Re Welsh Hospital (Netley) Fund*, *Thomas v. A.-G.* (4) ([1921] 1 Ch. 655), which was a case concerning the disposal of a surplus of £9,000 remaining after winding up the affairs of a hospital erected at Netley, and

- A equipped and run during the first world war for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. It would seem from the report that the terms of the appeals in response to which the fund was raised were such as in themselves to justify the conclusion that persons who subscribed to the fund did so with a general charitable intention.
- B In holding, however, that the surplus was applicable *cy-près* on the ground of general charitable intent, P. O. LAWRENCE, J., did clearly found himself to a great extent on the inclusion in the fund of moneys derived from anonymous sources. He said ([1921] 1 Ch. at p. 658):

C “In order to determine this question the court must first of all ascertain whether the fund is devoted permanently to charity and can be applied under the doctrine of *cy-près*. This in turn depends upon what the court ought in the circumstances to infer to have been the true intention of the subscribers to the fund when they made their contributions.”

Later in his judgment he said (*ibid.*, at p. 660):

- D “The fund was created by contributions from various sources and in varying amounts, partly by donations from private individuals of more or less substantial amounts, and partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales. So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or
- E placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my
- F opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked. They must, I think, also be taken to have known that the
- G total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end.”

- H With regard to this case, I would observe that it concerned the disposal of a surplus after the immediate purposes for which the fund was raised had been fully fulfilled, and was not a case of total failure *ab initio* like the case with which we now have to deal. It seems to me that this makes a material difference. The intention of a subscriber might well be that his contribution should
- I be returned in the event of a total failure *ab initio* of the purpose for which he made it, but that, in the event of a surplus being left over after that purpose had been duly fulfilled, any share in such surplus which might be regarded as representing his subscription or some part thereof should be permanently devoted to charity. In forming his intention as to the fate of his contribution in the latter event (if, indeed, he formed one at all), he might well be influenced by the fact that the inclusion of contributions from anonymous sources, and the indiscriminate spending of a mixture of anonymous contributions and contributions from named subscribers, would make it impossible to ascertain whether

the whole or any and, if so, what part of any particular contribution had been spent. In the case of initial failure different considerations apply, for the whole of the fund is *ex hypothesi* intact and there has been no effective application of it for the purpose for which it was raised. Moreover, I think that *Re Welsh Hospital (Netley) Fund* (4) might well have been decided the same way simply on the strength of the language of the appeals; and, quite apart from that, I think it might well have been held that, once the charity for which the fund was raised had been effectively brought into action, the fund was to be regarded as permanently devoted to charity to the exclusion of any resulting trust. In this connection I would refer to the following passage from the judgment of SARGANT, L.J., in *Re Monk, Giffen v. Wedd* (5) ([1927] 2 Ch. 197 at p. 211):

"The case is quite different from that of *Re Wilson* (3), so much relied on by the appellants, where the application of any part of the fund was dependent on the constitution of the whole scheme. If there should be any failure here it would be in the nature of a partial failure by matter subsequent, not as there, a total failure through failure of a condition precedent. Counsel for the respondents were not able to cite any case in which, a charity having actually been put into operation and having afterwards proved incapable of exhausting the whole charitable fund, it had then been held that there was a resulting trust for the donor, or in the case of a will for his next of kin."

Reference may also be made to the decision of DANCKWERTS, J., in *Re Wokingham Fire Brigade Trusts, Martin v. Hawkins* (6) ([1951] 1 All E.R. 454), where the surplus funds of a disbanded local fire brigade were held to be subject to public charitable trusts and applicable *cy-près*. DANCKWERTS, J., said (*ibid.*, at p. 456):

"It seems, therefore, that the funds were subject to public charitable trusts which have been in operation for a number of years. That rules out any other application of the fund. I think that the subscribers intended to part with all interest in the subscriptions when they made them for the benefit of this public purpose . . . I do not believe that when the subscriptions were made there was any thought of the future disposition of the money in such circumstances as have arisen. The only thing which I think was taken into account was the provision of the brigade or its equipment, and, that being so, the funds were devoted out and out for a charitable purpose. That purpose being no longer practicable by reason of the sale of the assets to a different body charged with the duties previously performed by the brigade, the charitable trusts do not fail. It is not necessary to consider whether there was any general charitable intention and the trusts must be modified by means of a *cy-près* application."

The declaration was that the funds were held on charitable trusts for the benefit of Wokingham and adjoining districts and should be applied *cy-près* by means of a scheme.

It will be seen that DANCKWERTS, J., said that it was not necessary to consider whether there was any general charitable intention. I think that observation was right in the circumstances of *Re Wokingham Fire Brigade Trusts* (6), and would have been equally appropriate in *Re Welsh Hospital (Netley) Fund* (4). For these reasons I cannot regard *Re Welsh Hospital (Netley) Fund* (4) as providing any real authority for the Attorney-General's argument in a case of total failure *ab initio* such as the present case.

The Attorney-General also referred us to the recent decision of this court in *Re Hillier, Hillier v. A.-G.* (7) ([1954] 2 All E.R. 59), on which he relied as authority for the proposition that, even in the case of a total failure *ab initio* of the purpose for which a fund is raised, the inclusion in the fund of contributions from anonymous sources has the effect of fixing named subscribers with a general charitable intention so as to exclude any resulting trust and make the

A fund a proper subject of *cy-près* application. It is true that *Re Hillier* (7) resembles the present case in that it was a case of total failure *ab initio*, and not a case of surplus like *Re Welsh Hospital (Netley) Fund* (4), but it differed from the present case in other, as I think, important respects.

The facts in that case were that in 1938 and 1939 an appeal was launched for the improvement of hospital services in South Bucks. and East Berks., and, in particular, for the erection and maintenance of a new hospital at Slough. The appeal was launched by a council, known as the South Bucks. and East Berks. Voluntary Hospitals Council, who issued a brochure appealing for subscriptions and donations. The brochure pointed out the serious lack of hospital accommodation in the area, and emphasised the superior advantages of "the truly British characteristic of making provision, without force, for those in need of medical care" in voluntary hospitals. The brochure was accompanied by forms to be filled in by donors and subscribers. The first form (document 1) provided for subscriptions in three forms, namely, "Council's discretion; Windsor Hospital; Slough Hospital". Another form (document 2) provided for seven-year covenants to subscribe towards the augmentation of the income or capital of (a) such hospitals as the council might nominate; (b) the Windsor hospital; (c) the Slough hospital, and (d) a hospital nominated by the covenantor. Substantial sums were received under the terms of these documents, and were also raised locally by concerts, church collections, whist drives, etc. It never became possible to build the proposed hospital at Slough, first, because of war conditions, and, secondly, because the provisions of the National Health Service Act, 1946, precluded the erection of new voluntary hospitals. A summons was taken out by the Slough hospital trustees for directions what should be done with the property in their hands, and, in particular, for the determination of the questions whether (a) any charitable trust formerly affecting the same had failed, and, if so (b) whether there was a resulting trust in favour of the donors and subscribers. On appeal from an order of UPJOHN, J., it was held by the Court of Appeal (SIR RAYMOND EVERSLED, M.R., and DENNING, L.J., ROMER, L.J., dissenting), that, on the true construction of documents 1 and 2 and in the surrounding circumstances, no definable class of donors was entitled to claim the return of their donations: that those donors who had allocated in writing their donations to the Slough hospital showed a general intention to provide a Slough hospital, but it was not of the essence of that intention that the Slough hospital should be a voluntary hospital, and there was a presumption in favour of a general charitable intent. SIR RAYMOND EVERSLED, M.R., said ([1954] 2 All E.R. at p. 69), that there might, however, be exceptional donations to which special conditions had been attached and inquiry should be directed to discover whether any such gifts had been received. *Re Wilson* (3) was applied, and the decision of UPJOHN, J., was varied.

It is clear from those facts that the avowed objects of that fund were such as to afford grounds wholly absent in the present case for imputing to subscribers a general charitable intention. It is also clear that a subscriber making use of the subscription form or the seven-year covenant form and striking out all the listed purposes other than Slough hospital need not necessarily have intended to limit his bounty to that one particular object, but might equally well have intended to indicate Slough hospital as the preferred object of his bounty, without any intention of excluding the other objects listed in the event of the preferred object failing. SIR RAYMOND EVERSLED, M.R., said ([1954] 2 All E.R. at p. 68):

"I agree with the learned judge that, if the particular circumstances in which one donor has made his donation—including his own written statement at the time of making it—lead to a clear conclusion on the question of his intention, that conclusion cannot be changed because other persons giving to the same cause in different circumstances must be taken to have had a

different intention. But where, as, I think, in the present case, the circumstances affecting the presumed intention of the first donor are, at best, equivocal, then, as it seems to me, it is a relevant and admissible fact in determining his true intention that when he contributed to the fund he must be taken to have known that his contribution would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negated any right or expectation on their part to any return of their money in any circumstances."

The Master of the Rolls said further (*ibid.*):

"Regarding, therefore, as I do, the language of the brochure, even when taken in conjunction with document 1, suitably employed, as at best in some degree equivocal, I come to the conclusion that the various other facts which I have enumerated are relevant and admissible for consideration and render it impossible to find or presume, as regards any class of donors, an intention such as to entitle them, in the events which have happened, to a return of any part of their donations. In my judgment, there is no good answer to the summary of his argument which counsel for the Attorney-General put before us, which was to this effect: It is sought to find a common intention, limited to a single and specific object, among all givers of a particular category: the particular category put forward is that of donors who, in response to the brochure, made use of document 1 to specify the Slough hospital; but whatever might be the interpretation properly put on these documents, as it were, *in vacuo*, the fact is that the category selected not only included persons who subscribed after the passing of the Act, but also consisted of persons who must be taken to have been aware of the pre-brochure contributions, and aware also of the fact that their gifts would be intermingled with those of others who would not in any circumstances expect, or be entitled to claim, a return of their money; and, therefore, no such intention can be found common to donors of a particular category differentiating them from the rest of the contributors on whose part no claim for any return could be substantiated. More briefly, but, in my judgment, no less correctly, the matter was thus put by junior counsel for the Attorney-General in reply when he said that where there are many sources of contribution to a charitable fund, then all contributors should, in the absence of special circumstances, be taken to contribute on terms common to all, and the only such terms possible in the present case deny any right to a return of their money to all contributors."

I do not think that these passages, read in their context and with reference to the facts of the particular case then before the court, can be regarded as supporting the general proposition for which the Attorney-General contends. In my view the Master of the Rolls was not seeking to lay down a general principle to the effect that in all cases where a fund of this kind is found to include contributions from anonymous sources a general charitable intention must be imputed to the named subscribers, however clear it may be that their subscriptions were solicited and made solely and exclusively for one particular purpose. I think that his observations as to the effect of the inclusion in the fund of contributions from anonymous sources were intended to be confined to cases comparable to the one then in hand, that is to say cases in which the circumstances in which the fund is raised are such as to leave it open to doubt whether the named subscribers did or did not contribute with a general, as distinct from a particular, charitable intention. In such cases the inclusion of anonymous contributions is a factor which—so the Master of the Rolls held—may be taken into account for the purpose of resolving the doubt in favour of a general charitable intention. The judgment of DENNING, L.J., goes a great deal further than that of the Master of the Rolls, and, if I may venture to say so with the greatest respect, I think that it goes further than was necessary for the decision of the

- A case; and, in view of the strictly limited use made by the Master of the Rolls of the factor of anonymous contribution, and the dissenting judgment of ROMER, L.J., I cannot regard it as representing the opinion of the court. It may or may not be desirable for the law to be altered so as to make all funds subscribed for charitable objects which fail applicable *cy-près* for other charitable purposes to the exclusion of any resulting trust in favour of the donors;
- B but I cannot agree that the law as it stands is to that effect.

For these reasons I think that the learned Vice-Chancellor came to a right conclusion in this case, and I would dismiss the appeal.

HODSON, L.J.: I agree with the judgment that JENKINS, L.J., has read.

- C LORD EVERSHERD, M.R. (read by HODSON, L.J.): I agree that the appeal should be dismissed for the reasons stated by JENKINS, L.J.

- Having regard, however, to the importance attached by the Attorney-General to the decision of this court in *Re Hillier, Hillier v. A.-G.* (7) ([1954] 2 All E.R. 59), and to certain parts of my own judgment in that case, I have thought it right that I should reconsider the language of that judgment. It was, and after this further consideration still is, my view that, having regard to the terms
- D of the brochure (there referred to) which constituted the relevant appeal for donations, those who made use of the form, called in the case document 1, in sending their donations in response to the appeal, could not be said to have subscribed exclusively for one single and specific object, but should be taken to have had a paramount intention to give their money for a general, rather than a particular, charitable purpose, and to have done no more than graft on to
- E that general gift a preference as to the way in which effect should be given to the general purpose, namely (in the instance under consideration), by establishing a voluntary hospital at Slough, where no hospital existed. I further expressed (and still hold) the opinion that, if the proper conclusion to be drawn from the brochure and document 1, without more, was fairly open to doubt, then it was legitimate, as part of the relevant surrounding circumstances, to have regard to
- F the fact that, as was clearly stated in the brochure itself, subscriptions and donations were being and would be sought through whist drives and other means such that contributors would inevitably part with their money for good and all. The language which I used ([1954] 2 All E.R. at p. 68), and which JENKINS, L.J., has quoted in his judgment (and particularly my acceptance of the arguments of counsel for the Attorney-General), should be read in the context
- G of the supposition which I was making, that is, that, the language of the brochure being equivocal, it was legitimate to assist its construction and effect by the inference to be drawn from the stated circumstances that contributions were being sought at the same time both from persons responding to the brochure appeal by using the form supplied and from persons whom JENKINS, L.J., has called anonymous donors.

- H I did not intend to lay it down (and I do not think that it would be right so to do) that the fact of anonymous donations being made and sought contemporaneously would control in favour of a general charitable intention gifts made by name in response to an appeal which, according to its natural and proper interpretation, was an appeal for a single and particular purpose. On the other hand, I cannot for my part accept the view that the fact of contemporaneous anonymous donations must always be irrelevant in determining the intention, general or particular, of named subscribers. As I have observed, the brochure which had to be construed in *Re Hillier* (7) contained an express reference to the collection of anonymous donations. An example was given during the argument in the present case of organisers of an appeal for some charitable object who send to local inhabitants a notice of a pending fête or similar occasion, at which the money collected would inevitably be collected anonymously, and who urge attendance on the occasion. Suppose a recipient,

who found himself unable to attend, wrote to the organisers so stating but enclosing a cheque, with a statement to the effect that the amount of the cheque represented what he would have spent at the fête. In such a case there would, to my mind, be, at the least, great force in the contention that the position of such a subscriber should be assimilated to that of those who attended the fête and there contributed anonymously. A

In the course of his reply, the Attorney-General for the Duchy of Lancaster referred also to the passage in my judgment ([1954] 2 All E.R. at pp. 66, 67) in which I expressed the view that, if the contributors of the class under consideration should be treated as subscribing to "the Slough hospital" as distinct from "the Slough voluntary hospital", the conclusion was in favour of a general charitable intention. In the present case, as the Attorney-General observed, the contributions sought were admittedly sought, in effect, for no more or no other than the Ulverston hospital. But in *Re Hillier* (7) it was a vital fact that there was no existing hospital at Slough at all: so that the issue and the argument was between the specific and particular object of a *voluntary* hospital at Slough, on the one hand, and a hospital, that is hospital services generally, at Slough—an object not in any case defeated or rendered impossible by the effect of the National Health Service Act, 1946. In the present case there was an old established voluntary hospital at Ulverston and the object of the appeal was, as we conclude, to provide a similar new and enlarged hospital to take the place of the old. B C D

I add, finally, that I confess to having been in *Re Hillier* (7) to some extent—and, as I hope, legitimately, if regard is to be had to the realities of the situation—influenced by the circumstance (in marked contrast to the circumstances of the present case) that, notwithstanding extensive advertisement, no single contributor had come forward who was ready to contend that he had contributed to a single and specific object which had failed, and so was entitled to a return of his money. E

Appeal dismissed.

Solicitors: *Solicitor for the Affairs of the Duchy of Lancaster* (for the Attorney-General of the Duchy of Lancaster); *Hatchett Jones & Co.*, agents for *Frank Jackson*, Ulverston (for the trustees of the fund); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Aston, Harwood, San Garde & Green*, Manchester (for the *Swarthmoor & Ulverston Co-operative Society*).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A O'SULLIVAN v. NOARLUNGA MEAT, LTD. AND COMMONWEALTH OF AUSTRALIA AND OTHERS (Intervenors).

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), May 9, 10, 14, 15, 16, 17, July 4, 1956.]

B *Privy Council—Australia—Appeal—Right to appeal without certificate of High Court of Australia—Inconsistency of federal law and state law—Whether a question as to the limits inter se of constitutional powers of Commonwealth and state—Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12, s. 9), s. 74, s. 109.*

C *Privy Council—Australia—South Australia—Validity of the Metropolitan and Export Abattoirs Act, 1936-1952 (S.A.), s. 52A—Validity of the Commonwealth Commerce (Meat Export) Regulations—Customs Act, 1901-1951, s. 112, s. 270 (1) (c).*

The question whether in a given case the law of a state is inconsistent with the law of the Commonwealth of Australia within the Constitution of the Commonwealth of Australia, s. 109, is not a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the state within s. 74 of the Constitution, since it is a question not between powers, but between laws made under powers.

D *Jones v. Commonwealth Court of Conciliation & Arbitration* ([1917] A.C. 528), *Commonwealth of Australia v. Bank of New South Wales* ([1949] 2 All E.R. 755), and *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* ([1951] A.C. 34) considered.

E A complaint and summons was issued at Adelaide against a company for using its premises for slaughtering meat for export contrary to s. 52A of the Metropolitan and Export Abattoirs Act, 1936-1952, which was a state Act. The magistrate reserved for the consideration of the Supreme Court of South Australia the question of law whether s. 52A was a valid and operative enactment. On appeal to the Judicial Committee, the company submitted that s. 52A was inconsistent with the Commonwealth Commerce (Meat Export) Regulations and, therefore, invalid under s. 109 of the Constitution of the Commonwealth of Australia. The complainant contended that, if the regulations were inconsistent with s. 52A, they were ultra vires the power to make regulations conferred by the Commonwealth Customs Act, 1901-1951.

F **Held:** section 52A was inconsistent with the regulations and invalid, because (i) the regulations evinced an intention to cover exhaustively the matter with which s. 52A dealt, namely, the special conditions for slaughtering for export, although the regulations did not evince an intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export and to override generally all provisions of a state code dealing with slaughtering; and (ii) the regulations were within the power to make regulations conferred by the Commonwealth Customs Act, 1901-1951, s. 112 and s. 270 (1) (c).

I Appeal dismissed.

[As to appeal from the High Court of Australia, see 5 HALSBURY'S LAWS (3rd Edn.) 690, para. 1476; and for cases on the subject, see 8 DIGEST (Repl.) 830-832, 831-842.

For the Constitution of the Commonwealth of Australia, 1900, s. 74, s. 109, see 6 HALSBURY'S STATUTES (2nd Edn.) 282, 288.]

Cases referred to:

(1) *Ex p. McLean*, (1930), 43 C.L.R. 472; Digest Supp.

- (2) *Nelungaloo Pty., Ltd. v. Commonwealth of Australia*, [1951] A.C. 34; 2nd Digest Supp.
- (3) *Jones v. Commonwealth Court of Conciliation & Arbitration*, [1917] A.C. 528; 86 L.J.P.C. 145; 117 L.T. 225; 24 C.L.R. 396; 8 Digest (Repl.) 831, 837.
- (4) *Australian National Airways Pty., Ltd. v. The Commonwealth*, [1946] A.L.R. 1; 71 C.L.R. 29, 115; 19 A.L.J. 304; 2nd Digest Supp.
- (5) *Commonwealth of Australia v. Bank of New South Wales*, [1949] 2 All E.R. 755; [1950] A.C. 235; 79 C.L.R. 497; 2nd Digest Supp.
- (6) *Grace Bros. Pty., Ltd. v. Commonwealth of Australia*, [1951] A.C. 53; 2nd Digest Supp.
- (7) *Clyde Engineering Co., Ltd. v. Cowburn, Metters, Ltd. & Lever Bros., Ltd. v. Pickard*, (1926), 37 C.L.R. 466; [1926] Argus L.R. 214; Digest Supp.
- (8) *McKay (H. V.) Pty., Ltd. v. Hunt*, (1926), 38 C.L.R. 308; 44 Digest 1302r.
- (9) *Hume v. Palmer*, (1926), 38 C.L.R. 441.
- (10) *Colvin v. Bradley Bros. Pty., Ltd.*, [1944] A.L.R. 35; 68 C.L.R. 151; 17 A.L.J. 337; 2nd Digest Supp.
- (11) *Wenn v. A.-G. (Victoria)*, (1948), 77 C.L.R. 84.

Appeal.

Appeal, by special leave, by the complainant, Thomas O'Sullivan, an inspector of police of the State of South Australia, from an order of the Full Court of the High Court of Australia, dated Dec. 17, 1954, on a Special Case stated by a court of summary jurisdiction sitting at Adelaide, South Australia, on Mar. 29, 1954, for the opinion of the Supreme Court of Australia pursuant to the Justices Act, 1921-1943, s. 162, and removed into the High Court of Australia pursuant to s. 40A of the Judiciary Act, 1903-1950, of the Commonwealth of Australia. The facts appear in the judgment of the Board.

D. I. Menzies, Q.C., R. R. S. C. Chamberlain, Q.C. (both of the Australian Bar), and *R. A. Gatehouse* for the appellant.

H. G. Alderman, Q.C. (of the Australian Bar), and *I. C. Baillieu* for the respondent.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *J. W. Brunsyate* for the intervener, the Commonwealth of Australia.

Frank Gahan, Q.C., and J. G. Le Quesne for the interveners, the State of New South Wales and the State of Tasmania.

LORD SOMERVELL OF HARROW: The appellant is an inspector of police of the State of South Australia. On Mar. 18, 1954, a complaint and summons was issued at Adelaide in his name against the respondent for using its premises for slaughtering meat for export, contrary to the provisions of s. 52A of the Metropolitan and Export Abattoirs Act, 1936-1952—a state Act. The magistrate reserved for the consideration of the Supreme Court of South Australia a question of law, and stated a Special Case. The question of law was "Whether s. 52A of the Metropolitan and Export Abattoirs Act, 1936-1952, is a valid and operative enactment". An agreed statement of facts was attached. The Special Case was referred by the Supreme Court to the High Court under s. 40A of the Commonwealth Judiciary Act, 1903-1950. The order for the removal of the Case was made on June 16, 1954, under s. 40 of the Judiciary Act. The Commonwealth and the States of New South Wales and Tasmania obtained leave to intervene.

Section 52A is as follows:

"(1) No person shall in any part of the state outside the Metropolitan Abattoirs Area use any premises for the purposes of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the Minister of Agriculture authorising him to use those premises for that purpose. Any person who contravenes this sub-section

A shall be guilty of an offence and liable to a fine not exceeding £100 and in the case of a continuing offence to an additional fine not exceeding £20 for every day on which the offence continues.

B “(2) The Minister of Agriculture shall have a discretion to grant or refuse any application for a licence under this section after due consideration of the following matters:—(a) whether the applicant is a fit and proper person to hold a licence under this section; and (b) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises; and (c) whether the premises are necessary to meet the requirements of the public: Provided that the Minister shall not refuse an application for such a licence if the premises for which the licence is required are to be erected at least eighty miles from all premises, existing at the date of such application, and established within the state for the purpose of slaughtering stock for export as aforesaid.

C “(3) Every licence shall be for such period and contain such restrictions, terms and conditions as the Minister thinks proper.

“ (4) This section shall not apply to the Government Produce Department.”

D The respondent had used its premises for slaughtering stock for export and had no licence from the Minister of Agriculture as required by s. 52A. The respondent submitted that s. 52A was inconsistent with the Commonwealth Commerce (Meat Export) Regulations and, therefore, invalid under s. 109 of the Commonwealth of Australia Constitution Act, which provides that:

E “When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

On this question the High Court was equally divided, and the opinion of the Chief Justice (DIXON, C.J.), who held that there was inconsistency, prevailed under s. 23 of the Judiciary Act. The Chief Justice and KITTO, J., agreed with the judgment of FULLAGAR, J.

F The appellant, who submitted there was no inconsistency, further submitted that the regulations, if “inconsistent” on their true construction with s. 52A, were (a) ultra vires the power to make regulations conferred by the Commonwealth Customs Act, 1901-1951, and (b) ultra vires the legislative power of the Parliament of the Commonwealth conferred by s. 51 (i) of the Constitution. The Chief Justice, FULLAGAR, J., and KITTO, J., held that (i) the regulations were within the regulation making power of the Customs Act, and (ii) were not outside the legislative powers of the Commonwealth. It is common ground that this last point is one as to the limits inter se of the constitutional powers of the Commonwealth and those of the states within s. 74 of the Constitution. It was, therefore, held that s. 52A was not a valid and operative enactment, and the prosecution failed.

H By an Order in Council dated June 21, 1955, the appellant was given leave to appeal “save as to any question as to the limits inter se of the constitutional powers of the Commonwealth and the state”. The appellant applied to the High Court for a certificate under s. 74 of the Constitution. On Mar. 2, 1956, the application was refused. On May 7, 1956, the respondent lodged a petition asking that the appeal should be dismissed on the ground that the appellant in his Case had abandoned important contentions as stated when leave to appeal was granted, and that the issues remaining were not of sufficient importance to justify leave to appeal. The appellant, in para. 13 of his Case, states that he accepts the decision of the High Court on the meaning of s. 109 whereas, when he applied for leave, this was one of the matters which he desired to argue, subject to the question whether it raised an “inter se” issue under s. 74. The appellant, by accepting the meaning placed on s. 109 by the High Court, did not wish to be taken as admitting that the “meaning” of s. 109 raised an “inter se” question within s. 74. That could not arise in his argument once he had accepted

the High Court decision on the meaning. It was also said in support of the petition that the appellant, having previously suggested that the decision of the High Court on the issues competent in the appeal was far reaching now treated it as a narrow decision. Their Lordships are of opinion that the petition should be dismissed with costs and will advise Her Majesty accordingly. A

The remaining issues are both difficult and important. The relevant facts have now been stated, and their Lordships must deal at once with a preliminary objection to jurisdiction which was taken both by the respondent and the Commonwealth of Australia as intervener. B

It was submitted that all the issues in the case, including the question of "inconsistency" and the question whether the regulations were *intra vires* the Customs Act, 1901-1951, raised questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of South Australia within the meaning of s. 74 of the Constitution. In other words, there was no issue on which the Order in Council giving leave to appeal could operate. It is not in dispute that it is competent for their Lordships to decide whether a question is an *inter se* question. If it is such a question, they cannot entertain an appeal on it without a certificate of the High Court. The importance of the objection that has been raised in the present case has been emphasised by learned counsel for the Commonwealth. It can hardly be exaggerated. For the question that has now for the first time been raised before their Lordships is whether a plea of inconsistency between a Commonwealth law and a state law under s. 109 of the Constitution involves an *inter se* question, and it is clear that a decision on this question must have far-reaching effects not only on the jurisdiction of Her Majesty in Council but also on that of the state courts and the High Court respectively under the Judiciary Act. C

The meaning of s. 109 not being in issue, the test of inconsistency has been authoritatively stated in a number of cases in the High Court. It is sufficient for the present purpose to quote a few lines from the judgment of DIXON, J., in *Ex p. McLean* (1) ((1930), 43 C.L.R. 472 at p. 483), which have often been cited with approval: D

"The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter." E

This being the accepted test of inconsistency, the question is whether it involves the determination of an *inter se* question to decide whether, in a particular case, that test is satisfied. On this question, their Lordships find themselves so fully in accord with the view consistently taken by the High Court that they can deal with the matter shortly. It has already been said that, in the present case, an application was made for a certificate and was refused. In the course of the joint judgment of DIXON, C.J., WILLIAMS, J., WEBB, J., and FULLAGAR, J., it was said: F

"Once the constitutional principle [scilicet the meaning of s. 109] is accepted, we have never regarded the application of it in deciding whether a given state law gave way to a given federal law as amounting in itself to a question as to the limits *inter se*. In this court it has always been regarded as a question, not between powers, but between laws made under powers." G

This statement is amply justified by a consideration of the numerous cases to which their Lordships were referred. H

It was, however, said that, in three or perhaps four cases which had come I

A before the Board, their Lordships had expressed a view which, if not in direct conflict with that consistently taken by the High Court, at least demanded a fresh approach to the question. From this proposition their Lordships strongly dissent. After *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* (2) ([1951] A.C. 34) (being one of the cases relied on by the respondent) had been heard by the Board and the appeal had been dismissed on the ground that an inter se question was raised and no certificate had been given, an application for a certificate was made to the High Court. In the course of his judgment, DIXON, J., said (85 C.L.R. at p. 577):

C "Notwithstanding the difficulties that were pointed out I do not think that the judgments of the Privy Council in the three cases demand any radical revision of the conception which has prevailed in this court of what are questions as to the limits inter se of the constitutional powers of the Commonwealth and those of the states."

With this statement their Lordships are in full agreement, except that they think that the word "radical" suggests an unnecessary qualification; they do not think that any revision is demanded.

D In *Jones v. Commonwealth Court of Conciliation & Arbitration* (3) ([1917] A.C. 528), the first of the cases on which the respondent relies, the essential question was as to the validity of an award by the president of a court constituted by the Commonwealth Parliament under placitum (XXXV) of s. 51 of the Constitution. That depended on the power of the Commonwealth, and on the determination of the extent of that power depended the power of the state.

E Here was a direct issue as to the relative constitutional powers of Commonwealth and state which gave rise to an inter se question. As was observed by DIXON, J., in the High Court in *Australian National Airways Pty., Ltd. v. The Commonwealth* (4) ([1946], 71 C.L.R. 115 at p. 122):

F "The settled interpretation of the crucial words of s. 74 . . . is that they cover any decision upon the extent of a paramount power of the Commonwealth . . ."

These words, which were cited with approval in *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* (2) ([1951] A.C. at p. 37), are repeated here because they go to the heart of the matter. It is the extent of the power that must be in debate in order to raise an inter se question; the extent to which such a power has been exercised, when the validity of its exercise is not in question, is apt to raise an issue under s. 109, but does not raise an inter se question.

G In the second of the three cases, *Commonwealth of Australia v. Bank of New South Wales* (5) ([1949] 2 All E.R. 755), their Lordships can find nothing which in any way supports the view that the issue of inconsistency under s. 109 by itself raises an inter se question. In that case, an attempt was made to elucidate the very difficult problem which arises where other pleas than a plea to jurisdiction under s. 74 are raised. In so far as it is relevant to the present appeal, it indicates that there is no justification for the Board refusing to entertain jurisdiction.

H Reference has already been made to the third of the cases, *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* (2). There, too, the constitutional validity of a regulation made under a Commonwealth Act was challenged, and it was for that reason that an inter se question was held to arise. In delivering the opinion of the Board, LORD NORMAND said ([1951] A.C. at p. 48):

I "But s. 51 does not expressly divest the states of any power, and it falls to the courts to determine where the limits of the states' powers and the limits of the Commonwealth powers are fixed. These questions of the limits of power spring from the Constitution and they are questions as to the limits inter se of the powers of the Commonwealth and the states."

As little in this as in the earlier cases do their Lordships see any justification for saying that the view consistently taken by the High Court of the scope of s. 74 of the Constitution and its relation to s. 109 has been questioned by the Board. If any phrase taken from its context raised any doubt, it should be set at rest by the statement made in *Grace Bros. Pty., Ltd. v. Commonwealth of Australia* (6) ([1951] A.C. 53), which immediately followed (*ibid.*, at p. 61):

"The question for decision is the same as that dealt with by their Lordships in *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* (2). It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an *inter se* question."

Their Lordships conclude by saying again that they indorse the view expressed by the High Court on an application for a certificate in the present case since they, too, regard a question of inconsistency under s. 109 as "a question not between powers but between laws made under powers". On the same principle, the preliminary objection fails on the issue whether the regulations were *intra vires* the Customs Act, 1901-1951, it being accepted that the regulations were *intra vires* the Commonwealth powers. The conflict suggested was not between powers but between "laws", namely, a section of an Act and regulations made, or purporting to be made, under it. Their Lordships, therefore, reject the preliminary plea to jurisdiction.

It is necessary, therefore, to consider the two issues raised by the appellant. First, is there an inconsistency? Secondly, are the regulations *intra vires* the Customs Act under which it was said they were made? The meaning of s. 109 of the Constitution, which has already been referred to in dealing with the preliminary plea, was stated in the following words in the judgment of FULLAGAR, J.:

"The test of inconsistency which is now generally applied was laid down in *Clyde Engineering Co., Ltd. v. Cowburn* (7) ((1926), 37 C.L.R. 466). It has been applied in a number of later cases: see especially *H. V. McKay Pty., Ltd. v. Hunt* (8) ((1926), 38 C.L.R. 308); *Hume v. Palmer* (9) ((1926), 38 C.L.R. 441); *Ex p. McLean* (1) ((1930), 43 C.L.R. 472); *Colvin v. Bradley Bros. Pty., Ltd.* (10) ((1943), 68 C.L.R. 151); and *Wenn v. A.-G. (Victoria)* (11) ((1948), 77 C.L.R. 84). In *Clyde Engineering Co. v. Cowburn* (7), ISAACS, J., said (37 C.L.R. at p. 489), 'If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field'. The test was analysed and fully stated by DIXON, J., in *Ex p. McLean* (1), in a passage which is often cited. His Honour said (43 C.L.R. at p. 483): 'When the Parliament of the Commonwealth and the Parliament of a state each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and s. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer* (9)). But the reason is that, by prescribing the rule to be observed, the federal statute shows an intention to cover the subject-matter and provide what the law upon it shall be. If it appeared that the federal law was intended to be supplementary to or cumulative upon state law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter'."

A In applying this principle, it is important to bear in mind that the relevant field or subject is that covered by the law said to be invalid under the section. In the present case, the law challenged is in one section in an Act of one hundred and twenty-eight sections. The question is whether the regulations express an intention to cover exhaustively the field or subject covered by that section. A decision that they do may or may not cover other provisions of the Act.

B The Commerce (Meat Export) Regulations, with schedules, occupy forty-six pages. It is unnecessary to consider the many detailed provisions which they contain. The export of meat is prohibited unless the establishment at which it is slaughtered, treated and stored has been registered. There are detailed provisions as to the lay-out, necessary machinery and sanitation. The operations of every registered establishment are subject to the supervision of an inspector. There are detailed provisions as to how carcasses are to be dealt with, rejection of diseased carcasses, tins or containers for canning and so on. There are provisions as to marking. Finally, if the regulations have been complied with, the inspector has to issue an export permit in a prescribed form. Regulation 4 of the Meat Export Control (Licences) Regulations prohibits the export of meat except by persons who hold licences, and the licensee has to comply with the Commerce (Meat Export) Regulations.

D FULLAGAR, J., held that the regulations evince an intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export. It might be said to follow from this that, if premises were to be used solely for slaughter for export, everything to do with them, including their situation, would be outside all state law.

E Their Lordships cannot read the regulations as evincing so wide an intention. Their Lordships are unable to find in the regulations an intention to override generally all provisions of a state code dealing with slaughtering. They do not purport, in their Lordships' opinion, to oust, for example, state laws, if any, based on town planning considerations which might be of vital importance to the state but would normally be irrelevant to the regulation of the export trade.

F Assuming so complete an ouster would be within the powers of the Commonwealth, it is not, in their Lordships' opinion, effected by the present regulations. If the state code dealing with slaughtering generally covered any specific matters dealt with in the regulations, the latter would, no doubt, oust and supersede the former quoad slaughter for export.

G In the present case, the respondent's slaughter-house had, at all relevant times, been licensed by the District Council of Noarlunga, pursuant to Part 27 of the Local Government Act, 1934-1952 (S.A.), and pursuant to the bye-laws of the council. On June 29, 1953, the respondent received a licence to export meat under s. 17 of the Commonwealth Meat Export Control Act, 1935-1946. On Sept. 9 the respondent's premises were registered under the regulations as an establishment in which, subject to certain conditions which need not be detailed, slaughtering for export could be conducted. It is not suggested that other requirements of the regulations were not complied with in respect of the slaughtered lambs, the basis of the complaint. The illegality is based on the fact that, the respondent having applied on Jan. 31, 1953, for a licence under s. 52A, the Minister of Agriculture of the state by letter of July 9 refused the application.

I Section 52A is not part of a general slaughtering code. It is a special condition confined to the use of premises for slaughtering for export. Special conditions for slaughtering for export are precisely the field which, in their Lordships' opinion, the regulations evince an intention exhaustively to cover. In words used by FULLAGAR, J.:

“ a state statute which has the effect of prohibiting the use of premises registered under the Commonwealth regulations for the very purpose for

which they have been registered under those regulations is plainly inconsistent with those regulations."

It was suggested that it was illogical to hold s. 52A to be inconsistent with the regulations and at the same time to allow any operation for state law. What, it is said, would have been the position if a section passed in an Act with a different title and scope had provided that all those who wished to slaughter stock must obtain a licence from the Minister of Agriculture as provided in s. 52A? It might be sufficient to say that that is not the case with which the Board have to deal. What happened in the present case would lead one to suppose that the respondent would have got a licence under such an Act since it obtained a general licence under the Local Government Act. Such a hypothetical law might, or might not, be challengeable on other grounds, but it could not be attacked, as is s. 52A, as a condition restricting and applicable only to the export trade.

Reliance was placed by both sides on reg. 103. It was one of the original regulations and read as follows:

"Where by the law of any state any goods are required to be inspected and approved by a state authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and markings under these regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly, in lieu of examination and marking under these regulations."

It was argued for the appellant that this meant that state legislation on the subject-matter of the regulations could exist alongside Commonwealth law, and that the state authority after inspection could prohibit export, although the Commonwealth authorities under the regulations had passed the meat as proper to be exported. Their Lordships agree with FULLAGAR, J., that the paragraph means only that, if satisfactory machinery happens to exist at any port, the Minister, in the interests of economy, may use it. If it is not so used, then the Commonwealth will set up its own inspectorate to deal with meat for export. It does not imply that the state inspector could prohibit for export what the Commonwealth inspector had passed for export.

The appellant submitted to the Board in support of his case Ordinances of the Legislative Council for the Northern Territory providing for the establishment of abattoirs and the regulation and control of the slaughtering of stock. These were of general application. There was no provision to the effect that they should not apply to slaughtering for export. On the argument put forward by the respondent before the Board, these ordinances do not assist the appellant's case. A person desiring to set up an abattoir for slaughter for export would have to satisfy the provisions of the local law as to slaughtering generally, and get his local licence before he could apply for, and get registration under, the Commonwealth regulations.

The appellant in the second place submitted that the regulations so construed were ultra vires the Customs Act, 1901-1951, under which it was said they were made. The regulation-making powers under the Act are contained in s. 112, as substituted by s. 5 of the Customs Act, 1951 (No. 56 of 1951), and s. 270.

"112 (1) The Governor-General may, by regulation, prohibit the exportation of goods from Australia.

"(2) The power conferred by the last preceding sub-section may be exercised . . . (c) by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with . . ."

Section 270 provides as follows:

"(1) The Governor-General may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for

- A giving effect to this Act or for the conduct of any business relating to the Customs, and in particular for prescribing— . . . (c) the conditions of preparation or manufacture for export of any articles used for food or drink by man or used in the manufacture of articles used for food or drink by man; (d) the conditions as to purity, soundness, and freedom from disease to be conformed to by goods for export; . . .”
- B FULLAGAR, J., held that the regulations were within the power conferred by s. 270 (1) (c), and their Lordships agree. In other words, the power to prescribe conditions under that section covers the ouster of the condition imposed by s. 52A.

C Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be dismissed. The respondent failed on its preliminary point of jurisdiction, but otherwise succeeded on the appeal. The appellant will pay two-thirds of the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the appellant); *Freshfields* (for the respondent); *Coward, Chance & Co.* (for the intervener, the Commonwealth of Australia); *Light & Fulton* (for the interveners, the State of New South Wales and the State of Tasmania).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

E

SHELL-MEX AND B.P., LTD. v. CLAYTON (VALUATION OFFICER) AND ANOTHER.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm), June 26, 27, 28, July 25, 1956.]

F

Rates—De-rating—Freight-transport hereditament—Installations for unshipping and storing oil—Ratepayer selling agent for oil companies—Use of hereditament for dock purposes—Occupation and use of hereditament as part of a dock undertaking—Oil “intended for the use of” the ratepayer—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 5 (1) (c), (3), s. 6 (3) (b).

G

The ratepayer was the occupier of a hereditament comprising land along the banks of the River Humber which it held under leases from the British Transport Commission (the dock authority) or their predecessors in title. The ratepayer was the sole selling agent in the United Kingdom of three oil producing companies. Substantially the whole of the ratepayer's business consisted of the sale and distribution of that oil, and it was remunerated for its services by the three oil companies on a commission basis. There stood on the hereditament, which was some 51½ acres in area, offices, stores, garages, filling sheds, pump houses, a boiler house, tanks and ancillary buildings, all of which erections save one were occupied by the ratepayer. In addition, the ratepayer owned and occupied a barge berth erected on part of the foreshore, in part leased from the Board of Trade and in part under licence from the British Transport Commission and their predecessors in title. The berth was some one thousand feet from the hereditament and was connected with the pump houses and tanks on the hereditament by means of pipe lines which were owned, occupied and used exclusively by the ratepayer. The ratepayer used the land as a terminal depot in its business of importing, distributing and marketing oil. Incoming tankers unshipped their cargoes of oil at two jetties which belonged to the British Transport Commission and which constituted a dock within the

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Rating and Valuation (Apportionment) Act, 1928, s. 5 (3)*. The unshipping was effected by pumping the oil from the tankers through a system of pipes running along the jetties and leading to the storage tanks on the hereditament, and the ratepayer took delivery of the oil at the ship's rail. The total tankage capacity at the hereditament was 211,781 tons and the tanks habitually contained between one hundred thousand and one hundred and fifty thousand tons of oil, which was sufficient to cover one month's deliveries. The average receipts and deliveries of oil approximately balanced, and the stock held at the hereditament was in the nature of a reserve. The ratepayer distributed supplies of oil by land and water transport to its own depots and to various categories of customers. The ratepayer consumed a relatively insignificant quantity in its own operations. Oil was shipped into barges at the barge berth (which was a dock within the meaning of s. 5 (3)* of the Act of 1928). Approximately one-quarter of the oil brought into the hereditament from the tankers was dutiable, and the whole hereditament, including the pipes and the storage tanks, was a bonded warehouse. The terms of the leases under which the hereditament was held showed them to have been granted for the purpose of receiving into the hereditament oil unshipped at the jetties. It was contended for the ratepayer that the hereditament was a freight-transport hereditament within s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928*, as being a hereditament (i) used partly for dock purposes and (ii) so used as part of a dock undertaking and (iii) whereof a substantial proportion of the volume of business was concerned with shipping and unshipping merchandise not belonging to or intended for the use of the ratepayer. The valuation officer and the rating authority conceded that (in accordance with the decision of the Court of Appeal) the hereditament was used partly for dock purposes.

Held (LORD OAKSEY dissenting from the conclusion and reason (i)): the hereditament was not a dock undertaking within s. 5 (3) of the Rating and Valuation (Apportionment) Act, 1928 (and, therefore, was not a freight-transport hereditament within s. 5 (1) (c)) for the following reasons—

(i) the hereditament was not part of the dock undertaking of the British Transport Commission, since it was leased to, and exclusively occupied by, the ratepayer for the purposes of its own business, and

(ii) although the ratepayer owned a dock, viz., the barge berth, its undertaking at the hereditament was not "business carried on at and in connection with that dock" within those words in the definition of dock undertaking.

Dictum of LORD FLEMING in *Clyde Navigation Trustees v. Glasgow Assessor* (1931 S.C. at p. 406) adopted by LORD SIMONDS (see p. 191, letter B, post).

Decision of the COURT OF APPEAL ([1955] 3 All E.R. 102) affirmed.

[Editorial Note.] The third condition of the definition of freight-transport hereditament in s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928, is that the dock undertaking is one whereof a substantial proportion of the volume of business is concerned with shipping and unshipping of merchandise not belonging to or "intended for the use" of the undertakers. On the question whether oil received by the appellants on the hereditament for the purpose of being sold by them was "intended for the use" of the appellants' opinions were divided. VISCOUNT SIMONDS and LORD TUCKER were of opinion that the oil was merchandise so intended (see p. 191, letter I, to p. 192, letter A, and p. 196, letter B, post); LORD OAKSEY and LORD MORTON OF HENRYTON were of opinion that the oil was not merchandise so intended (see p. 192, letter D, and p. 194, letter H, post), and LORD KEITH OF AVONHOLM, although inclining to the view that the oil was

* The text of s. 5 (1) (c) is printed at p. 187, letter I, post; and the definitions of "dock", "dock purposes", "dock undertaking" are at p. 187, letter I, to p. 188, letter B, post.

A merchandise so intended, expressed no concluded view (see p. 198, letter E, post).

For apportionment, where a freight-transport hereditament is used partly for transport purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 463, para. 891.

For the Rating and Valuation (Apportionment) Act, 1928, s. 5, s. 6, see 20 HALSBURY'S STATUTES (2nd Edn.) 184, 187.]

B Cases referred to:

(1) *Clyde Navigation Trustees v. Inland Revenue*, *Inland Revenue v. Kirkwall Assessor*, 1930 S.C. 454; Digest Supp.

(2) *Clyde Navigation Trustees v. Glasgow Assessor*, 1931 S.C. 400; Digest Supp.

Appeal.

C Appeal by the ratepayer, Shell-Mex and B.P., Ltd., from an order of the Court of Appeal, dated July 22, 1955, and reported [1955] 3 All E.R. 102, on an appeal by the ratepayer by way of Case Stated from the Lands Tribunal, pursuant to the Lands Tribunal Act, 1949, s. 3 (4). The ratepayer appealed to the Lands Tribunal against the decision of a local valuation court sitting at Kingston-upon-Hull on Sept. 25, 1952, dismissing the ratepayer's appeal

D that a hereditament occupied by the ratepayer and situated at Salt End, Preston, within Holderness rural district rating area, ought to be treated as a freight-transport hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 5 (1). The second respondents were the rating authority, the Holderness Rural District Council. The facts appear in the opinion of VISCOUNT SIMONDS, p. 188, letter E, to p. 190, letter A, post.

E *Michael Rowe, Q.C.*, and *J. R. Willis, Q.C.*, for the appellant ratepayer.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the first respondent, the valuation officer.

H. Edmund Davies, Q.C., and *E. P. Wallis-Jones* for the second respondents, the rating authority.

F The House took time for consideration.

July 25. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a question which I have found great difficulty in deciding. It comes before your Lordships on appeal from the Court of Appeal, which unanimously dismissed an appeal by the appellants, Shell-Mex and B.P., Ltd., on a Case Stated by the Lands Tribunal under s. 3 (4) and (11) of the Lands Tribunal Act, 1949. By its decision the Lands Tribunal had dismissed an appeal by the appellants from a decision of a local valuation court that the assessment of a certain hereditament occupied by the appellants should be confirmed.

H The problem is whether or not the hereditament in question is a "freight-transport hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, which I will call the Act of 1928, and whether the hereditament is or is not entitled accordingly to the benefit of de-rating. "Freight-transport hereditament" is defined by s. 5 (1) of the Act of 1928 to mean, *inter alia*,

I " (c) A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers."

By sub-s. (2) of the same section, "transport purposes" is defined to mean (*inter alia*)

" (c) 'dock purposes', that is to say, all purposes connected with the shipping or unshipping at a dock . . . of merchandise . . ."

And by sub-s. (3), the expression "dock" includes any harbour, wharf, pier, jetty or other works in or at which vessels can ship or unship merchandise, "dock undertaking" means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at or in connection with that dock, and "dock authority" means any person or body of persons whether incorporated or not who are authorised to construct or are owners or lessees of any dock authorised by or under any Act. It is necessary also to refer to s. 6 of the Act of 1928. That section, which provides for entries in the valuation lists of freight-transport hereditaments, enacts by a proviso to sub-s. (3) that no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so used and occupied. This proviso is called in aid by the appellants for the purpose of interpreting the expression "freight-transport hereditament" in the preceding section.

It was common ground between the parties, and has been accepted by the Court of Appeal, that the appellants could only establish that the hereditament in question was a freight-transport hereditament if they satisfied three conditions (i) that it was occupied wholly or partly for dock purposes, (ii) that it was so occupied and used as part of a dock undertaking, and (iii) that such dock undertaking was one whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

I must now state the relevant facts about the hereditament in question. It comprises three parcels of land at Salt End on the banks of the River Humber with an aggregate area of $51\frac{1}{2}$ acres which are held on separate leases from the British Transport Commission or their predecessors in title at a total ground rent of £4,195 per annum. Pursuant to their obligations in the several leases, the appellants or their predecessors in title have built and maintained on the land offices, stores, garages, filling sheds, pump houses, a boiler house, tanks and ancillary buildings. In addition, the appellants own and occupy a so-called "barge berth" which has been erected on part of the foreshore at a distance of about one thousand feet from the hereditament and is connected with it by means of pipe lines exclusively owned, used and occupied by the appellants. From the south-west corner of the land two jetties, the property of the British Transport Commission, run out into the river. Number 1 jetty is used jointly by the appellants and three other companies, but the appellants have their own pipe lines, twelve in number, which run along the jetty and are connected with the pump houses and tanks on the land. Number 2 jetty is used jointly by the appellants and one other company; the pipe lines on this jetty are for a certain distance common to both users.

Oil is brought to the jetties in ocean-going tankers of an average capacity of ten thousand to twelve thousand tons and unloaded there, bills of lading being made out in the name of "Shell-Mex and B.P." or in the name of the consignor. In every case delivery is taken by the appellants at the ship's rail. The tankers are unloaded at the jetties by means of pipes, which are coupled to the ends of the pipe lines which I have already mentioned, and the oil is pumped through the pipe lines to tanks on the hereditament. The nature of the appellants' business demands that they should have at a terminal depot such as that at Salt End a tankage capacity in excess of what would be required to meet the day-to-day requirements of the subsidiary depots, because it must correlate the intake of oil to the movements of tankers. It is the function of terminal depots to supply the subsidiary internal depots which in turn supply consumers. The total tankage capacity at the hereditament is 211,781 tons, and the tanks habitually contain stocks of the order of one hundred thousand to one hundred and fifty thousand tons. A substantial quantity of oil is also

A supplied from the tanks to the barge berth, of which I have spoken, where it is used for bunkering ships. Other parts of the oil are otherwise disposed of. I take as typical the appellants' operations for the year 1951 which are thus set out in the Case Stated by the Lands Tribunal:

" 21.—During the calendar year 1951 the total tonnage of oil handled at the hereditament was approximately 1,320,000 tons. This tonnage was dealt with approximately as follows:—

540,000 tons sent to dependent depots of the appellant company.

160,000 tons sent to other petrol companies.

277,000 tons sold direct to customers from the hereditament.

290,000 tons ships bunkering.

C 53,000 tons supplies to Air Ministry and for export, together with a tonnage of approximately 2,250 tons representing fuel for the appellant company's road vehicles and like purposes used and paid for by the appellant company.

1,320,000 tons

D "The ships bunkered were tankers chartered by the consigning companies (approximately 105,000 tons) and vessels, such as trawlers, owned by other persons (approximately 185,000 tons).

E " 22.—Of the 540,000 tons delivered to the dependent depots about 316,000 tons were sent on by water. Of this 316,000 tons 260,000 tons were shipped from the said barge berth. In addition, 82,000 tons of National Benzole product were also shipped from the said berth, making a total of 342,000 tons shipped from the barge berth during 1951."

The whole of the hereditament is a bonded warehouse, about a quarter of the oil which passes through the installation being dutiable.

F It is necessary now to refer briefly to the relations between the appellants and the companies from which they receive consignments of oil. This is relevant only to the third of the conditions to which I have referred. These relations are determined by an agreement made on Dec. 31, 1931, between Shell Marketing Co., Ltd. of the first part, Eagle Oil and Shipping Co., Ltd. of the second part, Anglo-Persian Oil Co., Ltd. of the third part and the appellants of the fourth part, the companies of the first three parts being referred to as "the consigning companies". By cl. 5 of this agreement, it was provided that each of the consigning companies would, during its continuance, employ the appellants as its sole and exclusive consignee and agent for the sale and distribution of oil for consumption within the area therein mentioned, and that the appellants would use their best endeavours to promote the interests of the consigning companies and would not knowingly sell oil for resale outside that area, (by cl. 7) that the appellants might at any time purchase on their own account any oil for resale on their own account but only for consumption in the said area and subject to the further conditions therein laid down, (by cl. 8) that delivery of the oil required by the appellants should be made to the appellants c.i.f. such ports in the area as the appellants might direct, (by cl. 9) that the appellants, as agents for sale, should have the fullest liberty in respect of the sale of oil delivered to them and might sell the same in their own name or otherwise and in such manner and at such prices and on such terms and conditions as they might think advisable, (by cl. 11) that the commission payable to the appellants for their services should be such as might from time to time be agreed between the parties or determined as therein mentioned, (by cl. 15) that each of the consigning companies should bear its due proportion of all shortages or losses by leakage or otherwise as therein mentioned, and (by cl. 19) that the stocks left at the end of each year should be ascertained and allocated to the respective parties who had delivered them to the appellants in the proportions therein mentioned. The commission payable under this agreement

was fixed at eight per cent. except in respect of a small quantity (0.17 per cent.) used by the appellants themselves for which they paid an agreed price. A

I have now stated what appear to be the relevant facts, which can be supplemented if necessary by reference to the Case Stated, and return to the three conditions which the appellants must satisfy.

First, is the hereditament used wholly or partly for "dock purposes"? Your Lordships are relieved of the necessity of discussing this. The Court of Appeal has answered the question in the affirmative, and learned counsel for the respondents have been content to accept their decision, but have properly reserved their right to claim an apportionment if the other conditions should be held to be satisfied. B

Secondly, is the hereditament used and occupied for dock purposes as part of a dock undertaking? I find this a very difficult question to answer. The appellants' contention is twofold: originally it had a third limb but that has been broken off. Now they say, first, that the hereditament is so used as part of a dock undertaking carried on by the British Transport Commission at the Port of Hull; but, if that fails them, they turn to the second part of the definition of dock undertaking and say that the hereditament is so used by them as part of the dock undertaking carried on by them at their own dock, namely, the barge berth. It is clearly more advantageous to them to succeed on the first alternative claim, for thus they avoid any difficulty on the third condition, since it could not be contended that their merchandise, the oil, belongs to or is intended for the use of the undertakers, viz., the British Transport Commission. C D

I ask first, then, whether the hereditament is used and occupied for dock purposes by the appellants as part of the dock undertaking carried on by the Transport Commission. This question has been answered in the negative by the Court of Appeal. They say ([1955] 3 All E.R. at p. 115): E

"To hold the contrary would involve the conclusion that the tenants of every industrial site let by the commission in the vicinity of the Port of Hull would be occupying and using their respective sites as part of the commission's dock undertaking if their leases or tenancy agreements allowed them the use for their own private purposes of the dock facilities provided by the commission." F

I agree that this conclusion would be involved and I do not think that learned counsel for the appellants shrank from it. Relying on the terms of the leases to which I have referred, he said that the development of the dock undertaking was effected by just such agreements as these whereby dock facilities were created for the benefit of individual tenants or lessees, and that it was immaterial that, in regard to any particular site, those facilities were private and exclusive. The dock undertaking of the commission, he said, was as truly "carried on" by these means as it would be if they themselves provided the installation and all the machinery of shipment and unshipment. To this the answer given by the respondents and accepted by the Court of Appeal is that, as soon as the hereditament is leased to and exclusively occupied by the appellants for the purpose of its own business of importing and distributing oil, it is segregated from, and no longer forms part of, the commission's dock undertaking. The point is a narrow one, but I have come to the conclusion that the decision of the Court of Appeal should be affirmed. The present interest of the commission in the hereditament is to receive the rent reserved by the leases and to enforce, so far as necessary, the lessees' obligations therein contained. I do not think that it can fairly be said that it is the consequence or corollary of this that the appellants occupy and use the hereditament as part of a dock undertaking carried on by the commission. It might well be otherwise if the appellants could themselves be said to be dock undertakers in the sense that they provided docking facilities for others, but it is clear that they do not do so. Their undertaking is the importation and distribution of oil, and for its purposes they need docking facilities. The use of those G H I

A facilities does not appear to me to convert their undertaking into part of a dock undertaking carried on by the British Transport Commission.

I have so far ignored the proviso (a) to s. 6 (3), on which the appellants rely as an aid to the interpretation of s. 5. It is a proviso to a sub-section dealing with a hereditament which is assumed to be a freight-transport hereditament. It can, I think, throw little light on the question what constitutes such a hereditament. Two Scottish cases have been referred to, in which the matter has been discussed, viz., *Clyde Navigation Trustees v. Inland Revenue* (1) (1930 S.C. 454), and *Clyde Navigation Trustees v. Glasgow Assessor* (2) (1931 S.C. 400). In these cases different conclusions were reached. I would with respect adopt the view expressed by LORD FLEMING in the second of the two cases (*ibid.*, at p. 406), which was cited by the Court of Appeal, that the proviso

C “seems . . . to imply that subjects which would otherwise be entitled to be regarded as freight-transport lands and heritages are not to be deprived of the benefits of de-rating merely because they have been let to and are occupied by some person other than the dock authority.”

I do not doubt that a dock authority may let a hereditament which forms part of its undertaking without its losing its character as a freight-transport hereditament. But it must have that character before it can lose it.

D I turn then to the alternative contention of the appellants in regard to the second condition. As I have pointed out, “dock undertaking” includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock. The appellants operate an undertaking and they own a dock, the barge berth, which is connected with the hereditament by the pipe lines which I have mentioned. From these premises the conclusion is drawn that the appellants occupy and use the hereditament as part of a dock undertaking. This contention also has been rejected by the Court of Appeal and, as I think, rightly. For it appears to me a plain misuse of language to say that, in respect of the barge berth, the appellants are carrying on a dock undertaking of which the hereditament forms part, and this misuse is expressly averted by the qualifying words “in so far as its business is carried on at and in connection with that dock.” In my opinion, the use and occupation of the hereditament is not “business carried on at and in connection with” the barge berth. Your Lordships were invited to consider the use and occupation of the hereditament in what were called their geographical and functional aspects. These are refinements which I do not find it easy to follow. It is enough for me to say that, in any aspect, the limitation in the definition is fatal to the appellants’ contention.

G There remains the third condition and, as I have pointed out, this is clearly satisfied if the appellants succeed in their contention that the hereditament is occupied and used as part of the British Transport Commission’s undertaking; but, if they succeed not on this but on their alternative contention, then they must H establish that the dock undertaking carried on by them at the barge berth is one whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to them or intended for their use. In my opinion, they do not satisfy this condition. The merchandise, the oil, which is unloaded at the ship’s rail, is from the moment of unloading in I their possession. No one, not even the consigning companies, can dispute it, for they have an uncontrolled power of disposition. They are under a contractual obligation to account for the proceeds of sale and they might, no doubt, be liable in damages if they broke other terms of the contract. But neither this fact nor the fact that the property in the oil is not in the full legal sense vested in them makes it inapposite to describe the oil as “belonging to them”. If it does not “belong to them”, it is at least intended for their use. It would, in my opinion, be in its context placing too narrow a meaning on “use” to confine it to use by consumption. It may and, I think, does include such use as a trader makes of

his stock in trade, that is, by selling it. In this sense, the oil is intended for the use of the appellants and is, in fact, so used by them. A

On the whole case, therefore, I am of opinion that the appellants fail to satisfy two of the three prescribed conditions and that their appeal must be dismissed.

LORD OAKSEY: My Lords, I have the misfortune to differ from your Lordships and from the Court of Appeal. In my opinion, the appellants' hereditament is wholly used for dock purposes as part of the dock undertaking of the British Transport Commission's undertaking at Hull, which is an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping of merchandise not belonging to, or intended for, the use of the British Transport Commission. The hereditament is, therefore, a freight-transport hereditament within the meaning of s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928, and its net annual value must be apportioned between the occupation and user for transport purposes and for other purposes in accordance with s. 6 (1) of that Act. B

If the hereditament were not used as a part of the dock undertaking of the British Transport Commission it would not, in my opinion, be a freight-transport hereditament, because a substantial proportion of the volume of its business as a dock undertaking is not concerned with the shipping of merchandise not belonging to the appellants. In my opinion, the words "merchandise . . . belonging to or intended for the use of the undertakers" are intended to apply to merchandise belonging to, or used by, the undertakers in their capacity as a dock undertaking and not as merchants for the sale of the merchandise. That the appellants' hereditament is occupied and used partly for dock purposes is clear, and it appears to me also clear that it is occupied and used as part of the dock undertaking of the British Transport Commission at Hull. That undertaking by its two jetties enables the appellants to import oil into works leased to the appellants by the undertaking and transport the oil from those works to the barge berth from which it is transported to purchasers in other parts of the country. Proviso (a) to s. 6 (3) contemplates that hereditaments can be let out for transport purposes and, if occupied and used for such purposes, are to be regarded as freight-transport hereditaments, and it seems to me, therefore, that the lease by the British Transport Commission to the appellants of the hereditament which is capable of separate assessment and is actually occupied and used for transport purposes creates a freight-transport hereditament. The broad distinction which the statute appears to me to make is between transporting and warehousing. If a hereditament is let out as a freight-transport hereditament and so as to be capable of separate assessment and is actually used for transportation and not for warehousing, it was not, in my opinion, intended to be rateable. C

LORD MORTON OF HENRYTON: My Lords, the appellants claim that certain land, fully described in the Case Stated by the Lands Tribunal, is a "freight-transport hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928. To succeed in this claim the appellants must satisfy your Lordships that this land is (to quote s. 5 (1) (c) of the Act): D

"A hereditament occupied and used wholly or partly for dock purposes as part of a dock undertaking being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers." E

It will be seen that the burden lies on the appellants to show that the land satisfies three conditions, namely: (i) that it is occupied and used wholly or partly for dock purposes; (ii) that it is so occupied and used as part of a dock undertaking; and (iii) that such dock undertaking is one whereof a substantial F

A proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

In the Court of Appeal, counsel for the respondents contended that no one of these three conditions was satisfied, but in this House they conceded, for the purposes of the present appeal, that the first condition was satisfied, since the land was occupied and used "partly for dock purposes". I turn, therefore, to the question whether it is so used "as part of a dock undertaking". Counsel for the appellants put their argument under this head in two alternative ways. First they submit that the land is occupied and used as part of the "dock undertaking" of the Port of Hull, carried on by the British Transport Commission. Alternatively, they submit that the appellants' own undertaking is a "dock undertaking" and the land is occupied and used as part of it.

My Lords, I cannot accept the first of these submissions. There can be no doubt that the undertaking carried on by the British Transport Commission at Hull is a "dock undertaking", as defined by s. 5 (3) of the Act of 1928. Nor can it be doubted that that undertaking satisfies condition (iii) already stated. But a statement of these facts supplies no answer to the relevant question: Is the land in question occupied and used as part of the undertaking of the British Transport Commission? To my mind it is not so used or occupied. It is used and occupied as part of the wholly separate undertaking of the appellants. As the Court of Appeal put it ([1955] 3 All E.R. at p. 114), the land is

"... in lease to and exclusively occupied by the ratepayer for the purposes of its own business of importing and distributing oil and thus excluded and segregated from the British Transport Commission's dock undertaking."

That court later observed, in regard to an argument by leading counsel for the appellants (*ibid.*, at p. 115):

"Counsel for the ratepayer relies strongly on the terms of the leases under which the various parts of the hereditaments are held by the ratepayer. He says these leases show that the ground was let with a view to the erection and operation thereon of a terminal oil depot for the unshipping, storage and distribution of oil, in connection with which the lessees were to have unshipping facilities in the shape of the pipes running out along the jetties. There was thus, he argues, something in the nature of an arrangement between the dock undertakers and the lessees under which the lessees were to extend the activities of the dock undertaking to the importation of oil. Therefore, says counsel... the installation should be regarded as constructed and operated as part of the dock undertaking. We cannot accept this argument. We would be disposed to agree with counsel if what the ratepayer did was to provide unshipping and storage facilities for anyone having occasion to import oil; but the ratepayer does nothing of the sort. It uses the hereditament and the pipe lines on the jetties simply and solely for the purposes of its own individual business, and not by way of performing the functions properly within the province of the dock undertakers as such... we find it impossible to hold that, in occupying and using the hereditament for its own private purposes, the ratepayer is occupying and using the hereditament as part of the dock undertaking carried on by the British Transport Commission. To hold the contrary would involve the conclusion that the tenants of every industrial site let by the commission in the vicinity of the Port of Hull would be occupying and using their respective sites as part of the commission's dock undertaking if their leases or tenancy agreements allowed them the use for their own private purposes of the dock facilities provided by the commission."

My Lords, I agree entirely with this reasoning, and I also agree with the reasoning

which led the Court of Appeal to reject the appellants' alternative submission under this head, which I have already stated. A

The result is, in my view, that the appellants have failed to satisfy the second condition laid down in s. 5 (1) (c) of the Act of 1928. If I am right so far, the appellants' claim fails, and the question whether the third condition is satisfied does not arise, but I shall express my views on this question, as the Court of Appeal answered it "no", and I do not agree with that answer. B

In my view, almost all the oil which is unshipped by the appellants and distributed by them is "merchandise not belonging to or intended for the use of" the appellants, within the meaning of s. 5 (1) (c). The only exception is the oil which the appellants retain for their own use, and this is a trifling part of the whole. I think that the sub-section is directed to the case of merchandise in the hands of agents for sale, such as the appellants, or forwarding agents, as contrasted with merchandise which has reached the end of its journey when it is unshipped, either by reaching the hands of an absolute owner, or by delivery to a person who intends to put it to the use for which it was manufactured. As appears from the Case Stated, the whole, or substantially the whole, of the oil unshipped at the jetties is oil consigned by three companies to the appellants as their sole agent for the sale and distribution of oil for consumption in the United Kingdom, under an agreement made between these three consigning companies of the one part and the appellants of the other part, and dated Dec. 31, 1931. Substantially the whole of the appellants' business consists of the sale and distribution of this oil, and they are remunerated for their services by the three consigning companies on a commission basis. The appellants are given wide powers under the agreement in regard to prices, terms and conditions of sale and so forth. C D E

These being the facts, does the oil which the appellants unship and pass on to purchasers "belong to" the appellants, within the meaning of s. 5 (1) (c), while it is in the appellants' possession? My Lords, I think not. It is true that the appellants have some of the rights of an owner while the oil is in their possession, but in other material respects their position differs from that of owner. For instance (a) the appellants are under a duty to the consigning companies to endeavour to sell the oil; (b) the appellants are not bound to pay for oil which they unship but fail to sell; (c) the agreement with the consigning companies is terminable on notice, and any oil which is in the tanks when the agreement is terminated belongs to the consigning companies—see cl. 19 of the agreement of Dec. 31, 1931, set out in the Case Stated; (d) if the oil in tanks had been requisitioned when war broke out, the compensation money would have been payable to the consigning companies and not to the appellants. Having regard to these facts, and to the general intention of s. 5 of the Act of 1928, read as a whole, I am of opinion that, of all the oil unshipped by the appellants, only the small quantity which the appellants keep and consume "belongs to" them, within the meaning of s. 5 (1) (c). The rest of the oil "belongs to" the consigning companies. F G H

Is the oil "intended for the use of" the appellants, within the meaning of s. 5 (1) (c)? Again, my Lords, I would answer "No". Here again I rely on the general intention of s. 5, as I read it, and also on the ordinary meaning of the word "use", in the case of merchandise, such as oil, which is consumed by being used; that is, to put it to the use for which it was manufactured or otherwise brought into being. If a visitor to the storage tanks on the land in question were to ask one of the appellants' officials: "Is this oil intended for the use of the company?", I feel confident that the answer would be: "Oh no, we can only use a very small part of it. All the rest is intended for sale by the company". And, in my opinion, that would be a natural and correct use of words by the official. I

The result is that, in my opinion, the land in question satisfies the third

A of the three conditions laid down by s. 5 (1) (c) of the Act of 1928; but I would dismiss the appeal because, and only because, the appellants have not shown that the land in question satisfies the second of these three conditions.

B LORD TUCKER: My Lords, it was conceded by counsel on behalf of the respondents in the course of the hearing that they could not contest the decision of the Court of Appeal that the appellants had established that the hereditament in question satisfied the first of the three necessary conditions prescribed in s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928, viz., that it was used wholly or partly for dock purposes. They reserved, however, their rights with regard to apportionment under s. 6, if the occasion should arise. It remains, therefore, to decide whether the hereditament also satisfies the two remaining further conditions, viz., (b) that it is part of a dock undertaking, and C (c) that such undertaking is one whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

D As to (b), it was contended for the appellants that the hereditament is occupied and used as part of the dock undertaking carried on by the British Transport Commission in the Port of Hull. And, alternatively, that it is so occupied and used as part of the dock undertaking carried on by the appellants at their own dock, i.e., the barge berth. If they are right in their submission that it is part of the undertaking of the Port of Hull, it is admitted that they would, in that event, satisfy the third condition with regard to the volume of business concerned with the shipping and unshipping of merchandise not belonging to or intended E for the use of the undertakers.

F On the first of these two alternatives I feel unable to accept the contention of the appellants. I think the decision turns largely on the particular facts of each case. It is quite possible for a dock authority to let off part of their premises on terms and in circumstances in which the demised premises will remain part of the dock undertaking subject to the regulations of the authority with regard to user and so forth; but in the present case, the authority merely granted long leases of vacant land adjacent to their undertaking to the appellants for their own purposes and free from any regulation or supervision by the authority. There is nothing which, to my mind, would justify a finding that, by the grant of these leases, the dock authority had incorporated in their existing undertaking the new installations and equipment which the appellants were to erect for the purposes of their business. I think the finding of the Lands Tribunal on this G issue was justified by the facts proved and should not be disturbed.

I pass, therefore, to the alternative submission. This depends on the definition of "dock undertaking" in s. 5 (3). It is as follows:

H " 'Dock undertaking' means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock."

I find the latter part of this definition very puzzling, but it would seem to me difficult to say on the facts of the present case that, if the undertaking is limited to the business carried on *at* and in connection with the dock, i.e., the barge berth, the hereditament in question, which is physically separated from the dock, could be said to be part of the limited undertaking. But, however this may be, I have reached the conclusion that, assuming the appellants qualify as undertakers under the second limb of the definition, the substantial proportion of the volume of their business is not concerned with the shipping and unshipping of merchandise not belonging to or intended for their use.

I do not think the words "belonging to" and "use of" in this context are equivalent to "the property of" and "personal use". I think they have a wider meaning. The property in the oil in the strict legal sense of the word did not

pass to the appellants from the consigning companies on delivery, but the appellants had a good possessory title to it as against everyone. The consignors had no more than a contractual right to an account and payment. When delivered, it was put in a common tank and mixed with other oil. For all practical purposes the oil was at the disposal of the appellants, subject only to the consignors' rights referred to above. I think, therefore, it "belonged to" the appellants within the meaning of those words in the present context. I also agree with the Court of Appeal that the oil was intended for their "use", in the sense of being used in their business. If a garage proprietor carries on a business which includes a hire-car service as well as an installation of petrol pumps for the supply of petrol to his customers, and for these purposes buys petrol from the distributing companies, I think the petrol is supplied to him to be "used" in his business, irrespective of whether it is put in the tanks of his own hire cars or those of his customers. This, in my opinion, is the sense in which the word is used in the present context.

For these reasons, I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, it is conceded that the hereditament here (which I shall call the "oil depot") is occupied and used partly for "dock purposes" in respect that it contains pumping apparatus which is used in unshipping oil from ocean-going tankers which berth at two jetties belonging to the British Transport Commission as dock authority at the Port of Hull. To that extent it satisfies the first of the requirements of s. 5 (1) (c) of the Rating and Valuation (Apportionment) Act, 1928. Delivery of the oil is taken at ship's rail and is pumped direct from the ship by means of pipes to the oil depot.

The first question which arises is whether the oil depot is occupied and used as part of what I shall call the Hull dock undertaking so as to satisfy the second requirement of s. 5 (1) (c). "Dock undertaking" here means "an undertaking carried on by a dock authority", being so defined in s. 5 (3). Now such an undertaking includes much more than the mere physical structure of the dock. The dock is only part of the undertaking, just as a railway is part of a railway undertaking and a canal a part of a canal undertaking as stated in terms by the Act when referring to these types of freight-transport hereditament under s. 5 (1) (a) and (b). A dock undertaking includes the whole business and activities of a dock authority. I should require clear evidence, which is entirely lacking here, that the Hull dock authority had statutory power to carry on the business of an oil depot as carried on by the appellants, i.e., as oil merchants and distributors, before I could regard a hereditament occupied and used for such a business as part of their undertaking. If the authority cannot so use their land, the appellants cannot be occupying and using the oil depot as part of a dock undertaking. A further difficulty is this. The land leased to the appellants or their predecessors in title belonged to the Hull dock undertaking and, I will assume, was part of the dock undertaking, though it may not have been used at all for dock purposes. But when it was let out it would, according to ordinary conceptions, cease to be part of the dock undertaking. It would be put, for the time being, beyond the operations and control of the dock undertakers. But counsel for the appellants points to proviso (a) of s. 6 (3), as showing that, though a part of the hereditament of a dock authority was let out, it might still, in the conception of the legislature, remain a part of the dock undertaking. The proviso is as follows:

"no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used;"

The proviso refers to occupation and use for transport purposes. In the case of a dock, this means dock purposes under the definition of "transport purposes"

- A in s. 5 (2). But this does not necessarily mean that every part of a dock undertaking which is let out and is used to some extent for dock purposes continues to be part of the dock undertaking. If it were open to a dock authority to let out the whole of its docks for dock purposes to serve the public as before, the undertaking would doubtless continue to be a freight-transport hereditament, and, if the authority had power to let out part of its docks or quays to be used for the berthing of ships and the loading and unloading of merchandise, it might, I think, be said that the part let out remained part of the dock undertaking.
- B The dock authority would be securing for the public through a lessee the same services as it would have performed itself. But where all that the authority does is to let out some waste or vacant land in order that the lessee may erect works and plant, such as we have here, it is impossible, in my opinion, to say that the land with the works on it is occupied and used as part of the dock undertaking, even if, as incidental to the operations carried on, it is used also for the shipping or unshipping of goods for the purposes of the occupier's business.
- C

On this part of the case, counsel for the appellants referred to and relied on the Scottish decisions in *Clyde Navigation Trustees v. Inland Revenue* (1) (1930 S.C. 454), and *Clyde Navigation Trustees v. Glasgow Assessor* (2) (1931 S.C. 400).

- D The last of these cases alone need be noticed as illustrative of the point made by appellants' counsel. In that case, the Lands Valuation Appeal Court held, inter alia, that offices built by a dock authority on ground within the precincts of their dock, and let to a firm of shipowners and a firm of stevedores respectively, were occupied and used for "dock purposes as part of a dock undertaking" within the meaning of s. 5 (1) and were, accordingly, freight-transport lands and heritages.
- E It may be observed that one of the facts found in the case was that the buildings had been constructed by the trustees (the dock authority) expressly for the purpose of leasing them to the shipowners and stevedores engaged at the dock in loading and unloading merchandise. Referring to s. 6 (3) (a) of the Act, LORD HUNTER said (*ibid.*, at p. 405):

- F "That means, I think, that, where one finds subjects, capable of separate assessment and leased to tenants, which are so used and occupied as to fall within the definition of freight-transport, one must treat the subjects, although let, as part of the dock undertaking for purposes of de-rating."

- That decision cannot, in my opinion, be pressed beyond the particular circumstances with which it dealt. The buildings in that case were being used for precisely the same purpose of loading and unloading merchandise as the dock authority would have used them if they had kept the buildings in their own hands. They were being used for no other purposes. For their own convenience, or for the convenience of the shipowners and stevedores using the docks, they chose instead to let them. Where similar buildings were erected by the lessees on land leased to them by the dock authority a different rule was applied, as the cases cited show. In such a case, the court held that the buildings were not part of the dock undertaking and so not entitled to de-rating. But as this distinction may depend on specialties of Scottish valuation law and procedure I do not seek to apply it to this case, though it shows how narrow the decisions in these cases were. The cases are, in my opinion, distinguishable from this case, where the operations carried on by the lessees extend far beyond the business and activities of a dock authority.
- G
- H
- I

It is said, however, that, if the oil depot is not part of the Hull dock undertaking, it is a dock undertaking in its own right by virtue of the second limb of the definition of "dock undertaking", viz.:

"any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock."

The appellants here rely on their barge berth at Hedon Haven, from which some of the oil in their oil depot is shipped. The barge berth is not part of the oil depot, though it is connected with the oil depot by pipes through which the oil is pumped for shipment. It is three hundred yards from the nearest part of the oil depot and is a separate hereditament, separately assessed, and, as such, does not come into this case. But it is used by the appellants to attract to their oil depot the character of a dock undertaking. Part, at least, of the business of the oil depot, it is said, is carried on at or in connection with the barge berth. I cannot apply the definition to the facts of this case in the way contended for by the appellants. No doubt the business done at the barge berth is associated with the business done at the oil depot. But the intention of the definition, in my opinion, is to effect a separation between the dock and the rest of the undertaking. The undertaking is carrying on business at the dock. It is also carrying on business at the rest of its premises. The two must be treated separately. No difficulty really arises, in my opinion, when the dock and the other premises are separated, as here. The dock is clearly identified from the rest. But the dock and the other premises may be within one curtilage where separation is not clearly defined. There it would be necessary, I think, to look at what would normally be regarded as dock activities, these being, *ex hypothesi*, part of the business of the undertaking, and the area within which these are carried on, or necessary for them to be carried on, would be marked by the definition as the dock undertaking. The rest would be excluded from being a dock undertaking. In my opinion, the definition is of no avail to the appellants in the circumstances of this case.

On the views which I have expressed it is unnecessary to consider the application of the third requirement of s. 5 (1) (c) to the facts of this case. If the oil depot were part of the Hull dock undertaking, that undertaking clearly satisfies the requirement. But if the oil depot were to be treated as a dock undertaking in its own right, I should have had great difficulty in holding that the oil did not belong to, or was not intended for the use of, the appellants. But I need not elaborate this point.

I would dismiss the appeal.

Appeal dismissed with one set of costs only to be apportioned as to two-thirds to the respondent, the valuation officer, and as to one-third to the respondents, the rating authority.

Solicitors: *Sydney Morse & Co.* (for the appellant ratepayer); *Solicitor of Inland Revenue* (for the first respondent, the valuation officer); *Smith & Hudson*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the second respondents, the rating authority).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A SOUTH OF SCOTLAND ELECTRICITY BOARD v. BRITISH OXYGEN CO., LTD.
CENTRAL ELECTRICITY AUTHORITY v. BRITISH OXYGEN CO., LTD.

B [HOUSE OF LORDS (Viscount Simonds, Lord Normand, Lord Tucker, Lord Cohen and Lord Keith of Avonholm), June 4, 5, 6, 7, July 19, 1956.]

Electricity—Charges for supply—Undue preference or discrimination—Differential in prices charged to high voltage users and low voltage users—Whether “undue discrimination” against high voltage users—Whether high voltage consumers and low voltage consumers separate classes of persons—Electricity Act, 1947 (10 & 11 Geo. 6 c. 54), s. 37 (8).

C O., Ltd. was supplied by the appellant board with electricity for industrial purposes at a voltage metered above six thousand volts. The price of the electricity was fixed by tariffs made by the board. A tariff operating from Dec. 15, 1951, fixed a price of .45d. per unit for high voltage consumers (of whom O., Ltd. was one) and .475d. per unit for low voltage consumers. It was admitted by the board that in general it was cheaper to supply electricity at a high voltage than at a low voltage; and O., Ltd. accepted that the differentiation between the charges of .45d. and .475d. (i.e. 5.55 per cent.) was fair at a time when the cost of fuel used by the board was 38s. per ton. The tariff provided for increasing the cost of electricity at a flat rate (.0008d. per unit) for each penny by which the cost of a ton of fuel used by the board rose above 38s. A second tariff superseded the first tariff as from Oct. 1, 1953, and a third tariff superseded the second tariff as from Apr. 1, 1954. Under the second tariff the initial price of a unit for high voltage consumers was .661d. and for low voltage consumers was .686d. (the differential thus being 3.78 per cent.); and the rate of increase of price of electricity was .00075d. per unit for high voltage consumers and .0008d. per unit for low voltage consumers in respect of each penny by which the cost of fuel used by the board rose above 60s. per ton. The third tariff was similar for present purposes to the second tariff. O., Ltd. claimed that in fixing the tariffs the board had exercised undue preference of low voltage consumers or undue discrimination against high voltage consumers and had acted in contravention of s. 37 (8) of the Electricity Act, 1947, and that the tariffs were ultra vires and sought also other relief. The board made application that the claim should be dismissed as irrelevant on the grounds, as originally advanced, that discrimination was not undue unless it was exercised for illegitimate reasons, which had not been averred, and that high voltage consumers and low voltage consumers did not constitute two classes of persons within s. 37 (8).

H **Held:** (i) discrimination may be “undue discrimination” within s. 37 (8) of the Electricity Act, 1947, although it is not exercised for illegitimate reasons; thus an excessive discrimination may be “undue discrimination”, and whether a particular discrimination is excessive may become an issue of degree and fact.

I *Phipps v. London & North Western Ry. Co.* ([1892] 2 Q.B. 229), *A.-G. v. Long Eaton Urban Council* ([1914] 2 Ch. 251) and *A.-G. v. Wimbledon Corpn.* ([1940] 1 All E.R. 76) considered.

(ii) high voltage consumers and low voltage consumers each constituted a separate “class of persons” within s. 37 (8).

Per LORD KEITH OF AVONHOLM: it may be questioned whether s. 37 of the Electricity Act, 1947, has the effect of nullifying tariffs containing an element of undue preference or undue discrimination . . . It is the preference that is illegal, not the whole tariff (see p. 206, letter G, post).

Observations on entertaining argument on questions not raised below on appeals against allowance before proof (see p. 202, letter H, to p. 203, letter C, and p. 206, letter E, post).

Appeal dismissed.

[As to undue preference and discrimination by area boards in fixing tariffs for electricity, see 14 HALSBURY'S LAWS (3rd Edn.) 412, para. 793.

For the Electricity Act, 1947, s. 37, see 8 HALSBURY'S STATUTES (2nd Edn.) 978.]

Cases referred to:

- (1) *Phipps v. London & North Western Ry. Co.*, [1892] 2 Q.B. 229; 61 L.J.Q.B. 379; 66 L.T. 721; 8 Digest (Repl.) 218, 1376.
- (2) *A.-G. v. Long Eaton Urban Council*, [1914] 2 Ch. 251; 83 L.J.Ch. 774; *affd.* C.A., [1915] 1 Ch. 124; 111 L.T. 514; 79 J.P. 129; sub nom. *Long Eaton Urban Council v. A.-G.*, 84 L.J.Ch. 131; 20 Digest 207, 48.
- (3) *A.-G. v. Wimbledon Corpn.*, [1940] 1 All E.R. 76; [1940] Ch. 180; 109 L.J.Ch. 56; 162 L.T. 365; 104 J.P. 111; 2nd Digest Supp.
- (4) *Stonehaven Magistrates v. Kincardineshire County Council*, 1940 S.C. (H.L.) 56.
- (5) *Metropolitan Electric Supply Co., Ltd. v. Ginder*, [1901] 2 Ch. 799; 70 L.J.Ch. 862; 84 L.T. 818; 65 J.P. 519; 20 Digest 207, 47.
- (6) *Denaby Main Colliery Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, (1885), 11 App. Cas. 97; 55 L.J.Q.B. 181; 54 L.T. 1; 50 J.P. 340; 8 Digest (Repl.) 195, 1250.
- (7) *A.-G. for Victoria v. Melbourne Corpn.*, [1907] A.C. 469; 20 Digest 207o.

Appeal.

Appeals by the South of Scotland Electricity Board (called "the board" in this report), and the Central Electricity Authority from an interlocutor of the Second Division of the Court of Session, dated June 10, 1955, in an action of declarator and damages brought by the respondents, the British Oxygen Co., Ltd. (called in this report "the company") recalling an interlocutor of the Lord Ordinary (LORD HILL WATSON), dated Jan. 7, 1955, sustaining pleas in law to the relevancy of the company's averments and dismissing the actions brought by the company against the board for certain declarators and other relief. The conclusions claimed by the summons were (i) for declarators that the board in fixing three industrial maximum demand tariffs for supplies on and after Jan. 1, 1952, Oct. 1, 1953, and Apr. 1, 1954, exercised undue discrimination against industrial users of supplies of electricity metered at or above a voltage of six thousand, contrary to s. 37 (8) of the Electricity Act, 1947, and that the tariffs were illegal, ultra vires and of no effect; (ii) for production and reduction of the three tariffs; (iii) for a separate declarator which became in the circumstances irrelevant to this report, and (iv) for payment by the board of £10,000 with interest at five per centum per annum from the date of citation. The Second Division allowed the parties, before answer, a proof of certain of their averments. The Central Electricity Authority took no pleas distinct from the board. The facts regarding the tariffs in question appear in the opinion of LORD KEITH OF AVONHOLM, p. 204, letters A to G, post.

J. O. M. Hunter, Q.C. (of the Scottish Bar), *E. S. Fay* and *R. H. M'Donald* (of the Scottish Bar) for the appellants, the board and the Central Electricity Authority.

Sir Andrew Clark, Q.C., *Ian H. Shearer, Q.C.*, and *W. T. Hook* (both of the Scottish Bar) for the respondents, the company.

The House took time for consideration.

July 19. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I concur at all points with the opinion LORD NORMAND will deliver and, in my opinion, this appeal should be dismissed with costs.

- A LORD NORMAND:** My Lords, the South of Scotland Electricity Board, being an area board under the Electricity Act, 1947, and the Central Electricity Authority, appeal against an interlocutor of the Second Division of the Court of Session, so far as it recalled the interlocutor of the Lord Ordinary (LORD HILL WATSON) and allowed the parties a proof before answer of certain of their averments with leave to appeal. The respondent company are in receipt of a supply of electricity for industrial purposes from the board at a voltage metered above six thousand. The Lord Ordinary had sustained the board's pleas in law to the relevance and had dismissed the action. The Section Division agreed with the Lord Ordinary that a severable part of the company's case was irrelevant, and excepted from the allowance of proof their averments in support of it. With that part of the case, as no appeal has been taken on it, we are not concerned. The question now to be decided is whether the Second Division was wrong in remitting any of the averments to probation.

- In the conclusions which survive for consideration, the company seek declarators that, in fixing three successive industrial demand tariffs, the area board exercised undue discrimination against industrial consumers of supplies of electricity metered at or above a voltage of six thousand, contrary to the provisions of the Electricity Act, 1947, s. 37 (8); declarators that the tariffs are illegal and ultra vires; reduction of the tariffs; and repayment by the board to them of the sum of £10,000 with interest thereon at the rate of five per cent. per annum from the date of citation until payment.

The following provisions of s. 37 are material to the decision of the appeal:

- E** “(3) Subject to any directions of the Central Authority . . . the prices to be charged by area boards for the supply of electricity by them shall be in accordance with such tariffs as may be fixed from time to time by them, and those tariffs shall be so framed as to show the methods by which and the principles on which the charges are to be made as well as the prices which are to be charged, and shall be published in such manner as in the opinion of the area board will secure adequate publicity for them . . .

- F** “(8) An area board, in fixing tariffs . . . shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons, and the Central Authority shall, in exercising their powers under this section in relation to the fixing of tariffs and making of agreements by area boards, secure compliance by area boards with this sub-section.”

- G** The three tariffs alleged to have contravened s. 37 (8) came into operation respectively on Dec. 15, 1951, Oct. 1, 1953, and Apr. 1, 1954. It is not necessary for me to repeat the averments for the company. The essence of them is that the amount of fuel required to produce and supply a given amount of electricity at a high voltage is substantially less than that required to supply the same amount at a low voltage; that the first tariff granted the high voltage consumers a fair differential, truly reflecting fuel costs when fuel was costing 38s. a ton, by fixing the original unit charges for them at 45d. and for the low voltage consumers at 475d., but that the fuel variation clause vitiated the tariff when fuel cost rose above 38s. a ton, by distributing the additional cost equally per unit between the two sets of consumers, and that the vicious effect of the clause was not rectified in the second and third tariffs. The original gap, as it was called in argument, between the unit price for the high voltage and the unit price for the low voltage was narrowed as the price of fuel rose. It is in this narrowing of the gap that the company profess to find the undue discrimination against them.

- I** My Lords, when the case was before the Lord Ordinary and at the hearing of the reclaiming note the board maintained that the averments were irrelevant on two grounds, and on two only. First, they said that a “discrimination” was not an “undue discrimination” within the meaning of s. 37 (8), unless it had been “exercised” for illegitimate reasons, and that, as there was no averment

of illegitimate reasons, there was no ground of action. Secondly, they said that the high voltage consumers and the low voltage consumers did not constitute two "classes" within the meaning of s. 37 (8). On the first point the company answered that an excessive discrimination might be an "undue discrimination" and that the issue between them and the board might become one of degree and of fact. The Lord Ordinary accepted the argument of the board on this point and sustained their pleas to relevance. The Second Division rejected the arguments of the board. I agree with the opinions of the Second Division and I think they are supported by the authority of LORD HERSCHELL and LINDLEY, L.J., in *Phipps v. London & North Western Ry. Co.* (1) ([1892] 2 Q.B. 229). The judgments of SARGANT, J., in *A.-G. v. Long Eaton Urban Council* (2) ([1914] 2 Ch. 251), and of SIMONDS, J., in *A.-G. v. Wimbledon Corpn.* (3) ([1940] 1 All E.R. 76), are entirely consistent with the view that the Second Division has taken.

On the other question, whether the high voltage consumers and the low voltage consumers form two "classes", the Lord Ordinary did not find it necessary to come to a decision. The Second Division were of opinion that the board's contention failed. Again, I agree with the opinions of the learned judges of the Second Division. The board argued that the two classes must be classes which are in competition with one another. That may be so, but I respectfully think that the board's conception of the kind of competition desiderated is too narrow and antiquated. In the conditions of our time all industries are in competition for capital and labour and for public favour. The customer's choice between buying an article of dress, a piece of furniture or a bicycle often depends on the prices of the goods and on his purse, and there is an effective competition between the most heterogeneous products of industry.

I am humbly of opinion that the Second Division took the appropriate course in allowing a proof before answer, leaving the pleas to relevance available so that any question of relevance can be argued in the light of the evidence after the proof. I would dismiss the appeal, the costs of which should be borne by the board.

At the hearing of the appeal, the board submitted a new argument on relevance which they had omitted to state either to the Lord Ordinary or in the Inner House. They said that, on the averments, it was clear that the company and other high voltage consumers were charged less per unit per month under all three tariffs, and that the test whether a preference had been shown to one class as compared with another was simply a matter of price. Thus, if all consumers were charged the same price per unit per month, there would be no discrimination and no preference. In the present case, according to the argument, the preference was shown to the high voltage consumers who paid less, and the discrimination was exercised against the low voltage consumers who paid more, but the preference and discrimination were justified by the greater cost per unit of supplying the low voltage consumers. This new submission is crucial to the decision of the action, and it is of the greatest importance to all users of electricity and also of gas. It is, in substance, a new case that this House is asked to consider without the aid of the judgments of the Court of Session. It was not in the contemplation of the Second Division when they granted leave to appeal, and, if the board had informed the court when they applied for leave to appeal that they intended to put forward a new question of such magnitude, it is scarcely conceivable that the application would have been granted. I am not, of course, suggesting that there was concealment or bad faith, for I think that this new case had not occurred to the board till after leave to appeal was granted. This House sometimes entertains a question which has not been argued in the courts below when justice requires that it should do so, because there is no other means at hand by which the question can be brought to a judicial determination. In *Stonehaven Magistrates v. Kincardineshire County Council* (4) (1940 S.C. (H.L.) 56), it even entertained and decided a point which had been expressly abandoned in the court below. But in

- A the present case, justice does not require that the House should entertain the question now proposed to it, and the board are not entitled to force the House to play for their convenience the part of a court of first instance. Appeals against an allowance of proof are not to be encouraged, and it would be a grave departure from correct practice to allow it to be thought that, when leave to appeal is granted, an appellant has the right to expect that any new question
- B which he chooses to raise will be entertained by this House. The case should proceed as the interlocutor of the Second Division has directed; it will then be open to the board after the proof has been led to take the point that there has been no discrimination against the company. The Lord Ordinary will deal with it, and a reclaiming note and a subsequent appeal, if necessary, will be competent. That is the normal and regular procedure. It may result in a second appeal, but that
- C is a risk which the board have taken with their eyes open. The board put forward another new contention, that the conclusions of the summons or some of them are incompetent. This contention also can be dealt with by the Lord Ordinary with such amendments of the conclusions or pleadings as may be proposed and may be deemed by him to be necessary for the disposal of the action.

D **LORD TUCKER:** My Lords, I concur in the opinion of my noble and learned friend, LORD NORMAND, which has just been delivered.

LORD COHEN: My Lords, I too have had the advantage of reading the opinion of my noble and learned friend, LORD NORMAND. Like my noble and learned friend on the Woolsack, I concur at all points with the reasons which LORD NORMAND has given for thinking that this appeal should be dismissed.

- E **LORD KEITH OF AVONHOLM:** My Lords, in this case, the respondents, the British Oxygen Co., Ltd., complain that the first appellants, the South West Scotland Electricity Board (now the South of Scotland Electricity Board), have unduly discriminated against them in fixing certain tariffs for supplies of electricity for industrial purposes, known as industrial maximum demand
- F tariffs. Three tariffs are in question, the first operating as from Dec. 15, 1951, superseded by the second operating as from Oct. 1, 1953, superseded in turn by the third operating as from Apr. 1, 1954. It will be convenient to describe the respondents as the company and the appellants as the board. The Central Electricity Authority were also called as defenders for any interest they might have and appear here as appellants but they take no pleas distinct from those of
- G the board.

The action is based on s. 37 (8) of the Electricity Act, 1947, which runs as follows:

- H “An area board, in fixing tariffs and making agreements under this section, shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons, and the Central Authority shall, in exercising their powers under this section in relation to the fixing of tariffs and making of agreements by area boards, secure compliance by area boards with this sub-section.”

- I The conclusions of the summons are for declarator, in respect of each of the tariffs, that the board exercised undue discrimination against industrial users of supplies of electricity metered at or above a voltage of six thousand, including the company, contrary to the provisions of the Electricity Act, 1947, s. 37 (8); and that the tariffs are illegal and ultra vires and of no force and effect; for production and reduction of the tariffs as applied to users metered at or above a voltage of six thousand; and for payment by the board to the company of the sum of £10,000 with interest at the rate of five per cent. per annum from the date of citation until payment. The Lord Ordinary (LORD HILL WATSON) held the averments of the company to be irrelevant and dismissed the action. The Second Division has recalled the Lord Ordinary's interlocutor and allowed a proof before answer.

It is against this judgment of the Second Division that the board appealed to this House. A

I do not find it necessary to set out the tariffs in full. They are made up of various components. It will be sufficient to indicate the components of which complaint is made. In the first tariff there was fixed a price per unit of '45d. for high voltage users and '475d. for low voltage users, with a proviso that this unit charge should be increased or reduced at the rate of '0008d. per unit for each penny by which the fuel cost per ton to the board in the previous month was more or less than 38s. The company accept the respective prices of '45d. and '475d. as making a fair differentiation between them and low voltage users when coal is 38s. a ton, but they say that to add a flat rate of '0008d. for each penny of increase in fuel cost per ton above 38s. per ton, progressively diminishes the differential advantage to them. The cost of coal in the relevant period has never, it would appear, been below 60s. a ton. In the twelve months ended Mar. 31, 1953, the average cost of fuel was admittedly 67s. 3d. per ton. Under the second tariff of October, 1953, a change was made in the unit charge. The basic unit charge for high voltage users became '661d. and for low voltage users '686d. with a proviso that the unit charge should be increased or reduced at the rate of '00075d. per unit for a high voltage supply and '0008d. per unit for a low voltage supply for each penny by which the fuel cost per ton to the board in the previous month was more or less than 60s. The complaint of the company here is not in the sliding scale applied to the basic unit charge in respect of increase of fuel costs above 60s. per ton. They are satisfied with the differential in the sliding scale as between high voltage and low voltage users now introduced in so far as it operates in the case of an increase in fuel costs above 60s. a ton. But they complain of the basic unit charge, which, they say, has been reached by taking a flat rate of '0008d. per ton for both high voltage and low voltage users in respect of the difference in the cost of fuel between 38s. per ton and 60s. per ton and adding the resultant, '211d., to the basic unit charges of '45d. and '475d. fixed by the first tariff. In the result, the basic unit charge in the second tariff is, they say, more unfair to them than the basic unit charge in the first tariff. Whereas the differential in their favour in the first tariff in this respect was 5·55 per cent. it has now been reduced to 3·78 per cent. They further point out that, if fuel costs fell below 60s. per ton, there would be an even greater inequity, as under the sliding fuel adjustment clause, they would receive a deduction of '00075d. for each penny per ton of fall in fuel cost, while the low voltage users would receive a reduction of '0008d. The third tariff complained of is similar to the second tariff, with certain small modifications in the figures of charge, and requires no special notice. B C D E F G

It will be observed from the foregoing that the company, as high voltage consumers, pay a lower rate for their electricity than low voltage consumers. The reason lies in the difference in the cost of supply. The following is the averment of the company: H

"It is less costly for the [board] to supply electricity at high voltage than at low voltage. The low voltage supply of [the board] (generally 400-440 volts) involves transformation from high voltage causing losses in transformation and also losses in low voltage distribution to be sustained. The amount of fuel required to produce and supply to the user a given amount of electricity for a high voltage supply is accordingly substantially less than that required to produce and supply the same amount of electricity for a low voltage supply as the latter involves greater losses in transformation and distribution." I

The complaint made by the company is that, in fixing the tariffs, the board has discriminated unfairly against them in the rates fixed respectively for high voltage users and low voltage users. The company themselves are high voltage users. The Lord Ordinary has held the company's averments to be

A irrelevant because they have not averred that the differentiation between the two classes of users was made "for an illegitimate reason". The words "undue preference" and "undue discrimination" in s. 37 (8), he holds, do not mean "excessive preference" and "excessive discrimination", but mean a preference or discrimination shown or exercised for illegitimate reasons. The judges of the Second Division took the opposite view and held that "undue preference" and
B "undue discrimination" could be established by mere excessive differentiation. The matter, they said, was one of degree and should be treated as a jury question, broadly and fairly in all the circumstances of the case. In my opinion, the judgment of the Second Division was right.

There is no doubt that an undue preference may be shown to, or undue discrimination exercised against, a person for an illegitimate reason. This does
C not necessarily mean for a corrupt reason, a case which would rarely arise, but for a reason which would, on the face of it, be bad. SARGANT, J., in *A.-G. v. Long Eaton Urban Council* (2) ([1914] 2 Ch. 251), gave as illustrations, charging A less than B merely to overcome a greater reluctance on the part of A to become a customer, or to induce A to become a customer in respect of another supply. He said (*ibid.*, at p. 263):

D "On the other hand, any circumstances which render it less costly or otherwise more profitable to supply A than B constitute a legitimate reason for making a lower charge to A for the same supply."

In my opinion a preference or a discrimination may, however, be undue also on the ground of excess, if the excess is substantial. This was implicit, in my
E opinion, if not expressly recognised, by BUCKLEY, J., in *Metropolitan Electric Supply Co., Ltd. v. Ginder* (5) ([1901] 2 Ch. 799 at p. 811), and by SARGANT, J., in *A.-G. v. Long Eaton Urban Council* (2) ([1914] 2 Ch. at p. 263). There are indications to the same effect in *Denaby Main Colliery Co., Ltd. v. Manchester, Sheffield & Lincolnshire Ry. Co.* (6) ((1885), 11 App. Cas. 97), especially in the speech of LORD BLACKBURN. The position was stated most clearly, I think, in
F *Phipps v. London & North Western Ry. Co.* (1) ([1892] 2 Q.B. 229), in the judgments of LORD HERSCHELL (*ibid.*, at p. 237 and p. 245), and LINDLEY, L.J. (*ibid.*, at pp. 251, 252). Whether a preference is given for a bad reason raises a question of law; if mere excess is in issue that is a question of fact; and an allegation of undue preference, in my opinion, may be raised on either ground.

A further point taken by the board was that the question of preference or discrimination could only arise as between persons or classes of persons charged
G on the same basis or system of supply. Here, it was said, there were two systems of supply, a supply to high voltage users and a supply to low voltage users, with separate tariffs applicable to each, and a question of preference or discrimination could only arise as between users within the respective types of supply. Reliance was placed on the decision of the Judicial Committee in *A.-G. for Victoria v. Melbourne Corpn.* (7) ([1907] A.C. 469). In my opinion, for the reasons given
H by the judges of the Second Division, that decision has no application to the case in hand. I see no reason why, under sub-s. (8), a case of undue preference or undue discrimination may not exist as between the classes of high voltage users and low voltage users.

It was argued, however, for the board, though in a somewhat negative way,
I that this was not a case in which it could be said that there was undue preference, or undue discrimination, or, indeed, any preference or discrimination at all against the company. The company, it was said, already had a preference over the low voltage users, in being charged a lower price for their supply of electricity. Counsel for the board said that he knew of no precedent for a consumer in such a case being allowed to say that he was suffering from undue discrimination exercised against him, or that he was entitled to a greater preference. There is no trace of this point in the pleadings of the board, though it may be said that it is covered by the board's plea to relevancy. But what is more important

is that, before the Lord Ordinary and before the Second Division, it must have been common ground that the company's pleadings were sufficient to support a case of preference or discrimination. Only on this footing was there any point in the board maintaining the two arguments already referred to which were considered and disposed of by the Second Division. Mere arithmetical disparity in tariffs as between two consumers on a different system of supply would be a very unsafe guide on which to decide, without the assistance of evidence technical or otherwise, the question of preference or discrimination. Other considerations may neutralise or extinguish what seems to be an apparent preference. Looking to the attack made on the board's tariffs the company are, I think, entitled to establish by evidence (within the limits of their record) that, in fact, the tariffs work out to their prejudice. The matter does not appear to me to involve an inquiry into the whole question of the costs of supplying electricity. The field of objection is much more limited. That would be a matter for the Lord Ordinary to consider when evidence is tendered at the proof, on a consideration of the averments on record. In the matter of precedents, also, I think more attention will have to be given to *Phipps v. London & North Western Ry. Co.* (1). Investigation, also, of other cases decided by the Railway Commissioners or the Railway and Canal Commission may disclose other relevant authority.

The question may be put thus: Whether discrimination may not be exercised against one consumer and a preference given to another where both are charged the same rate in circumstances which justify a differential rate between them. If the answer is "Yes", it would equally follow that, where the differential was too small, a like complaint could be made. For the reasons given, I am not prepared to decide this matter in this case as a question of relevancy, the more so as I consider that only in very exceptional circumstances would it be proper for this House to reverse an interlocutor of the Court of Session, allowing a proof before answer which can only be appealed to this House with the leave of the Court of Session, on a point which was never taken in the courts below, and on which your Lordships have not had the benefit of the opinions of the judges whose judgment is under appeal.

I should, before parting with this case, refer to certain other matters which were mentioned for the first time, but only slightly discussed, in the course of the appeal. The precise extent of the court's jurisdiction to interfere with tariffs fixed by an area board is not easy to determine. But it may be questioned whether s. 37 is an enactment that has the effect of nullifying tariffs containing an element of undue preference, or undue discrimination. Similar clauses have existed for many years in the [Railway and Canal Traffic Act, 1854, s. 2*] and the [Electric Lighting Act, 1882, s. 20†] and no case was cited to us where the effect of such a clause was held to render the tariff complained of null and void. It is the preference that is illegal, not the whole tariff. In most cases under earlier statutes the complaint was that somebody else's tariff was too low and no advantage would result to the complainer from wiping out the tariff altogether. The statute imposes a prohibition of undue preference or discrimination and the normal method of enforcing such a prohibition would be interdict, or injunction, against the continuance of the undue preference, as illustrated, for instance, by cases under the [Electric Lighting Act, 1882, s. 20†]. Further, the statutory procedure for fixing and revising tariffs raises a question whether the courts can in any sense function as a tariff-fixing body and whether for this and other reasons a conclusion for repayment of overcharges can ever be an appropriate remedy. This is not a case under an equality clause in which a claim for overcharges raises no serious difficulty. On these matters I express no concluded opinion. I mention them because the course which this whole case has taken has

* Now partly repealed by the Transport Charges, etc. (Miscellaneous Provisions) Act, 1954, s. 14 and Sch. 2, Part 1.

† Now repealed; superseded by the Electricity Act, 1947, s. 37 (8).

A been of a very unusual character, and the fact that these points were raised for the first time during the hearing of this appeal suggests that they have had little, if any, proper consideration in the earlier stages of the case. There seems to me to be a serious question whether the whole form of action here is not misconceived. I would dismiss the appeal.

Appeal dismissed.

B Solicitors: *R. A. Finn*, agent for *Wright, Johnston & Mackenzie*, Glasgow, *Biggart, Lumsden & Co.*, Glasgow, and *Campbell, Smith, Mathison & Oliphant*, Edinburgh (for the appellants, the board and the Central Electricity Authority); *Simpson, North, Harley & Co.*, agents for *Pringle & Clay*, Edinburgh (for the respondents, the company).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

C

PETER LONG & PARTNERS v. BURNS.

[COURT OF APPEAL (Singleton, Morris and Romer, L.J.J.), July 13, 16, 1956.]

D *Estate Agent—Commission—Agreement to pay commission on purchaser entering into a "binding contract"—Contract signed but rescinded before completion owing to innocent misrepresentation—Whether estate agent entitled to commission.*

E The vendor appointed the plaintiffs, a firm of house and business transfer agents, her sole agents to sell her garage business. She signed a commission note under which she undertook not to consent to her business being sold except to a person introduced by the plaintiffs and to pay to the plaintiffs commission "upon [their] introducing a person ready, willing and able to enter into a binding contract to purchase" her business. A purchaser signed a contract to purchase the business having been induced to sign by an innocent misrepresentation made to her by a representative of the plaintiffs in the presence of and on the information supplied by the vendor as to the effect of a town and country planning scheme. The purchaser, having subsequently discovered that the scheme might result almost in the abolition of the garage, sought to rescind the contract on the grounds of misrepresentation and by agreement was released from the bargain. The plaintiffs claimed from the vendor commission on the ground that they had introduced a person who had entered into a binding contract to purchase.

G **Held:** the contract signed by the purchaser was not a "binding contract" within the meaning of the commission note because it was induced by an innocent misrepresentation and could not be enforced as against the purchaser; the plaintiffs were, therefore, not entitled to recover commission.

Decision of LORD GODDARD, C.J. ([1956] 2 All E.R. 25) affirmed.

H [As to estate agents' commission, see 1 HALSBURY'S LAWS (3rd Edn.) 198, para. 457; and for cases on the subject, see 1 DIGEST 488-528, 1664-1861.]

Cases referred to:

(1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

I (2) *Clough v. London & North Western Ry. Co.*, (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 21 Digest 357, 1380.

(3) *Midgley Estates, Ltd. v. Hand*, [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432; 3rd Digest Supp.

(4) *Fowler v. Bratt*, [1950] 1 All E.R. 662; [1950] 2 K.B. 96; 2nd Digest Supp.

Appeal.

The plaintiffs appealed from an order of LORD GODDARD, C.J., dated Mar. 21, 1956, and reported [1956] 2 All E.R. 25, dismissing the action which they had

brought to recover estate agents' commission from the defendant. The facts appear in the judgment of SINGLETON, L.J. A

H. P. B. Dow and Quentin Edwards for the plaintiffs.

C. H. Gage for the defendant.

SINGLETON, L.J.: The plaintiffs are estate and business transfer agents at Richmond. They claim commission or damages from the defendant, Mrs. Burns, who has a garage some three miles out of Reading. A representative of the plaintiffs, Mr. Wade, heard that Mrs. Burns was anxious to dispose of her garage. He called on her and obtained her signature to a document part of which I read. It is headed "Peter Long & Partners, Lion House, Richmond, Surrey", and at the top there are spaces for the type of business and the address and position. The place is "Hawthorne Garage, Three Mile Cross, Near Reading, Berkshire", on the main road from Reading to Basingstoke. The type of business is set out, and there is a description of the premises. They are stated to be freehold, and the turnover is given as approximately £10,000 a year. The accounts are audited, and the price asked is £9,750. At the foot there appears in print: B C

"To Messrs. Peter Long & Partners, Estate & Business Agents, Lion House, Richmond, Surrey. I hereby appoint you my sole agent for the sale of my business and property the details of which are truly stated above and overleaf, at the price £9,750 and trade stocks at valuation. In consideration of your services I undertake not to revoke this agreement and agree to pay your commission in accordance with the terms stated herein on the total purchase price (including stock) upon your introducing a person ready, willing and able to enter into a binding contract to purchase my business referred to above. In further consideration of your services I agree to leave the disposal of my business and property with you as my sole agent for a period of three months from the date hereof, nor will I consent to my business being sold except to a person introduced by you. Commission Rates: business premises, lease, goodwill, trade fixtures and fittings and trade stocks 5%; freehold property, 5%." D E F

The document was signed by Mrs. Burns on Aug. 8, 1954.

No doubt the plaintiffs made some effort to find a buyer for the garage. It happened that a Mr. and Mrs. Pritchard were anxious to acquire the property and the business. They knew something of it, and they communicated with Mrs. Burns. This is Mr. Wade's account of what took place. I read from a document agreed between the parties: G

"Re Hawthorne Garage, Three Mile Cross, Near Reading. I called at Hawthorne Garage on Sept. 12 last at approximately 12.30 p.m. to meet a prospective purchaser and was informed at about 1.0 p.m. by Mrs. Burns that Mr. and Mrs. Pritchard, who had known the aforementioned garage for some time past, were very keen to buy. I suggested that this might well be an opportune moment for them to meet me and proceed with the purchase. Mrs. Burns telephoned Mr. Pritchard, who arrived with Mrs. Pritchard within forty-five minutes. They informed me that they had known the garage for some considerable time, and were very keen to purchase, also that they would not require any petroleum company finance. They were apparently quite satisfied with regard to the annual gallonage. I understood Mr. Pritchard to be a member of the Regent Petroleum Company, and in consequence he had checked the figures. I was then given Mrs. Pritchard's full name and address which was entered into the contract, the purchase price was agreed at £7,750 freehold, stock at valuation. Mr. Pritchard asked me if I knew of any town planning schemes. I informed him that to the best of my knowledge, and upon information from Mrs. Burns, two or three feet would be taken from the forecourt of the garage; H I

- A he did not regard this with any concern. Mrs. Pritchard then handed me a cheque payable to the favour of Messrs. Peter Long & Partners to the amount of £300 part of the normal ten per cent., agreeing to forward us the remaining £475 as soon as she had made arrangements with her bank, and duly signed the contract witnessed by myself."
- B Some work was being done further down the road, and Mrs. Burns, probably in reply to a question, had at some time told Mr. Wade that some two or three feet might be taken from the front of the garage. Whether she knew anything about town and country planning, I do not know; nor do I know whether Mr. Wade did. The contract which was signed was for the sale of the freehold, goodwill, fixtures, etc., for a total sum of £7,750, and by its terms the National Conditions of Sale (16th Edn.) were introduced. Apparently the agents' representative had a copy with him. Clause 8 provides:
- C "The vendor will upon completion for the further consideration of £3,250 convey (or procure the conveyance of) the said freehold property known as Hawthorne Garage Three Mile Cross to the purchaser and shall offer a statutory root of title."
- D Clause 9:
- "The National Conditions of Sale (16th Edn.) shall be deemed to be incorporated herein so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the express terms of this agreement."
- E Condition 15 (3) of the National Conditions of Sale reads:
- "Save as mentioned in the special conditions, the property is not to the knowledge of the vendor subject to any charge, notice, order, restriction, agreement or other matter arising under the Town and Country Planning Act, 1947, but (without prejudice to any right of the purchaser to rescind the contract under para. (2) of this condition) the property is sold subject to any such charges, notices, orders, restrictions agreements and matters affecting the same."
- F It seems to me to be highly undesirable that parties should be asked to enter into a contract of this kind without any advice. The impression given is that the sole desire of the agents' representative was to obtain a signature to the document in order to found a claim for commission. When the matter came into the hands of the solicitors, it was ascertained that the true position was that the Berkshire County Council, in their development plan, had a road-widening scheme which, when work commenced on it, would necessitate the compulsory purchase of the bulk of the said property and would render it impossible to continue the said business on what remained. The said work is scheduled for completion by 1972. I asked learned counsel during the argument if that was the correct position, and it was agreed that it was. There was considerable correspondence. The Pritchards refused to complete, and the proposed purchase fell through on Mrs. Pritchard, who alone had signed the contract as purchaser, making a small payment to the defendant. It is conceded for the purposes of this appeal that an action by the defendant for specific performance of the contract would not have succeeded. The agents commenced this action against the defendant claiming £387 10s., being five per cent. on the purchase price. The statement of claim is framed as though it is a claim for commission, but it ends as a claim for damages. The action was heard by LORD GODDARD, C.J., and on Mar. 21, 1956, he gave judgment for the defendant, holding that the agents had not produced someone who was "ready, willing and able to enter into a binding contract" to purchase the business. The plaintiffs appeal against the judgment.
- I On their behalf it was submitted by counsel that the contract was a binding contract until it was repudiated, and that the right to commission was established

when the contract was signed. I agree with the Lord Chief Justice that the words "binding contract" in the document on which the plaintiffs rely mean a contract which is enforceable in law. The contract could not be enforced by reason of the misrepresentation by the agents' representative as to the position under the Town and Country Planning Act, 1947. That is admitted; hence the claim must fail. If the contract could not be enforced as against the purchaser, it was not a binding contract within the meaning of those words in the document on which the plaintiffs rely. I do not think it necessary to go into the authorities. They were considered by the Lord Chief Justice, who said in the course of his judgment ([1956] 2 All E.R. at p. 27):

"The purchaser is saying that it is not a binding contract. I have to consider whether it was a binding contract. As the parties have agreed that the purchaser was induced to sign the contract by the statement made by Mr. Wade, I am bound to hold that it was a contract induced by an innocent misrepresentation, and I cannot say that it was not with reference to a substantial matter. The purchaser had been told that the town and country planning scheme which was in existence (which might, of course, have been seen by either party if they had wanted to) would only affect this garage to the extent of two or three feet; but in fact it would almost have wiped it out of existence, if it had not entirely done so. I cannot say that a representation of that sort is not a representation on a substantial matter; and, although it was an innocent misrepresentation, it was a representation of which the purchaser was entitled to take advantage while the contract was still executory and to say that she would not carry out the bargain because it had been induced by the representation."

On that ground the Lord Chief Justice was satisfied that the contract could not be enforced against Mrs. Pritchard and that therefore it was not a binding contract. It was submitted that the defendant could not take advantage of the misrepresentation of the agents' representative as she herself had given the information to him. She had told the agent the position so far as she knew it. That did not entitle the agent to make a representation such as he did without ascertaining what the true position was. He could have inquired at the offices of the county council whether there was a scheme and, if so, as to how far it was advanced, and as to what its effect on this particular property would be; or he could have told the Pritchards that he did not know and that they must make their own inquiries. Counsel for the plaintiffs relied on something in the nature of an estoppel and said that, as the information came from the defendant, she ought not now to be allowed to say that the agents' representation affected the position as against her; and he submitted that the agents' representative was not under any duty to the Pritchards. I would point out that at least he was under a duty to the defendant, and the making of a representation such as he made might well lead to trouble for her. Indeed, the representation made with such knowledge, or lack of knowledge as he had, might well be said to have been made recklessly. He was too anxious to obtain signatures to the contract. It is a matter for regret that the case was heard without witnesses, and that we have no proof of the precise words used. I am satisfied that there is no substance in this point raised by counsel.

The plaintiffs rely on the strict terms of the document which was signed by the defendant on Aug. 8, 1954. Counsel on behalf of the defendant pointed out that she can claim to do the same and to say that, on a strict reading of the document, they, the plaintiffs, did not introduce Mrs. Pritchard as a purchaser. It was the defendant herself who introduced Mrs. Pritchard to the agents' representative; it was not the agents or their representative who introduced Mrs. Pritchard to the defendant. It may be a sound point, although the defendant was prepared to treat the agents as having introduced the Pritchards. She caused the agents to meet them, and the agents' representative produced the contract, which was

A signed by both parties. It is not necessary to say anything further on this part of the case.

The case shows how undesirable it is for persons who have something to sell to sign a form put before them by agents without understanding it, and it emphasises the necessity for taking legal advice before a contract for the sale of property is signed. I have said nothing on the general duties of agents as to town and country planning matters. I would, however, point out that the claim of the agents in this case is for no less a sum than £387 10s., and I cannot see how they can be justified in placing on the defendant any responsibility for that which she said about what might happen to the frontage of the premises. She at least gave them some information which might have led to their making inquiries if they thought it right to do so. If they had been local agents, they might well have known something of the scheme. The representative apparently came on this place many miles away from where the agents carried on their business and very quickly obtained the signature of the defendant to the document on which they claim their commission. In my opinion the judgment of the Lord Chief Justice was right and the appeal should be dismissed.

D MORRIS, L.J.: I have reached the same conclusions. In these agency cases, it seems to me that the first matter is always to find out exactly what was the contract between the parties. In his speech in *Luxor (Eastbourne), Ltd. v. Cooper* (1) ([1941] 1 All E.R. 33), LORD RUSSELL OF KILLOWEN said (at p. 43):

E "A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question, and upon the true construction of those terms."

F My Lord has recited the words of the agreement. By the last words, the defendant agreed to this: "nor will I consent to my business being sold except to a person introduced by you". If those words were taken literally in this case, they would have meant that it was impossible for the defendant to sell to Mr. or Mrs. Pritchard at all, for it was the defendant herself who had found the Pritchards and not the plaintiffs. According to those strict words, she could not sell to anyone other than a person introduced by the plaintiffs, and it is common ground in this case that the Pritchards were never introduced by the plaintiffs. It may be, however, that the effect of what was done was that the parties agreed to treat the Pritchards as having been introduced. Without saying more on that matter, I propose to deal with the other points on the assumption that the parties proceeded on that basis.

G If that assumption be made, then the question arises whether there was in this case a binding contract. Counsel for the plaintiffs referred us to certain authorities which lay down what is the true position where there is a voidable contract. I cite one passage to which he referred us from *Clough v. London & North Western Ry. Co.* (2) ((1871), L.R. 7 Exch. 26 at p. 34):

I "The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property."

So counsel argues that, on the signing of the contract in this case, there was at that moment a binding contract even though it was a contract that was voidable. It seems to me, however, that in the present context the words "binding contract" mean a contract which can be enforced by the vendor against the purchaser. It is much too narrow a construction to say that the reference is to

some contract which might temporarily have been regarded as a contract or a binding contract. The reference is to a contract that remains binding. I respectfully agree with the judgment of the Lord Chief Justice on this point. I agree further with the Lord Chief Justice that commission is payable in a case of this kind when the contract is shown to be a binding contract in this sense. The result is that commission is not necessarily payable as soon as a contract is signed but only when it is shown to be a binding contract, and it may in many cases not be possible to prove that a contract is a binding contract until completion has taken place. Mention was made of the case in this court of *Midgley Estates, Ltd. v. Hand* (3) ([1952] 1 All E.R. 1394). In that case a contract was entered into by the plaintiffs, estate agents, and the defendant vendor under which it was agreed that the agents' commission should be paid as soon as the purchaser introduced by them

"shall have signed a legally binding contract effected within a period of three months from this date."

The person introduced signed a legally binding contract within the three months, paid a deposit, and was permitted by the vendor to enter into occupation of the premises, but he was unable financially to complete the purchase and his deposit was forfeited. The agents claimed their commission, but the county court judge held that as the person they had introduced was not able to complete the purchase they had not earned their commission. On appeal to this court it was held that although, generally speaking, when a vendor puts his property into the hands of an agent for sale he contemplates that if a completed sale resulted, and not otherwise, he will be liable to pay the agent's commission out of the purchase price, the question depends on the construction of each particular contract. If its terms are clear, and not ambiguous, the court will give effect to them. The plaintiff agents having introduced, within the stipulated period of time, a person who had bound himself to purchase the property by a legally binding contract they had earned their commission, and the subsequent fate of the contract of sale did not affect their right to it. In that case, however, no suggestion was made that the contract was not binding, and as the Lord Chief Justice pointed out the difference between that case and the present is that in that case no one suggested that it was a contract that could be rescinded. It seems to me, therefore, that here, since there was an innocent misrepresentation as to an important matter, Mrs. Pritchard was entitled to resile, and so there was no binding contract.

I would just add a word or two on the other part of the case. The plaintiffs say, in effect: "Oh, but the whole of this was Mrs. Burns' fault". Counsel for the plaintiffs put his argument in the following way. This was an argument alternative to his main argument, and was on the footing that there was no binding contract. He said: "(a) Mrs. Burns cannot rely on non-completion in order to avoid payment of commission when it was due to her fault"; that is to say, owing to the representation that she admits by her pleading she made to Mr. Wade: and further: "(b) Alternatively, it was an implied term in the contract between Mrs. Burns and the plaintiffs that she would not, by any wrongful act, deprive the agents of any opportunity to earn commission, and she broke that term by making the misrepresentation which enabled the purchaser, who would otherwise be bound, to escape from it". The speeches in *Luxor (Eastbourne), Ltd. v. Cooper* (1) convey a warning against too readily implying terms in a case of this kind. LORD RUSSELL OF KILLOWEN said ([1941] 1 All E.R. at p. 44):

"As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced. I can find no safe ground on which to base the introduction

A of any such implied term. Implied terms, as we all know, can be justified only under the compulsion of some necessity."

LORD WRIGHT, in his speech said (*ibid.*, at p. 55):

B "For instance, if the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property. Though the sale is not completed, the property in equity has passed from him to the purchaser. If he refused to complete, he would be guilty of a breach of agreement vis-à-vis the purchaser. I think, as at present advised, that it ought then to be held that he is also in breach of his contract with the commission agent—that is, C of some term which can properly be implied. However, that question and possibly some other questions do not arise in this case, and may be reserved."

In *Fowler v. Bratt* (4) ([1950] 1 All E.R. 662) DENNING, L.J., expressed this principle ([1950] 2 K.B. 96 at p. 105):

D "But in point of law if an agent succeeds in finding a person who actually enters into a binding and enforceable contract to purchase, and if that contract afterwards goes off by the vendor's default, the vendor is liable to pay commission."

E I think that counsel for the plaintiffs, in submitting his argument, had in mind some of the passages to which I have referred. It is important, however, to observe that in this case nothing was done by the defendant after Sept. 12 to deprive the plaintiffs of any commission.

The plaintiffs further submit that there was an estoppel. They plead as follows in para. 3 of the reply:

F "If it is found that the said contract was not binding on Mrs. Pritchard the plaintiffs will further say that the defendant having innocently misled the said Wade who upon the defendant's said instructions innocently misled Mrs. Pritchard, the defendant is estopped from setting up her own misrepresentation resulting in the rescission of her contract with Mrs. Pritchard, to defeat the plaintiffs' claim for commission."

G In my judgment this is not a case where the doctrine of estoppel can be relied on. There was nothing to prevent Mrs. Pritchard from proving that there had been an innocent misrepresentation and so from resiling from the contract. On proof that Mrs. Pritchard did disaffirm the contract it was shown that there had been no binding contract and so that commission had not been earned. There is no evidence, for no oral evidence was called, that had Mrs. Pritchard known the true facts as to the road widening she might have purchased at a lower figure and so enabled the plaintiffs to earn some commission. There was H no evidence to that effect. What, then, is the legal basis of the plaintiffs' complaint? The plaintiffs may say that they wasted some time because they had some dealing with Mrs. Pritchard which led to an abortive contract. But there is no claim against the defendant on that basis; nor do I see that there could be. The defendant made no fraudulent misrepresentation to the plaintiffs, and no sort of suggestion of that kind is or could be made. The plaintiffs do I not suggest that the defendant gave any warranty to them of the truth of the representation which she made. If the question is being considered as to where the fault lay in its broadest sense, then the agents have, I think, only themselves to blame for what happened. When Mr. Pritchard, at the interview of Sept. 12, asked a question about the town planning scheme Mr. Wade made answer. All he had known was what he had been orally told by the defendant. I express no opinion whether or not as agents the plaintiffs should have made their own inquiries of the county council or should have searched. In fact they had not inquired or searched. Mr. Wade, however, proceeded to give a positive answer.

He did not even leave it to the defendant to answer. He did not even say that he only knew what the defendant had told him. Once that question was asked, it seems to me that Mr. Wade must have known that no contract would go through if the answer given was incorrect. He ought at least to have warned Mrs. Pritchard that the answer to the question ought to be accurately ascertained. If an answer was being given, then it ought to have been verified before a contract was signed and, if necessary, the advice of solicitors sought. But a contract was signed there and then. If commission was to be earned when a binding contract was made, then I should have thought that solicitors would have been introduced to give their skilled assistance as to the terms and form of any proposed contract. This case perhaps illustrates how troubles and difficulties may arise if estate agents do work, that is to say, the work of arranging binding contracts, which is more appropriately done by solicitors.

I therefore agree that in this case the plaintiffs did not earn their commission and that no reason is shown why the defendant is precluded from proving that they did not.

ROMER, L.J.: I agree. Under the terms of the commission contract which the defendant signed on Aug. 8, 1954, the plaintiffs would only be entitled to claim commission if they introduced a person ready, willing and able to enter into a binding contract to purchase the defendant's business, which I suppose also implies a further term that such a person would in fact enter into such a contract. It is clear that Mrs. Pritchard, who did sign the contract on which this action has been brought, was not introduced by the plaintiffs, who had neither seen nor even heard of her by the time the interview took place on Sept. 12, 1954. It is clear from the correspondence and from the agreed statement of facts, that when Mr. Wade was told about Mrs. Pritchard he made himself very active in this matter and played as busy a part as he could in the discussions which took place with an eye, I have no doubt, to the claim to commission which his principals would found on this contract. However, the parties appear to have to some extent treated the plaintiffs, as a result of those activities, as coming within the requirements of the commission note notwithstanding that the plaintiffs had not even met Mrs. Pritchard before. Consequently, it is not necessary to come to a definite decision whether Mr. Wade's activities do justify them in saying that they had in fact introduced Mrs. Pritchard.

I confess that I have the gravest doubt whether the part which Mr. Wade played at this meeting and the things which he did, much of which would have been much better left undone, did entitle them to this large sum of £387 odd which they are claiming as commission. It is true, no doubt, that the plaintiffs had done quite a considerable amount of work in an endeavour to find other purchasers, but, so far as Mrs. Pritchard is concerned, they could hardly have done less than what they did do; and, as I have said, much of what they did do would have been better left undone.

I have no doubt that the contract which Mrs. Pritchard did sign was not a binding contract within the terms of the commission note. I agree, with respect, with the Lord Chief Justice that "a binding contract" in this context is the same as a legally binding contract, and that means a contract binding on the purchaser and legally enforceable against the purchaser by the vendor. The contract which Mrs. Pritchard signed was never legally enforceable against her by the defendant because of the innocent misrepresentation which was made to her by Mr. Wade. Moreover, the contract was voidable by Mrs. Pritchard, who could rescind it the moment that she discovered what the true facts were. Accordingly, it appears to me impossible to say that it was a binding contract within the meaning of that phrase as used in the commission note. A voidable contract, when rescinded, is avoided ab initio. Indeed, on the way counsel for the plaintiffs framed his argument on this point, which he did with great ability,

A it would follow that estate agents would be entitled under this form of commission contract to claim their commission even on a contract for sale which had been induced by a fraudulent misrepresentation made by the vendor or by some agent on her behalf and I cannot think that that is right.

B Finally, there is this question of an implied term on which counsel relied, which has been formulated by MORRIS, L.J., and which I will not formulate again. As to that, I very much doubt in the first place whether the point is open to the plaintiffs having regard to the terms of their pleadings; but, in any event, any claim founded on it would be a claim for damages for breach of an implied term, and not for commission. One thing that is plain is that the damages which the plaintiffs would recover would not be the full amount of £387 10s., because, had Mrs. Pritchard been told the truth in regard to the development which the local authority intended to put in hand, and the effect that that development would have on the property, she would never have agreed to buy this property for this sum at all. Therefore, assuming that the plaintiffs would obtain some damages measured by commission, they could not possibly be measured by the commission which would have been payable on the contract price.

D I am, however, far from satisfied what representation, if any, the defendant did make to Mr. Wade. As my Lord said, it is a great pity in many respects that this action was not fought on oral evidence, but there is no evidence at all here—there is nothing in the agreed statement of facts, and there is little enough in the correspondence—from which one can arrive at any definite conclusion that the defendant made any definite representation of the kind alleged to Mr. Wade at all. It may be that he asked her informally some question about it and she gave an informal answer saying what she believed to be the position; and, if she did, Mr. Wade made use of that for the purpose of making a deliberate answer to a specific inquiry on that very subject made by Mr. Pritchard, on a matter to which obviously Mr. Pritchard attached a great deal of importance in deciding whether he and his wife should buy this property. What makes it a great deal worse, to my mind, is that the plaintiffs themselves, in a letter dated Nov. 12, 1954, said, with reference to this interview of Sept. 12,

“We knew nothing of a road widening scheme in connection with the premises.”

G If they knew nothing, what business Mr. Wade had to give a definite and unequivocal answer in reply to Mr. Pritchard's query I am at a loss to understand, and it appears to me that he was a great deal more at fault in doing that without making the slightest attempt to ascertain what the answer was. Not knowing what the position was, as appears from that letter, he should have said to Mr. Pritchard: “I honestly do not know. You had better find out. You had better make the usual search.” I do not think there is any ground for founding a cause of action by the plaintiffs against the defendant on those lines.

H In conclusion, and in agreement with my brethren, I think it is highly undesirable that estate agents should hurry people into signing contracts without legal advice and especially when they attach to those contracts conditions of sale which neither the parties nor the agents themselves in the least understand. The agents' function is to find purchasers for property and not to produce contracts and persuade the parties into signing them. I agree that the appeal fails.

I *Appeal dismissed.*

Solicitors: *J. J. Dunnett* (for the plaintiffs); *Torr & Co.*, agents for *Francis & Parkes*, Reading (for the defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

WEST SUFFOLK COUNTY COUNCIL v. W. ROUGHT, LTD. A

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Goddard, Lord MacDermott, Lord Keith of Avonholm and Lord Somervell of Harrow), June 18, 19, July 25, 1956.]

Compulsory Purchase—Compensation—Assessment—Compensation for disturbance of business—Premises used as factory—Temporary interruption of manufacturing operations—Loss of business profits—Whether sum deductible for income tax payable if profits had been earned. B

In exercise of their statutory powers a local authority served on the respondents a compulsory purchase order comprising a substantial part of the respondents' business premises. In October, 1952, the local authority took possession, and the respondents were unable to recommence their business operations in new premises until midsummer, 1953. In their claim for compensation in respect of the compulsory acquisition, the respondents included an amount for temporary disturbance based on loss of profits in respect of loss of specific orders owing to the temporary interruption of their business. The local authority claimed that, in assessing the amount to be awarded under this head, a deduction should be made in respect of income tax. The Board of Inland Revenue had given an assurance that the respondents would not be liable for income tax on the compensation for temporary disturbance if the amount of the compensation was assessed after taking into account the fact that had the compensation been earned it would have been liable to tax. C

Held: in assessing the amount to be awarded for temporary loss of profits the liability of those profits to tax must be taken into account, and the compensation to be awarded for the loss of profits should be reduced by the amount of additional taxation which the respondents would have had to bear if they had earned the profits. D

British Transport Commission v. Gourley ([1955] 3 All E.R. 796) applied. E

PER LORD MORTON OF HENRYTON adopting a dictum of EARL JOWITT in *British Transport Commission v. Gourley* ([1955] 3 All E.R. at p. 802): in a case where it was necessary for the court to determine the fair valuation of a capital asset I should have thought it questionable whether a reduction of the amount to be paid as compensation for that capital asset, based on the prospective tax liability of its owner, was in accordance with the true principle of valuation (see p. 221, letter H, post). F

Decision of the COURT OF APPEAL sub nom. *W. Rought, Ltd. v. West Suffolk County Council* ([1955] 2 All E.R. 337) reversed. G

[As to the measure of compensation when loss of business results from disturbance on compulsory acquisition of land, see 10 HALSBURY'S LAWS (3rd Edn.) 163, para. 284; and for cases on the subject, see 11 DIGEST (Repl.) 126, 127, 164-168.] H

Cases referred to: I

- (1) *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.*, (1887), 12 App. Cas. 315; 50 L.J.P.C. 82; 11 Digest (Repl.) 249, 785.
- (2) *Billingham v. Hughes*, [1949] 1 All E.R. 684; [1949] 1 K.B. 643; [1949] L.J.R. 1147; 2nd Digest Supp.
- (3) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.

- A (4) *Livingstone v. Rawyards Coal Co.*, (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 34 Digest 656, 556.
 (5) *M'Daid v. Clyde Navigation Trustees*, 1946 S.C. 462; 2nd Digest Supp.
 (6) *Comyn v. A.-G.*, [1950] I.R. 142.

Appeal.

- B Appeal by the acquiring authority, the West Suffolk County Council, from an order of the Court of Appeal, dated Apr. 27, 1955, and reported sub nom. *W. Rought, Ltd. v. West Suffolk County Council* [1955] 2 All E.R. 337, on a Case Stated by the Lands Tribunal, pursuant to the Lands Tribunal Act, 1949, s. 3 (4), on the requisition of the acquiring authority on a claim by the company, W. Rought, Ltd., for compensation following on the compulsory acquisition of premises forming part of a factory known as "The Maltings", situate at Brandon, Suffolk.
 C The facts appear in the opinion of LORD MORTON OF HENRYTON.

Geoffrey Lawrence, Q.C., and *R. D. Ranking* for the appellants.
Gilbert Paull, Q.C., and *M. L. M. Chavasse* for the respondents.

- D The House took time for consideration.
 July 25. The following opinions were read.

- LORD MORTON OF HENRYTON: My Lords, this appeal arises out of a Case Stated by the Lands Tribunal. The facts are fully set out in the Case Stated, and may be summarised as follows: The appellants were engaged, in and after the month of October, 1952, on a scheme for widening and rebuilding a bridge over the Little Ouse river and widening the High Street at Brandon in the County of Suffolk. The respondents were leaseholders and in possession of a factory in close proximity to the bridge known as "The Maltings", having the benefit of a lease of the premises for twenty-one years from Oct. 11, 1944, with an option to renew for a further twenty-one years. As a necessary part of the bridge and road widening scheme, the appellants, in exercise of their statutory powers, served on the respondents a compulsory purchase order comprising a substantial part of the respondents' premises. The respondents at all material times have carried on business as hatters' furriers. This business involves the preparation of rabbit fur which forms the raw material of fur felt used in the manufacture of hats, and the respondents used the premises in question for the storage of skins and for the process known as "blowing fur".
 F The compulsory purchase order was confirmed by the Minister of Transport on June 9, 1951, and the appellants took possession of the premises on Oct. 6, 1952. As a result of the acquisition by the appellants, the respondents had to find other premises suitable for the purposes already mentioned. This they succeeded in doing shortly after the appellants took possession, but they found themselves unable to recommence blowing operations in the new premises, until midsummer, 1953. Consequently, during the period of nine months from October, 1952, to midsummer, 1953, the respondents were deprived of the premises acquired by the appellants and had no other premises to take their place.
 G

- H Following on the confirmation of the compulsory purchase order by the Minister of Transport, a notice to treat was served on the respondents by the appellants on Aug. 25, 1951. On Feb. 29, 1952, a claim for compensation for £50,000 was submitted to the appellants by the respondents. This was followed, on May 1, 1953, by a revised claim for £49,838. As the respondents and the Inland Revenue District Valuer were unable to agree on a figure, the question of compensation was referred to the Lands Tribunal. The claim was further revised on the opening day of the hearing before the tribunal and the figures as laid before the tribunal were as follows:

	Claimant	District Valuer	A
	£	£	
(1) Value of the leasehold interest in the land taken	2,280	530	
(2) Injurious affection of land not taken	360	150	
(3) Disturbance—			
(A) permanent	22,760	10,500	B
(B) temporary	20,716	2,100	
(4) Cost of removal	624	610	
(5) Architects' and quantity surveyors' fees . . .	1,028	nil	
	<u>£47,768</u>	<u>£13,890 "</u>	C

This appeal is concerned only with the sum claimed under item (3) (B).

The Acquisition of Land (Assessment of Compensation) Act, 1919, by s. 2, r. (2) (so far as material), provides as follows:

"The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise."

Section 2, r. (6) enacts:

"The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

Prior to the Acquisition of Land (Assessment of Compensation) Act, 1919, compensation for disturbance was governed by the Lands Clauses Consolidation Act, 1845, s. 63, which enacts (so far as material):

"In estimating the purchase money or compensation . . . regard shall be had . . . not only to the value of the land to be purchased . . . but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands . . ."

While disturbance is not expressly mentioned in s. 63, it has always been held (and there is no dispute as to this in this case) that compensation under the Lands Clauses Consolidation Act, 1845, should include in appropriate cases compensation for disturbance. The respondents' formulation of their claim under this head was as follows:

"Loss on contracts. The [respondents] have lost contracts for reasons directly caused by the forced removal from Brandon. The estimated extent of such loss is revealed by correspondence, the details of the claims being:—

Joseph Wilson & Sons, Ltd., Denton, Manchester. Loss of order for 25,000 lb. blown coney No. 1—Estimated loss: 25,000 × 5s. 6d.	=	£6,875	H
Cia. Prada Industria e Commercio, Sao Paulo, Brazil. Loss of order for 10/20,000 kilos blown coney No. 1—Estimated loss on say 10,000 kilos, say 22,000 lb. × 6s. 1d.	=	£6,691	I
Chapeus Vicent Cury SA: Campinas, Brazil. Loss of order for 20,000 kilos blown BCB unpulled—44,000 lb. × 3s. 3d.	=	£7,150	

£20,716 "

A The tribunal's decision on this claim was as follows:

B “It is not strictly correct to call the items in this claim ‘lost contracts’, they were inquiries which did not go as far in the Brazilian cases as a discussion of price. I decided that in the case of the Wilson inquiry the [respondents] would have obtained the order and I found that in this case they were entitled to full compensation, but I did not accept the suggested loss of profit of 5s. 6d. a lb. On the evidence of the accountants and an examination of the figures in the [respondents’] accounts I decided that a loss of 4s. a lb. was the proper amount and I therefore assessed the [respondents’] loss on this to be £5,000. I found that the Brazilian inquiries were by no means so surely to be reckoned on but I was satisfied that if the [respondents] had been undisturbed there was a very good chance that the orders would have come their way. So I put the 66,000 lb. claimed on these items at 2s. a lb. which gave a figure of £6,600 making a total in this item of £11,600.”

C In making his valuation under item (3) (B), the district valuer deducted a sum representing the income tax which he suggested would have been paid by the respondents if they had, in fact, earned this profit. He did this apparently under the instruction of the Board of Inland Revenue, the following letter being put in as part of his evidence:

“Block D,
Brooklands Avenue,
Cambridge.
Feb. 16, 1954.

E Dear Sirs,
West Suffolk County Council
The Maltings, Brandon, Suffolk—Messrs. W. Rought, Ltd.
Reconstruction of Brandon Bridge

F With reference to the subject of income tax and the question of it being taken into account in compensation for temporary trade disturbance, you are probably aware that it has been held in the House of Lords (*Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (1) ((1887), 12 App. Cas. 315)) that in the case of compulsory acquisition of land under the Lands Clauses Consolidation (Scotland) Act, 1845, the sum allowed by the jury as compensation for loss of business was part of the ‘consideration for the sale’ of the premises.

G As a result of this decision the Board of Inland Revenue do not regard the compensation in a case of this kind in respect of temporary loss of profits, as liable to taxation for income tax purposes. That being so, and as it is the [respondents’] real loss which is to be compensated, it will be contended on behalf of the acquiring authority that over-payment would result unless the [respondents’] non-liability for income tax were taken into account when assessing the amount of compensation payable in respect of temporary loss of profits of a continuing business. The object is to ensure that in the net result the [respondents] would be no better off than if they had not suffered temporary disturbance.

H I am directed by the Board of Inland Revenue to give your clients an assurance, if this view should be accepted by the tribunal, that the claimants will not be liable to income tax on the compensation for temporary disturbance.

I As this letter and the assurance which it contains will be referred to before the Lands Tribunal, I shall be glad if you will kindly acknowledge its receipt for the purpose of the hearing.

Yours faithfully,
(Signed) A. R. Barton, district valuer.

Messrs. Gerald Eve & Co.,
6, Queen Street, Mayfair, London, W.1.”

My Lords, the question whether any sum awarded to the respondents under item (3) (B) is or is not liable to income tax is not before the House, but I see no reason to doubt that the view of the Board of Inland Revenue, as expressed in this letter, was correct and I have formed the opinion which I am about to express on the footing that this is so.

The Lands Tribunal dealt with the deduction for which the district valuer contended as follows:

"I decided that this was not a deduction which I should make, and I made no decision on the subject of liability to tax by either party before me."

The tribunal concluded:

"The question for the decision of the Court of Appeal is whether in so deciding I came to a correct determination in point of law."

The Court of Appeal delivered judgment on Apr. 27, 1955, affirming the decision of the Lands Tribunal. The court found no valid ground for distinguishing the present case from *Billingham v. Hughes* (2) ([1949] 1 All E.R. 684).

On Dec. 8, 1955, your Lordships' House gave judgment in *British Transport Commission v. Gourley* (3) ([1955] 3 All E.R. 796). In that case the respondent Gourley was gravely and permanently injured in a railway accident, for which the Transport Commission was liable by reason of the negligence of its servants. PEARCE, J., awarded £37,720 damages in respect of loss of earnings, actual and prospective, and, in arriving at that sum, he had no regard to the fact that, had the respondent earned such a sum, he would have had to pay income tax and surtax in respect of it. The judge, at the request of the appellants, made an alternative assessment of £6,695, representing the sum which he would have awarded if he had taken that hypothetical tax liability into account. This House, overruling *Billingham v. Hughes* (2), held that the smaller sum should be awarded under this head, and EARL JOWITT observed (*ibid.*, at p. 799):

"The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries (see per LORD BLACKBURN in *Livingstone v. Rawyards Coal Co.* (4) (1880), 5 App. Cas. 25 at p. 39)."

After referring to certain cases, including the decision of LORD SORN in *M'Daid v. Clyde Navigation Trustees* (5) (1946 S.C. 462), the noble earl continued ([1955] 3 All E.R. at p. 802):

"My Lords, I agree with LORD SORN in thinking that to ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called on to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence."

LORD GODDARD (with whose opinion LORD RADCLIFFE and LORD SOMERVELL OF HARROW agreed) observed (*ibid.*, at p. 804):

"The basic principle, so far as loss of earnings and out-of-pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened . . ."

- A My Lords, it seems to me that the reasoning which led this House to its decision in *British Transport Commission v. Gourley* (3), is equally applicable to the present case. In *British Transport Commission v. Gourley* (3), the House had to decide what was the actual monetary loss suffered by the injured man by being deprived of earnings which he would have made if he had not been injured. In the present case, the House has to decide under item (3) (B) what was the
- B actual monetary loss suffered by the respondents by being deprived of profits which they would have made in the period of nine months already mentioned. I can see no reason why, if the incidence of taxation was a relevant factor in *British Transport Commission v. Gourley* (3), it is not also a relevant factor in the present case. The result is that the Lands Tribunal should have estimated, to the best of his ability, the amount of additional taxation which the respondents
- C would have had to bear if they had actually earned, during the period of nine months already mentioned, the sum of £11,600 awarded to them under item (3) (B), and should have reduced the award by that amount.

- In some cases it may be a matter of considerable difficulty to estimate the sum which ought to be awarded by way of compensation for disturbance, if the incidence of taxation is to be taken into account, but I do not think that any
- D great difficulty arises in the present case. It is for the respondents to prove the loss which they have suffered. Their trading year ends on Aug. 31. They have proved to the satisfaction of the tribunal that they have lost £11,600 profits which they would have made during the trading year ending Aug. 31, 1953, but it is still incumbent on them to prove their loss after taking into account the incidence of taxation. This they could do by submitting to the tribunal (a) a statement of the tax liability which they actually incurred in respect of their trading during the year in question, and (b) an estimate of the tax liability which they would have incurred in respect of their trading during the same year if they had made this profit of £11,600. These figures would, of course, be open to criticism by the appellants. When the tribunal had decided what are the right figures under (a) and (b), the net loss to the respondents by disturbance would
- E be £11,600 less the amount by which (b) exceeds (a). In saying this, I am not attempting to lay down any general rule as to how the relevant figure is to be ascertained; nor do I say that the procedure which I have outlined is the only possible procedure in the present case.

- Counsel for the appellants mentioned *Comyn v. A.-G.* (6) ([1950] I.R. 142), but did not base any part of his argument on that case. *Comyn v. A.-G.* (6) was
- G cited to this House in *British Transport Commission v. Gourley* (3), and LORD JOWITT observed ([1955] 3 All E.R. at p. 802):

- “This was a case in which the question arose as to the compensation for compulsory acquisition of property. It was, therefore, necessary for the court to determine the fair valuation of a capital asset. In such a case I should have thought it questionable whether a reduction of the amount to
- H be paid as compensation for that capital asset based on the prospective tax liability of its owner was in accordance with the true principle of valuation.”

He then referred to the decision of the Court of Appeal in the present case and continued (*ibid.*):

- I “The facts in *W. Rought, Ltd. v. West Suffolk County Council* were widely different from those in the present case, and it is not necessary for the present purpose to express any final opinion on either *W. Rought, Ltd. v. West Suffolk County Council* or *Comyn v. A.-G.* (6).”

My Lords, I respectfully adopt LORD JOWITT's comment on *Comyn v. A.-G.* (6), and I, too, take the view that it is not necessary to express any final opinion on that case. The present case is clearly distinguishable from it; although the sum to be awarded under item (3) (B) forms part of the total consideration to

be paid to the respondents on the acquisition of their property, the estimation of that sum does not involve a valuation of a capital asset but a computation of a temporary loss of profits by a company which remained in business. The tribunal, rightly in my view, dealt with the "value of the leasehold interest in the land taken" under a separate sub-head. A

I would allow the appeal, and answer in the negative the question asked by the Case Stated. The case should be remitted to the Lands Tribunal to reconsider the amount of compensation awarded under item (3) (B) on the basis that the tribunal should not have excluded the element of liability to tax. The respondents must pay the appellants' costs here and in the Court of Appeal. B

My Lords, **LORD MACDERMOTT**, who is unable to be present today, asks me to say that he agrees with the conclusions I have stated and the reasons on which they are based. C

LORD GODDARD: My Lords, the only question which falls for decision in this appeal is whether, where loss of profits is claimed in respect of disturbance due to the compulsory acquisition of business premises, the compensation should be assessed without taking into account the fact that the profits, if earned, would have been subject to tax. The Lands Tribunal decided that no deduction should be made on the estimated profits on this account, and this decision was affirmed by the Court of Appeal. Subsequently, however, the question came before this House concerning the amount of damages recoverable for loss of prospective earnings occasioned by personal injuries due to negligence, and this House held that, in calculating those damages, account must be taken of the fact that the injured person who would have earned them would have been under a liability to pay income tax on them when earned. It was held that compensation must be based on an estimate of the earnings after deduction of tax (*British Transport Commission v. Gourley* (3), [1955] 3 All E.R. 796). I am unable to find any principle on which that case can be distinguished from the present. The amount to be deducted cannot be calculated with any degree of certainty as it involves a forecast not only as to the amount which would be earned but also as to the future rate of tax and kindred considerations, but the opinions delivered in *British Transport Commission v. Gourley* (3) indicate how the tribunal of fact should approach this question and in my opinion the case should go back to the Lands Tribunal with a direction to consider the amount to be awarded under this head in the light of the decision of this House in that case. D

I agree that this appeal should be allowed. E

LORD KEITH OF AVONHOLM: My Lords, I agree with your Lordships that the question in this appeal is ruled by the decision of this House in *British Transport Commission v. Gourley* (3) ([1955] 3 All E.R. 796). One of the elements taken account of in fixing the compensation for, or purchase price of, the property compulsorily acquired was loss of profits for disturbance. In assessing the loss under this head liability to tax cannot, in my opinion, be ignored merely because the amount of the loss goes to make up the total compensation or purchase price to be fixed for the acquisition of a capital asset. I reserve entirely my opinion on how far the ratio of *British Transport Commission v. Gourley* (3) can be applied to assessing the value of land. F

LORD SOMERVELL OF HARROW: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be allowed. G

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. F. Skinner*, Bury St. Edmunds (for the appellants); *E. P. Rugg & Co.* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] H

I

NOTE.

R. v. LOVELOCK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Ashworth, JJ.), July 24, 1956.]

Criminal Law—Appeal—Sentence—Conviction quashed on one count of indictment, sentence on another count varied—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 5 (1).

[As to power to amend sentence or alter verdict, see 10 HALSBURY'S LAWS (3rd Edn.) 539, para. 990.]

Appeal against conviction.

The appellant, Thomas Henry James Lovelock, was convicted at Leicester Assizes on an indictment containing a count of attempted rape and a count of indecently assaulting a girl aged nine years. He was sentenced to six years' imprisonment on the first count and to two years' imprisonment on the second count, the sentences to run concurrently. He appealed against the conviction on the count of attempted rape. The appellant was eligible* to be sentenced to preventive detention as he was, at the time of his trial at assizes, over thirty years of age and, since he attained the age of seventeen, had been convicted on indictment on three previous occasions of offences punishable with a term of imprisonment of two years or more and had been sentenced on at least two of those occasions to a term of imprisonment, and had been served with a notice under s. 23 (1) of the Criminal Justice Act, 1948, of intention to prove those convictions. The appellant had been convicted three times previously of this class of offence.

B. D. Bush for the appellant.

James Ross for the Crown.

LORD GODDARD, C.J., gave the judgment of the court in which, after stating that the conviction for attempted rape could not be upheld but that there had been as foul an indecent assault on a child as had ever come before the court, and that the prisoner's sentence on the count of indecent assault, being the maximum sentence, could not be increased, continued: Counsel for the Crown has very properly called the attention of the court to s. 5 (1) of the Criminal Appeal Act, 1907. That is a sub-section which, so far as my experience goes, has never been put into force before. In all the years I have sat in this court either as a puisne judge or as chief justice I have never known it applied, but it is a section which appears to me to apply in the clearest possible manner to this case.

Section 5 (1) of the Criminal Appeal Act, 1907, provides as follows:

"If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted."

I should think that the reason why that sub-section was put in was this. An indictment might contain three or four counts. On the major count or the first count there might be a conviction and the court might pass a sentence of three years or five years. The court might then pass sentences which might be

* See the Criminal Justice Act, 1948, s. 21 (2); 28 HALSBURY'S STATUTES (2nd Edn.) 371.

concurrent or consecutive, but which are generally concurrent, on the other counts, and the court might very easily think: "We have passed a sentence of five years on count 1, so it will be enough on counts 2 and 3 if we pass a sentence of three or five years concurrent on each of those counts". The case might then come before the Court of Criminal Appeal and the court might say: "What has happened here obliges us to quash the conviction on count 1 which carries five years, but we affirm the conviction on count 2". It may be that there is very little difference, if any, between the merits of count 1 and count 2. The sub-section gives the Court of Criminal Appeal on quashing the conviction on count 1 power to pass an adequate sentence for the conviction on count 2. The sub-section quite clearly applies to this case. We have found that the appellant was not properly convicted on the first count which carried the sentence of six years, but that he was properly convicted on the second count, which carries a maximum sentence of only two years. As the necessary notices were served and convictions proved, it would have been possible for this appellant to have been sentenced to preventive detention, and that would have been a sentence warranted in law. I have already said that a sentence of two years for a horrible offence of this sort was quite inadequate. The appellant's record shows that this is the fourth time he has been convicted of these assaults on little girls. He is therefore not safe to be at large with children, and the court considers that it is right that they should put into force the provisions of s. 5 (1) of the Criminal Appeal Act, 1907. We shall pass the sentence of preventive detention which could have been lawfully passed on the count of indecent assault. The length of preventive detention might have been very long, and I am not sure that it would not be right to pass a long sentence; but considering that it is the first time that this sub-section has been invoked we will only pass the same sentence of preventive detention as the learned judge did of imprisonment on the first count. The sentence on the appellant is that he should go to preventive detention for six years.

Appeal against conviction allowed. Sentence varied.

Solicitors: *Mander & Prime*, Rugby (for the appellant); *J. M. Johns*, Rugby (for the Crown).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

A Re A DEBTOR (No. 66 of 1955), *Ex parte* THE DEBTOR v. THE TRUSTEE OF THE PROPERTY OF WAITE (a bankrupt).

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.J.J.), June 26, 27, 28, July 13, 1956.]

B *Bankruptcy—Set-off—Mutual dealing—Guarantee of creditor's bank overdraft—Deposit of title deeds by guarantor—Bankruptcy of guarantor—Trustee paying off creditor's overdraft—Whether creditor entitled to set off debt due to him from guarantor against amount paid by trustee—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 31.*

C In January, 1952, C. borrowed money from a bank in order to purchase goods which he supplied to W. on trade terms involving some months' credit. On Jan. 14, 1952, in consideration of the credit, W. guaranteed C.'s overdraft up to £200, and deposited with the bank title deeds of property belonging to him. During 1952, C. supplied goods to W. of the value of £201 14s. 6d. and W. paid £100 into C.'s bank. On Oct. 1, 1954, a receiving order was made against W. who still owed £101 14s. 6d. to C. On July 20, 1955, in order to obtain the release by C.'s bank of W.'s title deeds, W.'s trustee in bankruptcy paid to the bank £133 14s., the then amount of C.'s overdraft, and on Oct. 6, 1955, W.'s trustee obtained leave to sign judgment against C. for £133 14s. and £16 16s. 6d. costs (£150 10s. 6d. in all). C. failed to comply with a bankruptcy notice issued in respect of the judgment debt, and on Dec. 22, 1955, W.'s trustee filed a petition in bankruptcy against C. based on the judgment debt. On Feb. 9, 1956, a receiving order was made against C. C. appealed, claiming to be entitled to set off (in W.'s bankruptcy) under the Bankruptcy Act, 1914, s. 31* (which enables debts due to be set off where there have been mutual dealings), the sum which he alleged was owed to him by W. (£101 14s. 6d.) against the debt for which judgment was signed against him by W.'s trustee, so reducing the debt (£150 10s. 6d.) to less than the £50 required to support the petition. The amount of W.'s indebtedness to C. was not proved or agreed. It was conceded on C.'s behalf that the relevant date for the application of s. 31 of the Act of 1914 was Oct. 1, 1954, the date of the receiving order made against W.

E **Held:** the receiving order was rightly made against C., because on the relevant date for the consideration of mutual debts there was no debt due to W. from C. for the purposes of s. 31 of the Act of 1914, as the indebtedness did not arise until W.'s trustee paid off C.'s overdraft on July 20, 1955; moreover that payment could not be treated as a mere quantification of an obligation subsisting on Oct. 1, 1954 or otherwise related back to that date.

G *Re Daintrey, Ex p. Mant* ([1900] 1 Q.B. 546) and *Re Moseley Green Coal & Coke Co., Barrett's Case* ((1865), 34 L.J. Bcy. 41) distinguished.

H *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* ([1931] 1 Ch. 85) considered. Decision of the DIVISIONAL COURT OF THE CHANCERY DIVISION ([1956] 2 All E.R. 94) affirmed.

[As to the right of set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480-483, paras. 952-956; and for cases on the subject, see 4 DIGEST 389-398, 3563-3636, and 411-414, 3719-3744.]

I For the Bankruptcy Act, 1914, s. 31, see 2 HALSBURY'S STATUTES (2nd Edn.) 365.]

Cases referred to:

(1) *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.*, [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273; Digest Supp.

(2) *Re Daintrey, Ex p. Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; *affd.* C.A., [1900] 1 Q.B. 571; 4 Digest 389, 3562.

* For the terms of this section see p. 227, letter E, post.

- (3) *Re Moseley Green Coal & Coke Co., Barrett's Case*, (1865), 34 L.J. Bey. 41; 12 L.T. 193; 4 Digest 412, 3727.
- (4) *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; 70 L.J.Ch. 61; 5 Digest 856, 7182.

Appeal.

The debtor appealed from an order made by a Divisional Court of the Chancery Division on Mar. 26, 1956, and reported [1956] 2 All E.R. 94, confirming a receiving order dated Feb. 9, 1956, made against the debtor by the registrar of the Brighton County Court on the petition of the respondent, the trustee in bankruptcy of Ernest Edward Waite. The debtor claimed that he was entitled, under s. 31 of the Bankruptcy Act, 1914, to set off, against the respondent's debt of £150 10s. 6d., being a sum owed by the debtor to the estate of the bankrupt, a sum of £101 14s. 6d. owed by the estate of the bankrupt to the debtor.

Muir Hunter for the appellant, the debtor.

John K. Wood for the respondent, the petitioning creditor.

Cur. adv. vult.

July 13. The following judgments were read.

LORD EVERSHERD, M.R. (read by JENKINS, L.J.): On Oct. 6, 1955, the respondent, the trustee in bankruptcy of E. E. Waite, obtained in the Chancery Division of the High Court judgment against the appellant, S. H. Clark, for the sum of £133 14s. plus costs. The sum of £133 14s. was the amount paid by the respondent trustee in July, 1955, to the appellant's bankers in respect of a guarantee of the appellant's account with the bankers entered into by Mr. Waite before his bankruptcy, in circumstances hereafter mentioned. The appropriate sum for costs under the judgment was £16 16s. 6d. making with the sum of £133 14s. a total amount of £150 10s. 6d. In respect of that figure the respondent trustees proceeded on Nov. 16 to serve the appellant with a bankruptcy notice and on Dec. 22, 1955, the respondent trustee presented to the Brighton County Court a petition for the adjudication of the appellant as a bankrupt, the petition being founded on the appellant's failure to comply with the bankruptcy notice. A receiving order was made on the respondent trustee's petition on Feb. 9, 1956, but a stay was also granted which remains in operation until the determination of the present appeal.

The appellant took certain objections to the form of the bankruptcy notice and of the petition. These objections were, however, rejected by the Divisional Court, and counsel for the appellant did not pursue them before us. The real question argued in this court arises out of the provisions as to mutual credits and set-off in s. 31 of the Bankruptcy Act, 1914. It appears that certain business dealings took place between the appellant and Mr. Waite about the end of 1951 or early in 1952, some two and three-quarter years before the receiving order made in the case of Mr. Waite. The effect of these transactions was that goods were sold by the appellant to Mr. Waite, but, the latter being unable then to pay for the goods, credit was given to him by the appellant on the terms that he should guarantee the appellant's bank overdraft up to an amount of £200. It was argued by counsel for the appellant that the arrangement then made between the appellant and Mr. Waite was of a much more complex and precise character, and was to the effect that, since the overdraft had (as was suggested) been created exclusively for the purpose of enabling the appellant to acquire the goods sold by him to Mr. Waite, the latter should discharge his indebtedness to the appellant by paying off the appellant's debt to the bank. At the date relevant for the purposes of this appeal, the amount of the price of the goods sold to Mr. Waite by the appellant remaining undischarged was said to be £101 14s. 6d.: and it was contended by counsel for the appellant that, according to the terms of the agreement made between the appellant and Mr. Waite, the

A payment by the latter's trustee of the amount then remaining due to the appellant's bankers operated automatically to discharge the debt of £101 14s. 6d., so that the right of the respondent trustee arising from the suretyship to recover from the appellant was limited to the balance of £31 19s. 6d., a sum, even with the figure of £16 16s. 6d. added for costs, insufficient to support a bankruptcy petition.

B In my judgment, it is clear that the appellant has failed to prove an agreement having the terms alleged by counsel on his behalf, and such as to result in the automatic discharge of the appellant's outstanding claim for the sale of the goods. I add that he also failed to prove that, in fact, the bank overdraft was exclusively referable to the purchase of the goods by the appellant.

C There remains, however, the alternative submission of counsel for the appellant founded on s. 31 of the Act. Assuming (he says) that the appellant's claim for £101 14s. 6d., or whatever be the correct figure (for the amount which I have stated has only been conceded for the purposes of the present argument), remains undischarged, still the sum of £133 14s. paid by the respondent trustee in discharge of the appellant's bank overdraft together with the sum for costs, making in all £150 10s. 6d., gives rise to a "contra money claim" (to use the phrase of D LORD HANWORTH, M.R., in *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.* (1), [1931] 1 Ch. 85 at p. 109) arising out of the mutual dealings of 1951-52 which must, by the imperative terms of s. 31, be set off against the £101 14s. 6d.; and so a balance is left in favour of the respondent trustee 24s. short of the sum required to support a petition in bankruptcy.

The relevant terms of s. 31 of the Act are:

E "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ."

F It is conceded (and the concession is of the first importance in the case) that the relevant date for the application of the section is that of the receiving order made against Mr. Waite on Oct. 1, 1954. If, then, it is necessary to apply the terms of s. 31 to the state of affairs as they existed on that date, the question would be: G What on that day (Oct. 1, 1954) was due from the one party to the other, that is, between the appellant and Mr. Waite, in respect of their mutual dealings? On that day there was indubitably due from Mr. Waite to the appellant (for which the appellant was entitled to prove, as, I understand, he has done) the sum of £101 14s. 6d.—or whatever was the proper amount outstanding in respect of the goods sold to Mr. Waite. But was there on that date anything "due" from the appellant to Mr. Waite? H In my judgment, there was not. The rights of Mr. Waite against the appellant were the special but contingent rights of a surety who had not been called on to make any payment by the principal creditor and had not exercised what has been called the protective right of a surety to require the principal debtor to relieve him of his liability by paying the debt owed to the principal creditor. Nor was the case one in which all that remained to be done was I to quantify the extent of an obligation already incurred, the amount of the indebtedness when finally ascertained being exclusively referable to an obligation to pay that sum entered into prior to the relevant date, such as was the case in *Re Daintrey, Ex p. Mant* (2) ([1900] 1 Q.B. 546) see per ROMER, L.J. (*ibid.*, at pp. 573, 574). If and when a sum certain became due from the appellant to Mr. Waite or his trustee, that debt would be referable to the contract of guarantee with the bank or to the rights flowing from such contract, entered into by Mr. Waite with the bank subsequently to and independently (albeit in consequence)

of the mutual dealings between himself and the appellant. Moreover, the sum payable would depend on the state of the appellant's account with the bankers on the date when payment to the bankers was made. A

Counsel for the appellant, however, relied before us and in the Divisional Court on a number of decisions which (as he submitted) entitled him to say that, although in truth on Oct. 1, 1954, there was nothing "due" from the bankrupt, nevertheless the claim subsequently created by the respondent trustee's payment to the appellant's bankers could be related back, as it were, to Oct. 1, 1954, so as to entitle him to treat that claim as if it had been then a claim for payment of a sum certain from the appellant to Mr. Waite. I should state that Mr. Waite, at the time when he entered into his contract of guarantee with the appellant's bankers, had deposited with the bank by way of security the deeds of certain property belonging to him and that the respondent trustee paid off the sum owing to the bankers in order to obtain a release of such deeds and to allow him, accordingly, to sell the property free from the bankers' charge and to the best advantage. It follows that the facts in the present case are somewhat special: for in the ordinary case the trustee of a surety who had become bankrupt would be likely to await a proof by the principal creditor in the surety's bankruptcy and would not take the unusual step (as has been observed, with the assets of the surety's creditors) of paying off in full, and before any demand made, the amount due by the principal debtor to the principal creditor. B C D

The cases relied on by counsel for the appellant were fully considered by the Divisional Court and I find it necessary to refer to two only of them. The first is *Re Moseley Green Coal & Coke Co., Barrett's Case* (3) ((1865), 34 L.J.Bey. 41), which, undoubtedly, at first sight lends support to the submission of counsel for the appellant. The case is nowhere very fully reported. The facts, so far as relevant, are briefly these. Barrett was a contributor, as the registered holder of shares not fully paid, of a company the predecessor in title of which had mortgaged its principal asset, namely, certain mines. On the occasion of the mortgage Barrett had entered into a guarantee of the mortgagor's indebtedness to the mortgagee. After the transfer of the mines to the company and in consideration of indulgence on the part of the mortgagee, the company by way of collateral security for its obligations to the mortgagee executed a promissory note in favour of the mortgagee for the amount of the mortgage debt, but the promissory note was not by its terms payable until a date later than that of the company's liquidation. After the company's liquidation the mortgagee had been paid off by Barrett's sister, who had, accordingly, taken a transfer of (inter alia) the company's promissory note. Later Barrett had obtained—but, as was held, in all good faith—the transfer to himself from his sister of the company's promissory note (though not, as I understand, of the mortgage debt), giving to her in exchange a promissory note of his own for a like amount. A claim was then made in the liquidation of the company against Barrett for the amount of his unpaid calls on the company's share capital. Barrett claimed to set off against such claim the amount due to him, as holder, by the company on the promissory note which had then matured (and not, as appears to be stated by LORD HANWORTH, M.R., in his judgment in *Re Fenton* (1), the mortgage debt itself). LORD WESTBURY, L.C., held that Barrett was entitled to such set-off. The Lord Chancellor is reported as saying (12 L.T. 193 at p. 194): E F G H

"I think [Barrett] must be held to be precisely in the same state in which the creditor [the mortgagee] stood at the time when the note was made; and if I remit him back to the right which his principal had, then I refer his right to set-off to the state of things which existed at the time of the winding-up order . . ."

Later (after further argument) he said (*ibid.*, at p. 195): I

"Does the contract of suretyship, incurred as it was by Barrett anterior to the winding-up order, with its attendant rights, give such retroactive

A force to Barrett's possession and ownership of the note as to enable him to refer it back to that contract or relation, before the winding-up order was made? My present impression is that it will; that he is a bona fide possessor of the note, and therefore that he has a right to a set-off."

B LORD WESTBURY, L.C., is reported as having later expressed his adherence to this impression. It is to be noted that the fact of the promissory note not having matured until after the date of liquidation—which was for the purposes of set-off the relevant date—does not appear to have been referred to in the argument as reported or in the judgment.

C On a later date another case of a claim to set-off by Barrett, in the liquidation of the same company came before LORD CRANWORTH, L.C. Counsel for the appellant conceded that LORD CRANWORTH appeared to have entertained some doubt of LORD WESTBURY's decision. Whether that was so or not, LORD CRANWORTH disallowed Barrett's claim in the case before him, stating ((1865), 34 L.J.Bcy. at p. 44) that the matter seemed to him to stand on exactly the same principles as in bankruptcy.

D In my judgment, whatever be the view taken as to LORD WESTBURY's decision or the grounds on which it proceeded, *Re Moseley Green Coal & Coke Co., Barrett's Case* (3) was a case, depending on its own special facts and on the conclusion that on those special facts Barrett's claim against the company on its promissory note could be related back to the date of the company's liquidation. Such claim, at all events, arose exclusively out of the note itself which had been given for a sum certain and at a date prior to the liquidation; and Barrett, as surety for the mortgagor's obligation under the original mortgage, had been, as such, entitled to the benefit of the company's securities for payment of the principal debt. In other words, I think that DANCKWERTS, J., was entitled, as he did ([1956] 2 All E.R. at p. 98), to treat the case as dependent on its own special circumstances and distinguishable, accordingly, from the present.

F The second case relied on by counsel for the appellant is *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1), before LUXMOORE, J., and in this court. The relevant facts were that Fenton was indebted in a very large sum to the association but had guaranteed certain bank accounts of the association, the total amount so guaranteed being also large but less than the sum of Fenton's debt. Fenton had entered into deeds of arrangement with his creditors and, later, a winding-up order had been made with respect to the association. The banks (or some of them) had proved in the winding-up of the association and also against Fenton's estate, but neither Fenton nor his trustee had made any payment under the guarantees. The question, which this court answered negatively, was whether Fenton's trustee was entitled to set off against the claim of the liquidator the amount of Fenton's liability under the guarantees.

H It will be observed that the case is in certain respects analogous to that now before us, where the parts of Fenton and the association are, as it were, taken by Mr. Waite and the appellant respectively. It is, however, to be noted that in *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1) (unlike in the present case) the relevant date was treated as that of the association's liquidation. Moreover, as already noticed, nothing had been paid to the bankers by Fenton or his trustee. The question with which we are now concerned, the question what I the situation would have been had Fenton's trustee paid off the sums due to the association's bankers which Fenton had guaranteed, did not therefore directly arise for the determination of the court. The decision turned primarily on the court's view that to allow the set-off would, in effect, be to allow a double proof in respect of the same debt in the association's winding-up. The reasoning of the judgments, however, is clear authority for the proposition which I have earlier invoked—that, if at the relevant date a guarantor has not paid the principal creditor (and has not taken any other step to enforce his rights against the principal debtor), and so long, at least, thereafter as that situation continues,

there is no "debt due" to the guarantor from the principal debtor capable of forming the subject of a set-off, under s. 31 of the Bankruptcy Act, 1914, against a debt due from the guarantor to the principal debtor. A

It was, however, submitted by counsel for the appellant that the view for which he has contended (namely, that payment by the guarantor's trustee subsequently to the relevant date should be related back to that date so as to give rise to any application of s. 31 of the Act) is implicit in the judgments, particularly of LORD HANWORTH, M.R., and LAWRENCE, L.J. It must be confessed that some colour is lent to this view by the terms of the headnote*: B

"Held . . . that inasmuch as none of these sums had in fact been paid by [Fenton] or his trustee to the banks the trustee was not entitled . . . to set off . . ."

Moreover the learned counsel for the liquidator of the association is reported ([1931] 1 Ch. at p. 97) as conceding, in general terms, that C

" . . . if the surety had paid the sums due under the guarantees . . . the surety would have been entitled to set off the amount so paid."

His case was that neither Fenton nor his trustee had ever paid anything at all under the guarantees. Thus LORD HANWORTH, M.R., observed (*ibid.*, at p. 104): "Neither Fenton nor his trustee has yet paid anything to the banks on behalf of the association". Later in his judgment he said (*ibid.*, at p. 107): D

"Thus, so far as the cases go, it had been decided that a surety is entitled to a right to prove if (a) his liability arose under a guarantee given before the date of the receiving order or winding-up order, and (b) he has in fact paid to the creditors the sum that he seeks to set off. No case has decided that he can set off his contingent liability before he has changed that, by payment to the creditor, into an actual debt due to himself. Several cases have indicated a doubt whether there could be a right to prove before such a payment." E

In the same way LAWRENCE, L.J., stated, in general terms, the point to be decided thus (*ibid.*, at p. 111): F

"The claim on behalf of Fenton's estate to the right of set-off is made under s. 31 of the Bankruptcy Act, 1914, and the question is whether that section enables the trustee of the estate of a bankrupt surety (in whose bankruptcy a proof has been lodged by the principal creditor) to set off the liability of the surety under his guarantee against a debt presently due from him to the trustee of the estate of the bankrupt principal debtor, although nothing has been paid to the principal creditor either by the surety or by his trustee." G

There are, however, in my judgment, passages in all three judgments pointing in a different direction. Thus, LORD HANWORTH, M.R., referred (*ibid.*, at p. 108) to *Re Daintrey* (2), as authority for the proposition that H

"If the contra right were one which was effective before the receiving order, though its quantum was measured afterwards, the system of set-off would apply . . ."

More important, he said (*ibid.*, at p. 109):

"In the present case, as I have pointed out, the liability of Fenton at the date of the receiving order was uncertain, though he might have made his position certain by payment. The words of the section seem clearly to connote an account capable of ascertainment on either side if not immediately, yet based upon authority or liability definitely undertaken. I find it difficult to construe those words or adapt that system to dealings in which there was a debt on one side due to the other, and per contra there was not a debt or a I

* The headnote is set out in full at p. 234, letter C, post.

A certain liability, but one in respect of which there was a right of protection and no more; a liability which could not be turned into a direct contra money claim, unless and until the debt had been paid by the surety, who then, and not till then, would become entitled to give a discharge for the sum paid to him. This he had not done at the date of the liquidation when his rights became determined."

B I do not desire to multiply citations; but LAWRENCE, L.J. (*ibid.*, at p. 113) made a similar reference to *Re Daintrey* (2), and later (*ibid.*) used the phrase:

"The question . . . is, whether . . . there was any sum due from the estate of the principal debtor . . . at the time when the right to set off was claimed . . . regard being had to the fact that at that time nothing had been paid by or on behalf of the surety . . ."

C The language last cited may, no doubt, for present purposes be equivocal. ROMER, L.J., however, considered the hypothesis that Fenton had become bankrupt, the association remaining solvent, and posed the question (*ibid.*, at p. 117): Could Fenton's trustee have set off his liability to the banks against a proof by the association against Fenton's estate? ROMER, L.J., said (*ibid.*):

D "That there were mutual dealings between the association and Fenton resulting in the debt due to the association on the one hand and the liability of the association to indemnify Fenton against his liability to the banks on the other may be conceded. But there was nothing 'due' from the association to Fenton which could have been placed to Fenton's credit in the account that would have had to be taken under s. 31 of the Bankruptcy Act."

E DANCKWERTS, J., delivering the judgment of the Divisional Court of the Chancery Division in the present case, cited ([1956] 2 All E.R. at p. 99) and applied to the analogous circumstances of the present case, the passage which I have quoted from the judgment of ROMER, L.J.; and he treated the word "was" in the second sentence of that passage from the judgment of ROMER, L.J., as meaning "was at the date of (Fenton's) receiving order". I think that the learned judge was entitled so to do, for the date of that order was, on the hypothesis on which ROMER, L.J., was proceeding, the relevant date just as, in the present case, Mr. Waite's receiving order is conceded to be the relevant date.

G I am, therefore, on the whole, of the opinion that the language and reasoning of the three judgments in this court in *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1), are more consonant with the argument of counsel for the respondent trustee than with that of counsel for the appellant. None the less, the precise point with which we are concerned was not raised in *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1) and not determined in that case by this court. If that is so, then I am thrown back on the terms of s. 31 of the Bankruptcy Act, 1914, for the right of set-off claimed is a special right, defined and ordained by the statute. I have already expressed my view that, as I read the language of the section, and on the footing, which counsel for the appellant has conceded, that the relevant date for the application of the section is Oct. 1, 1954, the date of Mr. Waite's receiving order, there was then nothing "due" from the appellant to the bankrupt; and that the sum paid nearly ten months later by the respondent trustee to discharge the sum then due to the appellant's bankers (which may well have been quite different from the sum due on Oct. 1, 1954) cannot be treated as a mere quantification of an obligation in the nature of a debt already existing on the last-mentioned date.

I The registrar in the county court had held that the appellant's claim was concluded against him by the judgment of Oct. 6, 1955, against which the appellant had not appealed. As the Divisional Court pointed out ([1956] 2 All E.R. at p. 97), it has been long established by authority that for bankruptcy

purposes a judgment is not conclusive evidence of a petitioning creditor's debt. I have, therefore, dealt with the appellant's claim without regard to the judgment. On the view which I have formed of the effect of s. 31 of the Act, it is unnecessary to consider further for this purpose the effect of the judgment. A

Counsel for the appellant also contended, as I understood him, that there was some equity which was available to the appellant and which entitled him to require the respondent trustee to reduce his claim against the appellant by setting-off the sum due by the bankrupt to the appellant. I cannot agree. As I have observed, the set-off enjoined by s. 31 of the Bankruptcy Act, 1914, is a special statutory right or requirement. I do not think that there is any room for any such "equity" as counsel for the appellant sought. If, however, there were, then it is, to my mind, clear that it is now too late for the appellant to invoke it; for in that respect the judgment of Oct. 6, 1955, is conclusive against him. B C

I return once again to the vital matter of the relevant date, admitted to be, for present purposes, Oct. 1, 1954. On that date the circumstances of the present case were precisely analogous to the facts which ROMER, L.J., was assuming at the date of Fenton's bankruptcy in the passage from his judgment to which I have referred—with a result, as I hold, similar to that intimated by ROMER, L.J. The consequence is that, in my judgment, the receiving order of Feb. 9, 1956, was rightly made against the appellant. What will be the position if, in the appellant's bankruptcy, the respondent trustee claims to prove for the full amount of the judgment debt and costs, £150 10s. 6d.? Will the appellant's trustee then be able under s. 31 to set-off the "contra money claim" of £101 14s. 6d.—or whatever other sum is the proper figure—withdrawing his proof for the like sum against Mr. Waite's estate? It may be that he will; for, in this event, the relevant date will be Feb. 9, 1956, and on that date there would appear, undoubtedly, to be debts "due from the one party to the other in respect of [their] mutual dealings". If that were right, then it might appear that the result in the present case would in the end be academic, but in truth this is not so. The whole aim and object of counsel for the appellant in the present case has been to compel the respondent trustee, by virtue of an application of s. 31 of the Act to the date of the receiving order against Mr. Waite, to reduce his claim against the appellant to a figure incapable of supporting a bankruptcy petition and thereby to challenge the validity of the receiving order made against the appellant. In this counsel for the appellant has, in my opinion, failed—whatever turns out to be in the situation in Mr. Waite's bankruptcy. I think, accordingly, that this appeal must be dismissed. D E F G

JENKINS, L.J.: I am in complete agreement with the judgment of LORD EVERSHEDE, M.R., and I am also in complete agreement with the judgment about to be delivered by HODSON, L.J., which I have had an opportunity of considering in advance, and I find nothing that I can usefully add to the reasons given in those judgments for holding that this appeal fails and should be dismissed. H

HODSON, L.J. This is an appeal against a receiving order made by the registrar of the Brighton County Court (sitting in bankruptcy) on Feb. 9, 1956, and confirmed by the Divisional Court of the Chancery Division on Mar. 26, 1956. The main ground of appeal is the refusal of the registrar to give effect to a set-off claimed under s. 31 of the Bankruptcy Act, 1914.

The relevant facts relied on by the appellant are as follows. In January, 1952, the appellant agreed to supply Mr. Waite with goods which were to be paid for by the appellant with cash but were to be sold to Mr. Waite who was to pay in due course. Mr. Waite agreed to guarantee the appellant's banking account and deposited the title deeds of his house to secure an overdraft up to £200. The appellant supplied goods to Mr. Waite of the value of £201 14s. 6d. and Mr. Waite paid £100 into the appellant's bank, leaving a balance due of £101 14s. 6d. On Oct. 1, 1954, a receiving order was made in Mr. Waite's bankruptcy I

- A and the appellant had a right of proof in respect of the £101 said to be due, but the amount of Mr. Waite's indebtedness had not either been proved or agreed. Mr. Waite's trustee, in the course of realising the assets, had to pay off the appellant's overdraft in order to obtain release of the title deeds of the house. This he did on July 20, 1955, when the appellant's overdraft amounted to £133 14s. The trustee [referred to hereinafter as "the respondent trustee"] sued the
- B appellant to recover the sum of £133 14s. "paid for the defendant as his surety". Judgment was signed for the full amount of £133 14s. and £16 16s. 6d. costs. The respondent trustee then obtained the issue of a bankruptcy notice which was not complied with, and on Dec. 22, 1955, the respondent trustee filed a petition in bankruptcy against the appellant based on the judgment debt of £150 10s. 6d. On Feb. 9, 1956, the receiving order was made against the appellant as stated
- C above. The appellant complains that he was not allowed to reduce the debt on which the respondent trustee relied below the sum of £50 required to support the petition by setting off the £101 14s. 6d., the debt due from Mr. Waite to himself, against the total of £150 10s. 6d. due from him as a judgment debt.

The question turns on the effect of s. 31 of the Bankruptcy Act, 1914, which reads:

- D "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party,
- E and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

- F That there were mutual dealings between the appellant and Mr. Waite there is no doubt, but was there anything due from the appellant to Mr. Waite at the material date, namely, the date of the receiving order? It is true that Mr. Waite had guaranteed the appellant's overdraft and, although he had not been called on to pay under his guarantee, he had a contingent claim against the principal debtor for the amount which he might ultimately be required to pay and is a "creditor" within the meaning of the Bankruptcy Act, 1914: see *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.* (4) ([1901] 1 Ch. 77). That a surety with a contingent liability is a creditor was conceded in *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1) ([1931] 1 Ch. 85) (hereinafter referred to), but a distinction was there drawn between the contingent liability of a surety and an amount actually due in respect of mutual dealings. There
- H is no reported case of a set-off being allowed under the section except where a debt was due at the date of the receiving order.

- Re Daintrey, Ex p. Mant* (2) ([1900] 1 Q.B. 546) was a case of a debt actually due. SIR NATHANIEL LINDLEY, M.R., there pointed out (*ibid.*, at p. 572) that considerable sums would become payable under the agreement entered into between the parties before the date of the receiving order if they carried the agreement into effect. The amount was thus due at the date of the receiving order although it had to be calculated at a subsequent date. ROMER, L.J., said (*ibid.*, at p. 573): "... whatever sum eventually became payable, became payable to Daintrey by virtue of [the] agreement ... and of nothing else".
- I

Re Moseley Green Coal & Coke Co., Barrett's Case (3) (1865, 12 L.T. 193), seems at first sight to lend support to the view that, in a case such as the present, the appellant would be entitled to a set-off, for Barrett, being surety to a mortgage, took an assignment of a promissory note after the liquidation of the company which had given the note, but it was there held that his right as surety

had arisen before the liquidation and that he was entitled to use as a set-off the securities for the mortgage debt which came to him after the liquidation. LORD WESTBURY, L.C., referred (*ibid.*, at p. 195) to the mischief which would arise in winding-up or in bankruptcy if a debtor was permitted to buy up counter-claims subsequently to the winding-up order for the purpose of making a case of set-off, but held that the contract of suretyship incurred by Barrett anterior to the winding-up order, with its attendant rights, gave such retroactive force to his possession and ownership of the note as to enable him to refer it back to that contract or relation before the winding-up order was made.

Re Fenton, Ex p. Fenton Textile Assocn., Ltd. (1) was relied on by counsel for the appellant as supporting the appellant's claim to a set-off. The headnote reads:

"[Fenton] having guaranteed advances by certain banks to the [textile] association in which he was interested, subsequently executed two deeds of arrangement in favour of his creditors. The association having gone into liquidation the liquidator lodged a proof against [Fenton's] estate in respect of sums due by [Fenton] to the association. The trustee of [Fenton's] estate rejected the proof and claimed to set off the various sums which had been advanced by the banks to the association for which [Fenton] had given his personal guarantee. The banks had proved against [Fenton's] estate under the guarantees but nothing had been paid to them:—*Held* (reversing the decision of LUXMOORE, J.), that inasmuch as none of these sums had in fact been paid by [Fenton] or his trustee to the banks the trustee was not entitled, under s. 31 of the Bankruptcy Act, 1914, to set off [Fenton's] contingent liability under the guarantees against the sums due by him to the association."

LUXMOORE, J., had held that Fenton's contingent liability was available to his trustee as a set-off.

Counsel for the appellant argued that if Fenton or his trustee had paid these sums to the banks the trustee would have been held by the Court of Appeal entitled, under s. 31 of the Bankruptcy Act, 1914, to set off payments under the guarantee against the sums due by him to the association, and it was the fact that Fenton had paid nothing under his guarantee which led the Court of Appeal to take a different view from that of LUXMOORE, J. Counsel claimed that Mr. Waite's liability under his guarantee, although not ascertained at the date of the receiving order, was capable of ascertainment at a later date and so was reducible to a certainty and within the principle established by *Re Daintrey* (2), so that s. 31 applied and the appellant was entitled to a set-off.

This is, in my opinion, inconsistent with the views expressed by the court in *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.* (1). The decision there turned mainly on the point that to allow the set-off would be to allow a double proof in respect of the same debt in the winding-up of the association, and the question now at issue, whether a surety who has paid the debt which he has guaranteed can relate that payment back to a date before the liquidation or bankruptcy in question, was not decided. It is true that the members of the court emphasised that Fenton had paid nothing under his guarantee, but they must have had in mind payment or non-payment before the date of the liquidation.

The passages cited by LORD EVERSHED, M.R., from the judgment of LORD HANWORTH, M.R. ([1931] 1 Ch. at pp. 108, 109) show his view of the effect of s. 31. I refer in particular to the passage (*ibid.*, at p. 109) where LORD HANWORTH, M.R., said that he found it difficult to adapt the words of the section

"... to dealings in which there was a debt on one side due to the other, and per contra there was not a debt or a certain liability, but one in respect of which there was a right of protection and no more; a liability which could not be turned into a direct money claim, unless and until the debt

- A had been paid by the surety, who then, and not till then, would become entitled to give a discharge for the sum paid to him."

This, LORD HANWORTH, M.R., added, was not done by Fenton at the date of the liquidation when his rights became determined. Applying this language to the present case, Mr. Waite had not paid the debt at the date of the receiving order in his case when his rights became determined. Consequently, there is no right to set off.

- B LORD HANWORTH, M.R., had earlier pointed out ([1931] 1 Ch. at p. 104) that a surety's right to be protected against the liability that might fall on him by the failure of the principal debtor to liquidate his debt was of a distinctive character. In summarising the authorities he said (ibid., at p. 107):

- C "Thus, so far as the cases go, it had been decided that a surety is entitled to a right to prove if (a) his liability arose under a guarantee given before the date of the receiving order . . . and (b) he has in fact paid to the creditors the sum that he seeks to set off. No case has decided that he can set off his contingent liability before he has changed that, by payment to the creditor, into an actual debt due to himself."

- D I emphasise the words "changed that, by payment to the creditor, into an actual debt due to himself". In order to bring the case within s. 31 the change must take place before the date of the receiving order, when the rights of the parties must be determined. In this case no change took place at that time. It was not until nearly ten months after the date of the receiving order that the respondent trustee changed the contingent liability originally incurred by Mr. Waite into a debt due to himself when he paid off the overdraft outstanding on the appellant's banking account which then stood at £133 14s. in order to redeem the title deeds of Mr. Waite's house pledged to the bank as security. In my opinion, the reasoning in *Re Fenton, Ex p. Fenton Textile Asscn., Ltd.* (1) is against the contention that there can be a set-off within the meaning of s. 31 of the Bankruptcy Act, 1914. I agree that the appeal should be dismissed.
- E
- F

Appeal dismissed.

Solicitors: *Nye & Donne*, Brighton (for the appellant, the debtor); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Bosley & Co.*, Brighton (for the respondent, the petitioning creditor).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CITY OF LONDON REAL PROPERTY CO., LTD. v. WAR DAMAGE COMMISSION.

[CHANCERY DIVISION (Vaisey, J.), July 18, 19, 24, 1956.]

War Damage—Cost of works—“ Making good war damage ”—Reconstruction of several buildings as single new building—Whether cost of works payment payable—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 8 (3).

Premises comprising a basement, ground floor and five upper floors were damaged by enemy action and the War Damage Commission determined that a cost of works payment under the War Damage Act, 1943, was appropriate. It was proposed to build on the site of the premises, and on the sites of six other buildings which adjoined, a single building with one principal entrance, entrance hall, staircase and lift shaft, and consisting at each floor level of large undivided areas of floor space capable of division into office accommodation according to the needs of individual tenants. These undivided areas bore no relation to the respective areas of the buildings which stood on the site before the war damage occurred. On motion by the appellants for a declaration that a cost of works payment should be made, the commission contended that the rebuilding of all the properties as one building was not the making good of the war damage to the individual properties concerned, with alterations and additions, within the War Damage Act, 1943, s. 8 (3)*, and that therefore a claim for the amount of a cost of works payment “ equal to so much of the proper cost of the works executed for the making good of the damage ” as fell within the permissible amount could not be maintained under that sub-section.

Held: a cost of works payment was not payable because the war damage would not be “ made good by works which [included] alterations or additions to the hereditament ” within s. 8 (3) of the War Damage Act, 1943, since, having regard to the proposed new building, the war-damaged property could not fairly be described as being, after the new building was erected, the same property as before the war damage, but would be a wholly different property.

[**Editorial Note.** The test applied in this case is that which the commission stated under the title “ What is ‘ making good by works which include alterations or additions ’ ? ” in para. 4 of the Practice Notes, second series, which they have published, and which are given judicial approval in so far as they are relevant to this case (see p. 239, letter H, post).]

For s. 8 (3) of the War Damage Act, 1943, see 26 HALSBURY’S STATUTES (2nd Edn.) 479.]

Cases referred to:

- (1) *Re War Damage Act, 1943, Re 56 Denton Road, Twickenham, Middlesex*, [1952] 2 All E.R. 799; [1953] Ch. 51; 17 Digest (Repl.) 484, 299.
- (2) *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwin’s Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 27; [1949] 1 K.B. 385; [1949] L.J.R. 713; 113 J.P. 78; 2nd Digest Supp.

Originating Notices of Motion.

These five motions were heard together and were in respect of (1) 28, Fenchurch Street; (2) 127, Fenchurch Street; (3) 134 and 135, Fenchurch Street; (4) 24, 25, 26, 27, Rood Lane; (5) 3 and 4, Cullum Street; all in the City of London.

The appellants, the City of London Real Property Co., Ltd., moved the court under the War Damage Act, 1943, s. 32 (3), for an order to discharge the determination, dated Oct. 17, 1955, of the War Damage Commission and a declaration that the applicants were entitled to receive from the War Damage Commission in respect of war damage to the properties a payment for cost of works of an amount calculated in accordance with the provisions of the Act.

* For the text of this provision see p. 238, letter E, post.

A The facts relating to each of the appeals were substantially the same and, by way of example, the following statement of facts is taken from the statement of case relating to No. 28, Fenchurch Street (here called "the property").

B The property formed part of a continuous row of buildings and consisted of a basement ground floor and five upper floors. Before the property suffered war damage, the basement and ground floors were used for the purposes of a shop, and were let for those purposes together with the basement and ground floors of Nos. 26 and 27, Fenchurch Street. The appellants' interest in the property was freehold. On Dec. 6, 1940, the appellants gave notice to the valuation department of the Inland Revenue that the property (and also Nos. 26 and 27, Fenchurch Street) had sustained war damage. Notification of further damage was made on subsequent occasions, the last notification being that the property (and also Nos. 26 and 27, Fenchurch Street, in which the appellants had a leasehold interest) had been destroyed. On Dec. 2, 1948, the War Damage Commission wrote to the appellants informing them that the damage to the property did not involve total loss and that a cost of works payment under the War Damage Act, 1943, was appropriate.

D In August, 1954, the commission were informed that it was intended to reconstruct Nos. 24-30, Fenchurch Street and Nos. 24-27 and No. 29, Rood Lane, and, later, drawings of a proposed new building covering the sites of all those properties were submitted. The proposed new building was designed as a single unit with one principal entrance, entrance hall, staircase and lift shaft, and to consist at each floor level (apart from lavatory accommodation and accommodation in the basement for certain services) of large undivided areas of floor space capable of division into office accommodation according to the needs of individual tenants. These undivided areas bore no relation to the respective areas of the buildings which stood on the site before the war damage occurred. All the said buildings, so far as they were not destroyed as a result of the war damage, had been or would be demolished to make way for the proposed new building. The commission did not accept that proposal to rebuild as one building as a proposal to make good the war damage to the individual properties concerned with alterations and additions.

F In the circumstances the commission determined: (i) the appropriate payment in respect of war damage to No. 28, Fenchurch Street, under the War Damage Act, 1943, s. 7, was a payment of cost of works; and (ii) the proposed new building did not or would not constitute the making good of the war damage to No. 28, Fenchurch Street, by works which included alterations and additions for the purposes of s. 8 (3) of the Act of 1943, and that a payment of cost of works could not properly be made in respect of such part of that building as included the site of No. 28, Fenchurch Street.

Harold Williams, Q.C., and J. R. Willis, Q.C., for the appellants.

H *Michael Rowe, Q.C., and Denys B. Buckley for the respondents.*

Cur. adv. vult.

I July 24. VAISEY, J., read the following judgment: In each of the five cases now before me for judgment the appellants are the City of London Real Property Co., Ltd. In each case the appeal is against a "determination" of the respondents, the War Damage Commission, and the point involved in all the cases is the same. It is perhaps surprising that it has not come before the court hitherto.

The properties with which the appeals are concerned are situated in a very congested part of the City of London, in, and in the neighbourhood of, Fenchurch Street. Before the occurrence of the war damage giving rise to the present appeals the hereditaments were in each case comparatively small units of building comprising basements and ground and upper floors, and the area of the sites occupied was in each case of quite small dimensions. There is no

dispute about the facts, and what the War Damage Commission have "determined" is that the incorporation of these sites, with others, into the site of a large building in a process of re-development such as is being widely adopted at the present time in the City of London and other comparable areas of property, cannot be treated as a making good of the war damage to the original hereditaments within the meaning of the War Damage Act, 1943. In other words, they say that the projected large new buildings (there are two of them) covering and absorbing, so to speak, the sites of the respective hereditaments to which the appeals relate, are new hereditaments and not the pre-existing hereditaments any longer. A

It seems to me that the question in each case is one of mixed law and fact. The true construction of the relevant provisions of the War Damage Act, 1943, comes first, and involves a question of law, and when that has been ascertained the question whether those provisions have been rightly applied to the circumstances of the particular cases is, to my mind, a question of fact. B

The point really lies within a very narrow compass. In the first place, these are admittedly *prima facie* cases for the payment of cost of works and not of a value payment. C

Turning to s. 8 of the Act, sub-s. (2) says this: D

"If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof."

No one suggests that what is being done in these cases is a "reinstatement" of the hereditaments in their pre-existing form, and, therefore, I now turn to s. 8 (3) which provides: E

"If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount." F

I need not pause to explain what is meant by "proper cost" or "permissible amount", for the only point is whether what is now proposed to be done can properly be described as "making good" the war damage to each hereditament by works which include alterations or additions to it.

The appellants say, with truth, that there is no definition of "alterations" or "additions" or any limit as to the extent of the alterations or additions to which s. 8 (3) refers. On the other hand, the War Damage Commission argue that the sub-section assumes and requires that there will be a measure of continuity between, and substantial identity with, the property as it was and the property as it will be when the projected works have been carried out. Admittedly there must be border-line cases in which the test suggested, as I will presently explain, by the War Damage Commission may not be very easy to apply, and it is, of course, obvious that the provisions of s. 8 of the Act, and particularly the references to "making good" and to "alterations and additions", are not capable of a precise definition which can be applied unhesitatingly and automatically to every conceivable combination of circumstances. It is easy to imagine a case in which alterations and additions of quite an extensive character have been made and yet the property remains the same property. It is also easy to imagine other cases in which the alterations and additions have not really made good the damage to an hereditament, but have actually destroyed the hereditament itself and put something else in its place, and the problem in these cases is whether or not the hereditaments here have been destroyed or whether they still exist or will exist. G H I

The War Damage Commission, for the guidance of themselves no less than of those with whom they have to deal, have published certain "Practice Notes"

A dealing almost entirely with this matter of alterations and additions. Prints of these notes are annexed to several of the cases now before me. They have undoubtedly had a very wide circulation. I have on previous occasions had to consider these Practice Notes in other contexts. They have evidently been compiled with very great care, and I am told, and am not surprised to hear, that they have proved extremely helpful in dealing with cases of which these present

B appeals are examples. I refer particularly to para. 4 of the notes which is entitled: "What is making good by works which include alterations or additions?" So far as is necessary for the present cases I may say that in my judgment the contents of that paragraph commend themselves entirely to me, and I will quote its opening sentences as representing what is, in my judgment, the crucial test to be applied:

C "The test which the commission will apply in order to decide whether works . . . constitute making good the war damage or involve the creation of a different property . . . is repeated here for convenience. It is: 'Looking at the works executed, can the property be fairly described as still the same property as before the war damage though altered or added to'? And it is to be answered on common-sense lines."

D If that is right, and I think it is, I cannot doubt that the proposed new building, in so far as it stands on the site of any one of these units of property, is not the same property as before the war damage, but a wholly different property. I think that the former property has been altered or added to not only out of all recognition, but out of existence. For their own purposes, the appellants have

E adopted a scheme of re-development, wholly sensible and desirable, but having only in part the identity of a common site with the buildings which were there before the war damage. I have said that there may be border-line cases, but the present cases, in my judgment, fall without any doubt or question altogether outside any making good of the war damage within the meaning or for the purposes of the Act. In the letter dated July 1, 1955, the matter is stated on

F behalf of the War Damage Commission in the following words which appear to me to be entirely convincing:

"From the point of view of physical characteristics a comparison of the plans of the original properties and of the proposed re-development shows so little correspondence between the old and the new that the commission find it impossible to say of any of the original properties . . . that the

G war damage will have been made good by works which include alterations or additions to the hereditament but can only conclude that each will have become an undistinguishable part of an entirely different property."

Some other points were raised during the hearing but in my judgment none of them is relevant. I am satisfied that there is no question of estoppel, as there was in *Re War Damage Act, 1943, Re 56 Denton Road, Twickenham, Middlesex* (1) ([1952] 2 All E.R. 799), and s. 20 of the Act seems to have no bearing on the present cases. This judgment may perhaps be valuable as providing definite judicial approval of the Practice Notes so far as these are relevant to and affect the problems now before me. I cannot believe that on any reasonable interpretation of the quite untechnical expressions in s. 8 of the Act the cases now under

H appeal can be brought within sub-s. (3).

I On the problem of how far this is a question of law and how far a question of fact I was referred by counsel for the respondents to a useful passage from the judgment of DENNING, L.J., in *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwin's Iron & Steel Co., Ltd.* (2) ([1949] 1 All E.R. 27 at p. 30).

If this had been a truly border-line case I should have hesitated before disturbing the conclusions arrived at by the War Damage Commission, even though I had myself been disposed to take, on balance, an opposite view. In my

judgment, however, this is a clear case, and I think that each of these appeals fails and must be dismissed. A

Appeals dismissed.

Solicitors: *Forbes & Son* (for all the appellants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

GILL v. GILL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 25, 1956.]

Divorce—Discretion—Decree nisi granted on ground of desertion—Failure by petitioner to disclose adultery—Application by petitioner after decree nisi for leave to amend petition by including prayer for discretion—Jurisdiction. C

Divorce—Practice—Amendment—Application after decree nisi to amend petition by including prayer for discretion—Jurisdiction.

A wife presented a petition for divorce on the ground of the husband's desertion and did not ask for the court's discretion to be exercised in her favour. The petition was undefended and the wife was granted a decree nisi. The wife had, however, failed to disclose to her solicitor and to the court that she had committed adultery prior to the presentation of the petition. On a summons by the wife applying for leave to amend the petition by including a prayer for discretion, for leave to file a discretion statement, and for an order that the decree be made absolute, D

Held: although the court had jurisdiction to deal with the summons, in the present case the summons would be dismissed so that the Queen's Proctor would have an opportunity to make inquiries and to take such steps, if any, as the Attorney-General might direct. E

[**Editorial Note.** A consequence of the dismissal of the summons in the present case is that if the Queen's Proctor desires to show cause against making absolute the decree nisi he can enter an appearance in accordance with r. 37 of the Matrimonial Causes Rules, 1950. F

As to amendment of petition after service, see 12 HALSBURY'S LAWS (3rd Edn.) 321, para. 646, note (g); and for cases concerning the amendment of prayer, see 27 DIGEST (Repl.) 453, 3878-3892.]

Summons.

The wife, who on Apr. 19, 1956, had been granted a decree nisi on the ground of the husband's desertion, applied for leave to amend her petition to include a prayer for the exercise of the court's discretion, for leave to file a discretion statement, and for an order that the decree be made absolute. G

C. I. Poole for the wife.

W. L. M. Davies for the husband.

Colin Duncan for the Queen's Proctor. H

KARMINSKI, J.: On Jan. 24, 1956, a petition was presented to this court by the wife in which she sought a dissolution of her marriage with the husband on the ground of his desertion of her without cause for a period of upwards of three years immediately preceding the presentation of that petition. The suit was undefended and, on Apr. 19, 1956, it came on for hearing before His Honour JUDGE ARMSTRONG, sitting as a special commissioner at Bournemouth. He, I

It now transpires that before the presentation of this petition, namely, in or about September, 1955, the wife had in fact committed adultery on a number of occasions with a man in Canada, where she was then staying or residing—a fact which was not disclosed either to the court or to her solicitor. I should add at once that, on the evidence at present before me, I am entirely satisfied that before the proceedings were started she was closely questioned by her

A solicitor whether or not she had committed adultery, and she informed him that she was innocent of any adultery during the marriage. That answer may well have been true at the time that she gave it, but it is equally clear that in fact she did commit adultery before the proceedings were started, but failed deliberately to disclose it to her solicitor. It is fair to say that she has now filed an affidavit admitting that she did not tell her solicitor, and apologising for what was at least an omission. The matter came for trial before the learned special commissioner, without any evidence before him that the wife had in fact committed adultery, so that he tried the case on the basis that she had not committed adultery. The matter now comes before me on a summons, asking leave for the wife to amend her petition, to include in the prayer of that petition a prayer for discretion, and asking leave to file a discretion statement. The summons also asks for a third form of relief, namely, that this court should pronounce a decree absolute, but counsel for the wife did not proceed with that part of his application.

The matter comes before me, admittedly, in a novel form; but novelty is in no way conclusive against an application. The summons was served not only on the husband but also on the Queen's Proctor. The husband's counsel has taken no active step in the debate except, in answer to a question that I asked, to tell me that the husband did not in fact know of the wife's adultery until after the hearing of the petition.

The Queen's Proctor, whose position is far different, not surprisingly, has resisted the present application. Counsel for the Queen's Proctor has pointed out that in the first place the learned special commissioner (against whom, of course, no sort of error is imputed) has in fact not been able to apply his mind to one of the issues of the case, namely, the husband's knowledge of or indifference to the adultery committed by the wife, because he had no idea that she had in fact committed adultery. The other aspect of the matter, which is at least equally important from the point of view of the public interest, is that the Queen's Proctor, on the facts now disclosed to him, is bound to prosecute certain inquiries, a duty not in the present case made necessarily easier by the fact that the wife appears to be again residing in Canada. He is not, I think, handicapped or debarred from prosecuting those inquiries if he so desires, and I understand from counsel that the Queen's Proctor may so desire. If and when he satisfies himself as to the relevant facts, it will then become his duty to submit the whole matter to the Attorney-General for directions as to what, if any, steps should be taken to bring the matter before the court. I am particularly anxious, in a case of this kind, to do nothing which would in any way impede the Queen's Proctor in carrying out his statutory duties. Indeed, I propose to take particular care that he shall not be so impeded.

It was suggested by counsel for the wife that the question of satisfying a court that the husband had deserted the wife, notwithstanding her adultery, has really been satisfactorily disposed of by the admission made today on behalf of the husband that at the time of the trial and for the three preceding years he did not know that the wife had committed adultery. That is not, I think, the end of the matter because, as I have already pointed out, one of the issues requisite to establishing desertion was not before the learned special commissioner at all. It is also suggested that the Queen's Proctor could still make his inquiries if the applications for leave to amend the petition and to file a discretion statement were granted, and the rest of the summons were adjourned. I do not think that that would be a convenient procedure. I believe that the proper and more usual procedure is that, the facts having been brought to the attention of the Queen's Proctor admittedly, as I emphasise, by the husband's solicitor, the Queen's Proctor should have an opportunity of pursuing inquiries and taking such steps as he may subsequently be directed to take by the Attorney-General.

In my view, the present summons must fail. I do not doubt that I have power to deal with it in the form in which it is before me, if I thought that it was right and proper to do so. I am not proposing to deal with it on a matter of strict procedural rules. Indeed, I know of no rule which prevents a summons of this kind coming before the court or being acted on if a court thinks fit; but in the exercise of my judicial discretion, I believe that the proper course is to dismiss the summons and to let the matter take such a course as the Queen's Proctor, after investigation and on direction, sees fit to take. The summons fails and must be dismissed, the wife undertaking to make no application for decree absolute until intervention by the Queen's Proctor or until the Queen's Proctor has advised her solicitors that inquiries have been completed.

Application dismissed.

Solicitors: *Roche, Son & Neale*, agents for *Peter S. Horden*, Bournemouth (for the wife); *Badham, Comins & Sloman*, agents for *Batten & Co.*, Yeovil (for the husband); *Queen's Proctor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

BRYERS v. CANADIAN PACIFIC STEAMSHIPS, LTD.

[LIVERPOOL ASSIZES (Diplock, J.), June 20, 21, 27, 1956.]

Dock—Dry dock—Ship under repair—Employee of shipowners injured—Several repairers engaged on work on ship at same time—Liability of shipowners—Notional occupier—Civil right of action where injury to person employed—Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), preamble, reg. 10—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 60, as amended by Factories Act, 1948 (11 & 12 Geo. 6 c. 55), s. 12 (1) and Sch. 1.

On Dec. 8, 1954, a ship owned by the defendants was in public dry dock undergoing annual repairs by general repairers and also by seventeen specialist contractors all of whom were engaged under direct contract with the shipowners. The shipowners retained the general control of the ship apart from the work of repair. The plaintiff, an able seaman serving as a carpenter, employed by the shipowners, was instructed by them to clear the scuppers on F deck and the bilges in the well. While looking for a light cluster on F deck for the purpose of doing the clearing of the scuppers, the plaintiff fell into an unprotected well forming one of the holds of the ship and was injured. In an action brought by him against the shipowners for damages for breach of statutory duty under reg. 10 of the Shipbuilding Regulations, 1931, by not securely protecting the well, the plaintiff contended that the duty of providing the protection was imposed on the shipowners by proviso (b)* to the head "Duties" in the regulations and that the plaintiff was within the category of persons (viz., "persons employed" within s. 60 of the Factories Act, 1937, as amended) on whom the regulations conferred a civil right of action.

Held: the Shipbuilding Regulations, 1931, applied and the plaintiff was entitled to recover damages from the shipowners for breach of statutory duty under proviso (b) and reg. 10 since

(a) although where more than one person contracted to execute work of repair on a ship in a public dry dock there was no notional occupier to be subjected to duties under the regulations (observations of LORD OAKSEY, L.J., in *Hartwell v. Grayson Rollo & Clover Docks, Ltd.*, [1947] K.B. at p. 912 applied), yet the only condition precedent to the imposition of a duty under proviso (b) was that a ship was being repaired in a public dry dock and, as that condition was satisfied, the proviso imposed on the shipowners (as they retained control of the ship apart from the work of repair), the duty of

* For the terms of this proviso see p. 244, letter I, post.

- A providing the protection required by reg. 10 (dictum of *DEVLIN, J.*, in *Donovan v. Cammell Laird & Co.*, [1949] 2 All E.R. at p. 87, letter C, applied, but his decision, *ibid.*, at p. 89, that the shipowner was not liable, not followed; *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50 applied); and
- B (b) it was the plaintiff's normal duty to work regularly at a place to which the regulations applied and therefore he was a person employed within s. 60 of the Factories Act, 1937, as amended, although he was not employed on the work of repairing the ship (*Hartley v. Mayoh & Co.*, [1954] 1 All E.R. 375 and *Wingrove v. Prestige & Co., Ltd.*, [1954] 1 All E.R. 576 considered and distinguished; *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper*, [1956] 2 All E.R. 722 applied).

C [For the Factories Act, 1937, s. 60, as amended, see 9 HALSBURY'S STATUTES (2nd Edn.) 1046.

For the Shipbuilding Regulations, 1931, preamble "Duties", reg. 10, see 8 HALSBURY'S STATUTORY INSTRUMENTS 142, 144.]

Cases referred to:

- D (1) *Donovan v. Cammell Laird & Co.*, [1949] 2 All E.R. 82; 2nd Digest Supp.
- (2) *Smith v. Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 2nd Digest Supp.
- (3) *Hartwell v. Grayson Rollo & Clover Docks, Ltd.*, [1947] K.B. 901; [1947] L.J.R. 1038; 2nd Digest Supp.
- (4) *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.
- E (5) *Hartley v. Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 3rd Digest Supp.
- (6) *Wingrove v. Prestige & Co., Ltd.*, [1954] 1 All E.R. 576; 3rd Digest Supp.
- (7) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 682; 79 L.T. 284; 24 Digest 911, 80.
- F (8) *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper*, [1956] 2 All E.R. 722.

Action.

This was an action for damages against the defendants for breach of statutory duty under the Shipbuilding Regulations, 1931, regs. 1, 10, 42 (b) and (c) and for negligence. The plaintiff, who was an able seaman serving as a yeoman carpenter, was employed by Canadian Pacific Steamships, Ltd., the defendants, in a ship, the Empress of Canada, which at the material time was in public dry dock undergoing its annual survey and overhaul. This work was being undertaken by general repairers and also by seventeen firms of specialist contractors all of whom, like the general repairers, were employed under direct contract with the defendants. The plaintiff was instructed by the defendants to remove the covering cement from the scuppers on F deck and the wood boards and burner from the bilge openings in the well, the scuppers and bilge openings having been covered in this manner because a cargo of grain had previously been carried in the hold. Most of the other holds in the ship had already been cleared by the plaintiff and an assistant carpenter in a similar manner before the ship had been moved into dry dock. F deck consisted of the flat steel tops of the port and starboard tunnels which contained the ship's propeller shafts. Between these two tunnels was an unprotected well about twelve feet deep which formed No. 5 lower hold. The edge of the top of the tunnels where they flanked the well was rounded in an arc of three-inch radius. To enable him to carry out his instructions the plaintiff required a light cluster because there was no lighting in that part of the ship. Normally light clusters were obtained from the ship's store but the plaintiff thought he would find one on F deck itself. He borrowed a torch from some plumbers working on F deck and with the assistance of one of them opened up the hatch covers on that deck sufficiently to admit a ladder and so enable him to

climb down to F deck. The torch provided perfectly adequate light and with torch in hand he descended the ladder to F deck but failed to find a cluster there. He then walked to the edge of the well in order to shine the torch down into the well to see if there was a cluster there. When he was about one and a half feet from the edge of the well his feet slipped and he fell into the well and injured his legs. The defendants by their defence pleaded that the regulations did not apply as in law the defendants were not the occupiers of the ship, or if the regulations did apply the plaintiff did not fall within the class of persons who was given a civil right of action as a result of a breach of the regulations. The case is reported on the breach of statutory duty, but there was a finding of contributory negligence and the amount and apportionment of damages is included at the end of the judgment.

Rose Heilbron, Q.C., and J. Tarsh for the plaintiff.

J. S. Watson, Q.C., and Melville Kennan for the defendants.

Cur. adv. vult.

June 27. **DIPLOCK, J.**, stated the facts and continued: In those circumstances the plaintiff now claims damages from his employers for breach of statutory duty under the Shipbuilding Regulations, 1931, and for common law negligence. The regulations on which he relied in the statement of claim were reg. 1, which relates to safe means of access, reg. 10, which deals with the protection of openings in decks and tank tops, and reg. 42 (a) and (b), which deal with the provision of efficient lighting. Reliance on reg. 1 (safe means of access) was abandoned, and in view of the plaintiff's own evidence that lighting had got nothing to do with his accident the breach of reg. 42 was not pressed. The statutory duty, therefore, turns on breach of reg. 10, the protection of openings in decks and tank tops. The common law negligence alleged in the statement of claim, apart from lighting which is no longer pressed, was based on the absence of stanchions and lifelines protecting the well from F deck.

I must deal first with the case as it rests on breach of statutory duty. Whether the plaintiff can succeed on this depends on the construction of the Shipbuilding Regulations, 1931. As long ago as 1949 **DEVLIN, J.**, in *Donovan v. Cammell Laird & Co.* (1) ([1949] 2 All E.R. 82), drew attention to the difficulties of these regulations and recommended that they should be re-drafted, with the assistance of somebody with some knowledge of the conditions under which work is done. That, **DEVLIN, J.**, thought, might result in more comprehensible regulations being drafted. Unfortunately that has not been done, and I am faced in my turn with the unenviable task of seeking to discover the meaning of these regulations.

The plaintiff puts his case in this way: The regulations throw duties on the occupier. "The occupier" is the occupier of the shipbuilding yard. That was decided by the House of Lords in *Smith v. Cammell Laird & Co., Ltd.* (2) ([1939] 4 All E.R. 381) but while the duty is placed *prima facie* on the occupier, there is a proviso to that obligation, which is in these terms:

"Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts 1 to 8 [of the regulations] and it shall be his duty to comply with the said parts, except as follows: . . . (b) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable."

A Then follows exception (c), which relates to lighting and with which I need not deal in the present circumstances. That the ship was in a public dry dock, that the well in F deck was an opening in the deck, and that the well was not securely protected or maintained in position, are matters which are not contested. The plaintiff says that the proviso applies because the ship was being repaired in a public dry dock, that the control of the ship apart from the work of repair
B remained with the shipowners, and that it was therefore the duty of the shipowners (the defendants) to provide the protection specified in reg. 10, because the well in F deck was not a hatch or opening required to be used for the purposes of the repair. That indeed also is common ground.

The defendants put forward two arguments in answer to that. The first logically, although the points were argued in the opposite order, is that the regulations did not apply at all. The second is that, if the regulations did apply,
C then the plaintiff did not fall within that class of persons to whom a civil right of action is given as a result of a breach of the regulations. I have to deal with those two arguments separately, and I will deal first with the contention that the regulations did not apply at all. The argument involves two steps. The first step is that where more than one person contracts with the owner of the ship to do the repairs in a ship in public dry dock there is no notional occupier under the proviso. The authority relied on for that proposition is the judgment of LORD OAKSEY, L.J., in *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3) ([1947] K.B. 901 at p. 912) and the judgment of DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (1) ([1949] 2 All E.R. at p. 87). That is the first step. The second step is that where there is no notional occupier under the proviso, then there is no liability on the shipowner under the exceptions to the proviso. The authority for that proposition is the judgment of DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (1) ([1949] 2 All E.R. at p. 89). Both those steps are essential to the defendants' argument on this branch of the case; if either of them fails this part
E of their argument breaks down.

As to the first step, viz., the proposition that where more than one person contracts with the owner of a ship to do repairs there is no notional occupier under the proviso, it is to be noted that there is no authority which is binding on me. Although LORD OAKSEY, L.J., expressed that view in *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3), BUCKNILL, L.J. ([1947] K.B. at p. 915), expressly refrained from expressing an opinion on this matter, and ROXBURGH, J. (ibid., at p. 917), took the same course, finding it unnecessary for the purpose of the decision in that case. DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (1), accepted and followed the reasoning of LORD OAKSEY, L.J., to which I have just referred. Such opinions are, of course, entitled to great respect although they may not be binding on me, and I have reached the same conclusion as LORD OAKSEY and DEVLIN, J. If one looks at the regulations one finds that the reference is to
F

H "the person who contracts with the owner of the ship or with his agent to execute the work of repair."

No doubt the words "the person" in the singular can, if the context so admits, by application of the Interpretation Act, 1889, s. 19, be understood as meaning "the persons", in which case presumably some joint liability could be put on
I all the persons in any way concerned in the repairs, but it seems to me on an examination of the Shipbuilding Regulations, 1931, that the context of these regulations does exclude that statutory rule of construction*.

* It may be noted that the Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), do not contain the common provision that the Interpretation Act, 1889, shall apply, and that s. 19 is expressed only as applying to an Act. There is a similar provision in s. 61 of the Law of Property Act, 1925, which extends to "orders and other instruments", but both provisions are excluded if a contrary intention appears, or the context otherwise requires. See, generally, 1 HALSBURY'S STATUTORY INSTRUMENTS 12, 13.

Had Harland & Wolff, for instance, been doing the general repairs and had the only other repairers been Messrs. Chubbs, repairing the locks of the store-room, I should have felt no difficulty in saying that Harland & Wolff were "the person" doing the repairs. Leaving aside, however, such a question of the *minimis non curat lex*, as I must in the present case having regard to the wide nature of the other repairs, it seems to me that when one looks at the regulations it cannot have been intended to put a joint liability on a number of different repairers. One has only to look, for instance, at reg. 1 relating to safe means of access, and at reg. 6, which requires all ladders to be of sound material. It would be odd indeed if one repairer who had no access to a part of the ship where another repairer was working—for example, to the refrigerating chambers—were to be responsible penally for the safety of the ladders provided by another repairer, over which he had no control. There are many other examples, viz., reg. 11 to reg. 17, relating to staging, and reg. 28, relating to oil tanks. Quite plainly it would be an absurd result if a repairer who had no work to do in relation to oil tanks and no right to go to the oil tanks were liable, and liable criminally, for the failure of someone over whom he had no control to comply with the regulations relating to oil. The fact of the matter is, as DEVLIN, J., pointed out, that the draftsman of the regulations appears to have proceeded on the assumption that in every case there would be one repairer, and other repairs would be done by sub-contractors to him. I accept the reasoning of LORD OAKSEY, L.J., and of DEVLIN, J., in the cases which I have cited, and I agree that where more than one person contracts with the owner of a ship to do the repairs there is no notional occupier under the proviso.

That is not sufficient for the defendants. In order to succeed on this part of the case they must satisfy me that the next step in the reasoning is correct, namely, that where there is no notional occupier under the proviso there is no liability on the shipowner under the exceptions. I turn back to the proviso to consider its true construction. Read literally it plainly imposes liability on the shipowner if two conditions are fulfilled. Those conditions are that the ship is being repaired in a public dry dock and that the control of the ship, apart from the work of repair, remains with the shipowner. Read literally therefore, since those conditions are fulfilled in the present case, the liability is placed on the shipowner by the proviso and exception (b) thereto; and in *Wilkinson v. Rea, Ltd.* (4) ([1941] 2 All E.R. 50), the Court of Appeal, having decided that there was no notional occupier because in that particular case only minor repairs were being carried out, unanimously held that the shipowner was under a liability under exception (c) to the proviso, which is in *pari materia* with exception (b).

In that case no argument was addressed to the Court of Appeal on the lines which were addressed to and commended themselves to DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (1). I am not sure whether it is open to me in the light of the decision in *Wilkinson v. Rea, Ltd.* (4) to refuse to follow *Donovan v. Cammell Laird & Co.* (1) on the basis that it was decided *per incuriam*, but in any event and with great hesitation I have come to a different conclusion from DEVLIN, J., on this point. I agree with what he says ([1949] 2 All E.R. at p. 87, letter G) in *Donovan v. Cammell Laird & Co.* (1) that the condition precedent to the provisos coming into operation is that a ship is being repaired in a public dry dock, and that there is not a further condition precedent that there must be a notional occupier. It was indeed on this basis that he there held that the occupier or the owner of the dry dock (the Mersey Docks and Harbour Board) had not had imposed on them a liability to comply with the regulations. If that be so then the proviso comes into operation in the present case, and if the proviso comes into operation *prima facie* the exceptions to the proviso, which are part of the proviso, come into operation too, and those exceptions impose expressly on the shipowner, in the circumstances when the control of the ship (apart from

A the work of repair) remains with him, the duty of providing the protection for hatches, openings in decks and tank tops.

DEVLIN, J., who expressed his own doubt on the matter in his judgment, took the view that he was entitled to depart from the literal meanings of the words, because he was satisfied from the construction of exception (b) that the regulations were drafted on the assumption that there must necessarily be a notional occupier
B when a ship is repaired in dry dock, and he pointed out that it would lead to odd results if there were no such occupier. He relied particularly on the division of responsibility between the shipowner and the occupier which exception (b) contemplates, since it places the liability on the shipowner only

“in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs”,
C and then the more important words

“but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable.”

D If there is no occupier, that exception cannot apply. It does not seem to me that there is a sufficiently compelling reason to make me depart from the literal meaning of the words. If the shipowner chooses to divide the responsibility for the repairs among a number of repairers so that there is no notional occupier under the regulations, it does not seem to me unreasonable that he should accept complete responsibility for the maintenance of the protection of the hatches and for the replacement of the covering when the repairs are completed. I therefore
E hold that the regulations did apply in the present case.

That does not complete the defendants' possible lines of defence, because there remains the second ground, that if the regulations did apply then the plaintiff did not fall into the category of persons on whom the regulations conferred a civil right of action. For that purpose the defendants rely on two cases: *Hartley v. Mayoh & Co.* (5) ([1954] 1 All E.R. 375), and *Wingrove v. Prestige & Co., Ltd.* (6) ([1954] 1 All E.R. 576). Those cases were decided within one month of one another, and SINGLETON and HODSON, L.JJ., were both members of the courts which dealt with them. The ratio decidendi of those two cases is quite different.
F In order to follow this argument it is necessary to look at the power under which the regulations were made. The regulations were originally made under s. 79 of the Factory and Workshop Act, 1901, which was in these terms:

“Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description
H of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.”

It is to be noted that that section refers to danger or injury to health or dangerous to life or limb generally. Section 60 of the Factories Act, 1937, continued
I the power in somewhat different terms, the relevant part of it reading as follows:

“Where the [Minister]* is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to the persons employed in connection therewith, or any class of those persons, he may, subject to the provisions

* The Minister of Labour and National Service, to whom the functions of the Secretary of State were transferred, see Transfer of Functions (Factories, etc., Acts) Order, 1946, art. 2; 5 HALSBURY'S STATUTORY INSTRUMENTS 49.

of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

The regulations were therefore after that date relating to the risk of bodily injury to persons employed in connection with the processes. That section was amended by the Factories Act, 1948, s. 12 (1) and Sch. 1, and the words "persons employed" were substituted for the words "persons employed in connection therewith."

That is the history of the legislation. It is always a question of construction whether an Act of Parliament or regulations made thereunder imposing penalties gives or give a right of action to a person injured as a result of a breach of the regulations (see *Groves v. Lord Wimborne* (7) ([1898] 2 Q.B. 402)). In *Hartley v. Mayoh & Co.* (5) the Court of Appeal applied the principle of that case to a claim by a fireman who was called to deal with a fire at a factory and was injured by a breach of the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 to 1907. They held that the regulations were intended for the benefit of persons employed and that the fireman did not fall within that protection. In *Wingrove v. Prestige & Co., Ltd.* (6), decided by the Court of Appeal a month afterwards, it was held that a clerk of the works employed on a building site by the owners of the site was not entitled to a right of action as a result of a breach of reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which relates to the provision of scaffolding and safe means of access.

Now if the clerk of the works, who was a person employed on the site although not employed by the occupier, had not fallen within the category of "persons employed" there was a very simple answer to the *Wingrove* case (6), which must have been strongly in the minds of SINGLETON and HODSON, L.JJ., because they had decided *Hartley v. Mayoh & Co.* (5) on that ground only a month before. *Wingrove v. Prestige & Co., Ltd.* (6) was not decided on that ground, however; it was decided on the assumption that the clerk of the works would have fallen within the protection of the regulations but for the construction of the particular regulation relied on, which it was held plainly referred and applied only to the persons employed by the building contractors. I can see no reason why in the case of reg. 10, which is perfectly general in its terms, I should exclude the plaintiff from the benefit of the regulation on the construction of the regulation itself, nor do I think that on the *Groves v. Lord Wimborne* (7) principle the plaintiff fell outside that category of persons to whom Parliament intended to give a right of action for breach of the regulations. It is plain that the restriction of that category of persons to those employed by the contractors is not one which I ought to accept as a matter of construction, and it seems to me that anyone who is employed in a place where the regulations apply, employed in the sense of its being his normal place, the place where it is his duty to work, and certainly to work regularly, is obviously covered by the expression "the persons employed". I am, of course, fortified in this view by the statutory change which was made in 1948, prior to which the words were "persons employed in connection therewith". The removal of those last three words "in connection therewith" must have been intended to extend the scope of the construction, and it is clear to me that it covers persons such as the plaintiff, a seaman employed on a ship on which repairs are taking place and who is as likely as anyone to suffer injury if regulations for the safety of persons there are not observed. It so happens that on the very day I reserved judgment the Divisional Court of the Queen's Bench Division in *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper* (8) ([1956] 2 All E.R. 722), expressed similar views as to the scope of the decision in *Hartley v. Mayoh & Co.* (5).

I find, therefore, that the plaintiff fell within the category of persons for whose protection the regulations were made. I accordingly find that the regulations apply and that there was a breach of the regulations. I am conscious that any

A matter which depends on the construction of the Shipbuilding Regulations, 1931, is one on which more than one view may well be held.

[HIS LORDSHIP considered the question of common law negligence and continued:] I am not satisfied that there was any breach of common law duty in the present case, and I hold the defendants liable for breach of statutory duty only. I also consider that the plaintiff was guilty of contributory negligence. Making the best estimate I can as to the blameworthiness of the two parties, I apportion the liability fifty-fifty between the plaintiff and the defendants. As to damages, the accident took place on Dec. 8, 1954. There is an agreed medical report. The plaintiff bruised one heel and had a relatively minor fracture in the other. As a result he was not confined to hospital at all. He had a plaster cast on his leg for four weeks and after that he had Elastoplast and for a time he had to use a crutch. He was capable of work at the beginning of July. The special damage has, however, been agreed on the basis that gives him another two months for rehabilitation. He is a man who made the most of his injuries and I think that the agreement on the special damage has been on a generous basis. It was a very minor leg injury and in the circumstances I assess the general damages at £120. There falls to be added to that the agreed special damages of £273 6s. 6d., making a total of £393 6s. 6d. Having regard to the apportionment of blame that entitles the plaintiff to judgment for £196 13s. 3d.

Judgment accordingly.

Solicitors: *Silverman & Livermore*, Liverpool (for the plaintiff); *Hill, Dickinson & Co.*, Liverpool (for the defendants).

[*Reported by K. BUCKLEY EDWARDS, Esq., Barrister-at-Law.*]

R. v. KEMP.

[BRISTOL ASSIZES (Devlin, J.), June 27, 1956.]

Criminal Law—Insanity—Defect of reason from disease of the mind—Accused unaware of nature and quality of his act—Temporary defect of reason caused by physical disease—Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2 (1).

If the act with which an accused is charged, and which would be a crime if the requisite intent were proved, was done by him at a time when he was unconscious of what he was doing, he is entitled at common law to be acquitted; but if he was insane at the time, within the rule laid down in *M'Naghten's Case** ((1843), 10 Cl. & Fin. at p. 210), and therefore is not criminally responsible for his act, he is entitled, by virtue of s. 2 (1)† of the Trial of Lunatics Act, 1883, only to a qualified acquittal, viz., the special verdict of guilty but insane.

The accused, an elderly man of excellent character who suffered from arteriosclerosis, struck his wife with a hammer and inflicted a grievous wound on her.* He was charged with causing grievous bodily harm to her. At the trial medical evidence was called by both the prosecution and the defence which showed that at the time when he did the act he did not know what he was doing. It was common ground that all the requirements of the rule laid down in *M'Naghten's Case* for the defence of insanity were satisfied save that it was in issue whether there was disease of the mind. One doctor gave as his opinion that the physical disease of arteriosclerosis induced a mental condition of melancholia as a result of which the accused committed the act; and that melancholia was a disease of the mind. Two other doctors, however, gave as their opinions that the disease had led to a congestion of blood in the accused's brain as a result of which he had suffered from

* The rule is stated at p. 252, letter G, post.

† The terms of the sub-section are printed at pp. 251, 252, post.

a temporary loss of consciousness which made him act irrationally and irresponsibly; but that there was not in the present case such a degeneration of the accused's brain cells as to amount to a disease of the mind. On the question whether there should be a special verdict of guilty but insane if the jury accepted the medical evidence first mentioned or an absolute acquittal if they accepted the medical evidence of the two doctors last mentioned,

Held: whichever medical opinion the jury accepted they would be bound to return the special verdict under s. 2 (1) of the Trial of Lunatics Act, 1883, since on either medical view it was established that the accused was labouring under a defect of reason within the rule laid down in *M'Naghten's Case* and that the defect was caused by a disease, arteriosclerosis, which was capable of affecting the mind and thus was a disease of the mind within the rule; it was immaterial whether the disease had a mental or physical origin or whether the defect of reason was temporary or permanent (see particularly p. 254, letters A to F, post).

[As to disease of the mind and insanity, see 10 HALSBURY'S LAWS (3rd Edn.) 287, para. 530; and for cases on the subject, see 14 DIGEST 56, 57, 229, 230.

For the Trial of Lunatics Act, 1883, s. 2 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 903.

For the Criminal Lunatics Act, 1800, s. 2, see *ibid.*, 593.]

Cases referred to:

- (1) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 14 Digest 56, 229.
- (2) *R. v. Charlson*, [1955] 1 All E.R. 859; 119 J.P. 283; 3rd Digest Supp.

Trial.

The accused was charged with causing grievous bodily harm to his wife by striking her with a hammer. It was accepted that at the time of the act the accused was suffering from arteriosclerosis and that he did not know what he was doing—that he did not know the nature and quality of his act. One doctor, called by the prosecution, gave as his opinion that this was due to melancholia, a disease of the mind, which was induced by the disease of arteriosclerosis. Two other doctors, one called by the prosecution and the other by the defence, gave as their opinions that whereas arteriosclerosis can cause degeneration of the brain cells which would in time amount to disease of the mind, in the present case that stage had not been reached, and that at the time when he committed the act the accused suffered from a congestion of blood in the brain (due to the arteriosclerosis) which caused a temporary loss of consciousness as a result of which he acted irrationally and irresponsibly. It was therefore submitted by the defence that although the accused did not know the nature and quality of his act, he was not suffering from a disease of the mind and was not, therefore, insane within the test laid down in *M'Naghten's Case* (1) ((1843), 10 Cl. & Fin. 200).

Michael Lee for the prosecution.

N. J. Skelhorn, Q.C., and *K. H. Bain* for the defence.

DEVLIN, J.: It is apparent in the present case that when I come to charge the jury it will be necessary for me to direct them as a matter of law on what I take to be the true meaning and effect of the rules in *M'Naghten's Case* (1) ((1843), 10 Cl. & Fin. 200), as to which I have heard divergent arguments from counsel for the prosecution and the defence. It is convenient, having heard those arguments, that I should state now what my ruling is going to be and give my reasons for it, so that when counsel come to address the jury they will know what is the law as I have declared it to be.

The facts of the case in relation to which this point has to be considered are that the accused, who is charged with causing grievous bodily harm to his wife, struck her during the night with a hammer with such violence as to inflict a

A grievous wound. The accused is an elderly man of excellent character and he and his wife have always been thought to be a devoted couple, and it seems that there is strong evidence to show that the act was entirely motiveless and irrational. I say strong evidence, even though that is a matter which the jury will have in due course to decide, and for the purpose of my ruling I assume that the act was committed, as all the doctors think it was, while the accused was in a mental condition which made him not responsible for his actions. The three doctors are agreed that he did the act, as he says he did, not knowing anything about it and not having any real memory of it. It is not merely a question of his striking his wife when in some mental derangement, not appreciating that what he was doing was wrong, but in the view of all three doctors it is a case in which the accused was not conscious that he picked up the hammer or that he was striking his wife with it. In those circumstances if the presumption that a man is sane continues to govern the case and if the jury accept the evidence to which I have referred, they would have to return a verdict of not guilty on the basis that the man was not responsible for his acts and did not know what he was doing and therefore could not have had the necessary guilty intent. That, indeed, was what happened in *R. v. Charlson* (2) ([1955] 1 All E.R. 859) where the facts were somewhat similar. In that case the doctors were apparently agreed that the accused was not suffering from any disease of the mind which would render him insane at the time of the commission of the acts. The present case is in my judgment entirely different, because here the doctors are not so agreed and the whole question that I have to determine, which was not considered in that case, is what is meant by "disease of the mind" within the meaning of the M'Naghten rules?

So far as common law principles are concerned that question would have been entirely irrelevant and would not, indeed, have arisen at all. In the eyes of the common law if a man is not responsible for his actions he is entitled to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or to any other cause. That position in common law was altered by statute. The Trial of Lunatics Act, 1883, which I now have to consider, introduces what I think is best called a qualified form of acquittal as distinguished from the absolute acquittal, which is all that is known in common law, an acquittal which is expressed in the verdict of guilty but insane, which has been held to be a verdict of acquittal and to mean in effect not guilty because he is insane*. As a result of that qualified verdict the accused is detained in strict custody until Her Majesty's pleasure be known and he is sent to some institution where his mental state can be assessed and considered; in the case of an absolute acquittal the prisoner, of course, is entitled to be discharged. The object of the Act, no doubt, was that people who committed crimes of violence, even though they were not responsible for their actions, ought not to be allowed to go free because they might commit an act of violence again, but ought to be kept in custody until their position should be determined. It is, therefore, that Act which makes a dividing line, as it were, between those sorts of lack of responsibility which would give rise to a complete acquittal, such for example as complete drunkenness, and those other sorts that fall within the terms of the Act permitting only the qualified form of acquittal to which I have referred. The distinction is an arbitrary one and the line between the verdicts is one which is drawn by statute. My duty is to give effect to the statute and to decide into which category the present case falls.

The Trial of Lunatics Act, 1883, s. 2 (1), provides:

"Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible,

* See *Felstead v. R.*, [1914] A.C. 534; 10 HALSBURY'S LAWS (3rd Edn.) 289, para. 534, note (b).

according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

The material words are:

"... it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done ..."

Insanity is not a legal term and there is no such thing as a legal definition of insanity. This Act is concerned with responsibility more than with insanity, and I think that it is useful to note that in the similar provision in relation to unfitness to plead, insanity is given a very wide meaning indeed. Section 2 of the Criminal Lunatics Act, 1800, reads:

"... if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment ... it shall be lawful for the court before whom any such person shall be brought to be arraigned ... as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody ..."

The Act follows the same pattern as the one which I have to consider. One Act deals with insanity where the accused cannot be tried and the other with such insanity that he cannot be held responsible for his acts. In the case of the Act of 1800 it has been held that a deaf and dumb person is not fit to plead and has to be regarded as insane for the purposes of the Act. That shows that the Act of 1883 is concerned with responsibility rather than any definition of insanity; it predicates that it is given in evidence of the accused that he is insane, "so as not to be responsible, according to law, for his actions". The test of responsibility, according to the law was laid down in *M'Naghten's Case* (1) (10 Cl. & Fin. at p. 210), in the following now familiar words:

"... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

In the present case it is conceded that everything in that definition is satisfied except for the condition "disease of the mind". It is conceded for the purposes of this argument that the accused was labouring under a defect of reasoning; it is conceded also that he did not know the nature and quality of the act he was doing; it is conceded also that there was something wrong with his mind; but it is submitted that there was no disease of the mind and that what he did was simply due to the condition of his mind, not amounting to a disease, and that therefore he is not within the rule in *M'Naghten's Case* (1). If that is so, then he is entitled to be tried on the assumption that he is sane and if the responsibility of his act is not proved by the prosecution he is entitled to be returned a verdict of not guilty. It is common ground on the evidence that the accused was suffering from a physical disease, namely, arteriosclerosis, or hardening of the arteries. It had not reached the stage at which the accused was showing any general sign of mental trouble. Apart from a depression, not an irrational depression, produced by his poor state of health, there were no signs at all of mental trouble, and that would appear to be his physical state. How, therefore, did he get into a condition of unconsciousness or clouded irresponsibility when

A he committed this act? [His LORDSHIP discussed the medical evidence and continued:] According to the evidence there is no general medical opinion on what category of diseases are properly to be called diseases of the mind. The doctors have expressed their views, but they have expressed their views as personal views and not views for which they can call in aid any general body of medical opinion.

B The broad submission that was made to me on behalf of the defence was that this is a physical disease and not a mental disease, that arteriosclerosis is primarily a physical not a mental condition; but that argument does not go so far as to suggest that for this purpose those diseases that affect the mind can be strictly divided into those that are physical in origin and those that are mental in origin. That there is such a distinction is clear from the evidence. I should think that

C it would probably be recognised by medical men that there are mental diseases which have an organic cause; that there are disturbances of the brain which can be traced to some hardening of the arteries, to some degeneration of the brain cells or to some physical condition which accounts for mental derangement. It would probably be recognised that there are diseases functional in origin about which it is not possible to point to any physical cause but simply to say

D that there has been a mental derangement of the functioning of the mind, such as melancholia, schizophrenia and many other of those diseases which are primarily handled by psychiatrists, but that distinction is rightly not pressed as part of the argument for the defence in the present case. The distinction between the two categories is irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it but simply with the

E mental condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect of reasoning is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there.

F The distinction that emerges from the evidence of the doctor called by the defence, and which has been argued by counsel for the defence, is different. It is that arteriosclerosis is something which is capable, as I understand it, of becoming a mental disease but in the present case has not yet become one. It has not yet created any degeneration of the brain and the argument is that it is merely interfering temporarily with the working of the brain by cutting off the supply of blood in the same way as concussion might. The test, therefore, that

G I am invited to apply is to say that this disease at this stage is purely physical; when it interferes with the brain cells so that they degenerate it then becomes a disease of the mind. There again I should think that that is a very difficult and complicated principle to apply for the purposes of the law. I should think that it would be a matter of some difficulty medically to determine precisely at what point degeneration of the brain sets in and it would mean that the verdict

H depended on the medical evidence. It is the effect which is produced on the mind and not the precise cause of producing it which is relevant. Moreover, the Trial of Lunatics Act, 1883, is not in any way concerned with the brain but with the mind, in the sense that the term is ordinarily used when speaking of the mental faculties of reasoning, memory and understanding, particularly in the present case the faculties of reasoning and understanding. If one read for

I "disease of the mind" "disease of the brain" it would follow that in many cases pleas of insanity would not be established because it would not be established that the brain had been affected either by degeneration of the cells or in any other way. In my judgment the condition of the brain is irrelevant and so is the question whether the disease is curable or incurable, or whether it is temporary or permanent. There is no warranty for introducing those considerations into the definition of the M'Naghten rules. Either temporary or permanent insanity is sufficient to satisfy them.

I therefore accept the argument of counsel for the prosecution. He stresses the order of the words [i.e., in the rule stated in *M'Naghten's Case* (1)] that I have to apply, namely:

" . . . the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing."

It is not labouring under a disease of the mind which produces the defect of reasoning, but the paramount thing that has to be looked for is the defect of reasoning. The prime thing is to determine what is admitted in the present case, namely, whether or not there is a defect of reasoning, and in my judgment the words "from disease of the mind" are not to be construed as if they were put in for the purposes of distinguishing between diseases of the mind and diseases of the body, diseases which had mental or physical origin, but they were put in primarily for the purpose of limiting the effect of the words "defect of reason". A defect of reason is by itself normally enough to make the act irrational and therefore to deny responsibility in law, but it was not intended by that rule that it should apply to defects of reason which were caused simply by brutish stupidity without rational power. It was not intended that the law should say of a person: "Although with a healthy mind he nevertheless had been brought up in such a way that he had never learned to exercise his reason, and therefore he is suffering from a defect of reason". The main object, in my judgment, was that it should be decided whether there was a defect of reason which had been caused by a disease affecting the mind; if it were so decided, then there would be insanity within the meaning of the rule in *M'Naghten's Case* (1). The hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and understanding, and is thus a disease of the mind within the meaning of the rule. I shall therefore direct the jury that it matters not whether they accept the medical evidence of the prosecution or the defence, but that on the whole of the medical evidence they ought to find that there is a disease of the mind within the meaning of the rule.

[After the jury had heard speeches of counsel and the summing-up they returned a verdict of guilty but insane. DEVLIN, J., then ordered the accused to be kept in strict custody until Her Majesty's pleasure should be known.]

Order accordingly.

Solicitors: *Director of Public Prosecutions; Farnfield & Nicholls, Warminster* (for the defence).

[*Reported by* CONRAD OLDHAM, ESQ., *Barrister-at-Law.*]

A

BOULTON v. BOULTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), July 16, 1956.]

B

Justices—Husband and wife—Maintenance order—Enforcement of order—Appeal—Case Stated—Jurisdiction of Divorce Divisional Court—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 87 (1), (2)—R.S.C., Ord. 59, r. 29 (2).

C

An appeal against any order or determination by justices in regard to the enforcement of an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, lies to a Divisional Court of the Probate, Divorce and Admiralty Division by way of Case Stated and not by notice of motion.

D

In 1924 the wife obtained an order under the legislation then in force (now the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949). In 1954 the amount payable by the husband under that order was increased to £5 a week. The husband was in arrear with his payments and the wife applied to the justices to enforce the order as varied. The justices dismissed the application and the wife appealed to the Divorce Divisional Court by notice of motion pursuant to r. 71 (2) of the Matrimonial Causes Rules, 1950. Her appeal was not made within the fourteen days limited by s. 87 (2) of the Magistrates' Courts Act, 1952, for cases stated under s. 87. On a preliminary objection by the husband that the appeal lay only by way of Case Stated and not by notice of motion,

E

Held: the objection succeeded since although the introduction of R.S.C., Ord. 59, r. 29 (2) transferred from the Queen's Bench to the Divorce Division jurisdiction to hear appeals against orders or determinations by justices relating to the enforcement of maintenance orders, it did not alter the method of appealing, viz., by way of Case Stated under the Magistrates' Courts Act, 1952, s. 87.

F

Ruther v. Ruther ([1903] 2 K.B. 270) applied; *R. v. Miskin Lower JJ., Ex p. Young* ([1953] 1 All E.R. 495) considered.

[As to appeals from decisions relating to enforcement of maintenance orders, see 12 HALSBURY'S LAWS (3rd Edn.) 509, para. 1115, notes (g), (h); and for cases on the subject, see 27 Digest (Repl.) 730, 6970-6973.

G

For the Magistrates' Courts Act, 1952, s. 87, see 32 HALSBURY'S STATUTES (2nd Edn.) 488.]

Cases referred to:

H

- (1) *R. v. Miskin Lower JJ., Ex p. Young*, [1953] 1 All E.R. 495; [1953] 1 Q.B. 533; 117 J.P. 166; 3rd Digest Supp.
- (2) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest (Repl.) 724, 6922.
- (3) *Adams v. Adams*, [1914] P. 155; 83 L.J.P. 151; 111 L.T. 414; 27 Digest (Repl.) 730, 6972.

Appeal.

The wife appealed against an order of the Pirehill North justices sitting at Newcastle-under-Lyme dated Feb. 17, 1956. On June 30, 1924, an order was made in the wife's favour under the Married Women (Maintenance) Acts, 1895 and 1920 (now the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949). On Sept. 16, 1954, the order was varied by increasing to £5 a week the sum payable by the husband thereunder as maintenance. The husband was in arrears and the wife applied by way of complaint to the justices to enforce the order as varied. On Feb. 17, 1956, the justices dismissed her application and she now appealed.

I

P. L. W. Owen and *E. C. B. Hammond* for the wife.

I. B. Fife for the husband.

LORD MERRIMAN, P.: Counsel for the husband with great clarity and force has raised the preliminary point that the whole of the present appeal is misconceived. It is an ordinary appeal by notice of motion under the Matrimonial Causes Rules, 1950, r. 71, which governs appeals to this court under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. He submits that this is a misconception, because, although undoubtedly the appeal now lies to this court, it only lies by way of case stated. The wife's application was dismissed by the justices on Feb. 17, 1956, and as there is a statutory time limit* in connection with cases stated which expired fourteen days after Feb. 17, 1956, manifestly that is a very serious matter from the wife's point of view. However, the point must be faced. It is common ground that there has been a recent change in connection with appeals against an order, either dismissing or granting an application to enforce a maintenance order made under the Summary Jurisdiction (Married Women) Act, 1895, as amended by various statutes down to and including the Married Women (Maintenance) Act, 1949, and now, incidentally, by the Magistrates' Courts Act, 1952, itself.

Until *R. v. Miskin Lower JJ., Ex p. Young* (1) ([1953] 1 All E.R. 495), appeals from any order concerning the enforcement of maintenance orders had to go by case stated to the Queen's Bench Division. That resulted from *Ruther v. Ruther* (2) ([1903] 2 K.B. 270), which, to read one sentence only from the headnote, decided this:

"The decision of a court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under [the Summary Jurisdiction (Married Women) Act, 1895] are in arrear, is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division; but the court has power to state a case for the opinion of the King's Bench Division upon a point of law arising on the information."

That was followed, with evident reluctance, by a Divisional Court of this Division in *Adams v. Adams* (3) ([1914] P. 155), where, as far as one can judge from a very short report, the very procedure which has been adopted here was attempted, and was rejected for the reason that the King's Bench Division had already decided in *Ruther v. Ruther* (2) that the only method of testing the validity of an order for enforcement was by way of case stated to them. The matter came up again in *R. v. Miskin Lower JJ., Ex p. Young* (1) and, without going into further detail of that case or into the reasoning of the judgment of PEARSON, J., which was the leading judgment on the point chiefly at issue in that case, LORD GODDARD, C.J., at the conclusion of his judgment agreeing with the judgment of PEARSON, J., said ([1953] 1 All E.R. at p. 502):

"The proceedings in this case took the form of an application for mandamus, but I have no doubt the matter could be raised by way of Special Case, and I think it would be most desirable if all appeals relating to matters under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, were brought to the Probate, Divorce and Admiralty Division. In *Ruther v. Ruther* (2) it was held that a Special Case arising out of an application to commit for arrears lay to this Division and not to the Probate, Divorce and Admiralty Division, but, if I may say so, the reasons given do not appear to be wholly satisfactory, and evidently the Divisional Court of the Probate, Divorce and Admiralty Division which heard *Adams v. Adams* (3) did not regard the decision with favour. If the practice could be changed by rule or by an order of the Lord Chancellor under s. 57 of the Supreme Court of Judicature (Consolidation) Act, 1925, it would, I think, be a desirable alteration."

* See the Magistrates' Courts Act, 1952, s. 87 (2): 32 HALSBURY'S STATUTES (2nd Edn.) 489.

A The allusion to s. 57* is to the power of the Lord Chancellor to alter the distribution of business which is laid down in s. 56, and need not be further referred to.

What was done was to adopt the rule-making procedure, and by R.S.C. (No. 1), 1953†, two new paragraphs were added to R.S.C., Ord. 59, r. 29. R.S.C., Ord. 59, r. 29 (1) was left as it stood, namely:

B “Subject as hereinafter provided, all appeals from a court of quarter sessions or from justices by way of case stated and all cases stated by a court of quarter sessions under s. 11 of the Quarter Sessions Act, 1849, shall be heard by a Divisional Court of the Queen’s Bench Division.”

C That sub-rule still stands, and it is worth noticing that the method of appeal by way of case stated is expressly mentioned. The two sub-rules which were added are as follows, so far as relevant:

D “(2) Appeals against any order or determination by justices in regard to the enforcement of—(a) an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, or (b) an order for the payment of money to a wife for her maintenance, or for her maintenance and that of any child or children of hers, which has been confirmed or registered in England or Wales under the Maintenance Orders (Facilities for Enforcement) Act, 1920, or the Maintenance Orders Act, 1950, shall be heard by a Divisional Court of the Probate, Divorce and Admiralty Division.”

E If I were under cross-examination as an ex officio member of the Supreme Court Rules Committee‡, and as the promoter, or at any rate the mouthpiece, of that particular amendment, I should have said without hesitation that I thought that we had obviously brought that procedure under the Matrimonial Causes Rules, 1950, r. 71 (1) and (2), and enabled ourselves to hear the present appeal, duly put before us by notice of motion in the usual way.

F Counsel for the husband, however, has submitted with great force that that was not in the least what we were doing; but that we were transferring to this court the power, indeed the duty, to hear cases stated under s. 87 of the Magistrates’ Courts Act, 1952, which, as he submits, is the only method of appeal provided in such cases, and that we were relieving the Queen’s Bench Division of deciding whether or not in any given case there has, for example, been a resumption of cohabitation or conduct conducing to adultery. It is a formidable argument, and it has the support of the learned editors not only of STONE’S JUSTICES’ MANUAL (88th Edn.) at p. 1155, note (n), but also of 12 HALSBURY’S LAWS (3rd Edn.) at pp. 508, 509, under the title “Divorce Appeals from Magistrates’ Courts.” It is right to point out that nothing in the judgment of LORD GODDARD, C.J., in *R. v. Miskin Lower JJ.* (1) which I have already quoted suggests anything except the transfer itself. It does not say one way or the other whether the procedure by way of ordinary appeal, if I may so call it, by way of notice of motion, would be better or more convenient. There is no reference to that particular point at all. It is also plain that there is no inherent difficulty in our dealing with the matter by way of case stated. It is not our usual method of procedure, but there is no reason why it should not be adopted, and it will work, as I see it, in this way: If this is not an appeal in the ordinary way from an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, then in terms, I r. 71 of the Rules of 1950 does not apply. If it does not apply, then the Rules of the Supreme Court do apply¶, and I think that one must recognise that the

* See 18 HALSBURY’S STATUTES (2nd Edn.) 492.

† S.I. 1953 No. 985.

‡ See Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (4); 18 HALSBURY’S STATUTES (2nd Edn.) 512.

¶ See Matrimonial Causes Rules, 1950, r. 80; 10 HALSBURY’S STATUTORY INSTRUMENTS 236.

underlying point of the decision in *Ruther v. Ruther* (2) and those cases which have followed and approved it, with modified or restrained approval, does go on the basis that the order for enforcement is not one made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but is an order made under the affiliation code. A

One other point tends to support the preliminary point. I have read R.S.C., Ord. 59, r. 29 (2), but sub-r. (3) is not without importance. That reads: B

“ If, before the hearing of any such appeal as is mentioned in the last foregoing paragraph [that is, an appeal against any order or determination by justices in regard inter alia to the enforcement of an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949] there has been entered for hearing an appeal against an order or determination by justices in regard to the enforcement of an order made under s. 3 (2) of the Guardianship of Infants Act, 1925, and the parties to such appeal are the same as the parties to the first-mentioned appeal, a Divisional Court of the Probate, Divorce and Admiralty Division shall have jurisdiction to hear both appeals.” C

I am not suggesting that that is conclusive, but bearing in mind that an order for maintenance appended to a guardianship order is itself enforceable as an affiliation order, and, therefore, would in the ordinary course of things go on appeal by way of case stated to the Queen's Bench Division, the provision that in the case of two concurrent appeals between the same husband and the same wife as regards the enforcement of a maintenance order proper and a guardianship order which includes maintenance shall both be tried in this court, does suggest that the two things were regarded as being in the same category. Of course, it would not be impossible to hear both the appeal and a guardianship appeal by way of case stated simultaneously, though different considerations, no doubt, would apply to the one appeal and to the other; but the difficulties would not be insuperable. Nevertheless, I think that that sub-rule does suggest that what was really being dealt with was the transfer of appeals, by way of case stated, from the Queen's Bench Division to this court. D

In conclusion I wish to say that a decision on this type of preliminary point is to my mind the most distasteful decision which a judge has to give, and if I felt that we could rightly go the other way, and say that the present appeal was in order, nobody would have been more delighted than I. And I go a step further; if the Court of Appeal think that transference of the appeal, as such, to this Division, enables us to apply our ordinary rules and to hear it by way of notice of motion, I should be happier still. For the moment, however, I have no option but to say that this preliminary point succeeds. E F

COLLINGWOOD, J.: I agree, and in doing so I share the regret which has been expressed by LORD MERRIMAN, P. G

It is a wife's appeal against the dismissal of her application to enforce a maintenance order, and on the authorities to which my Lord has referred, *Ruther v. Ruther* (2) ([1903] 2 K.B. 270), *Adams v. Adams* (3) ([1914] P. 155) and *R. v. Miskin Lower JJ., Ex p. Young* (1) ([1953] 1 All E.R. 495), it is clear that the right of appeal is not under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895, but that it comes under s. 87 of the Magistrates' Courts Act, 1952, that is to say that it is limited to the procedure of appeal by way of case stated, and consequently the time allowed for that appeal is limited by s. 87 (2) to fourteen days. It is true that since R.S.C. (No. 1), 1953, which added sub-rr. (2) and (3) to R.S.C., Ord. 59, r. 29, the necessity for bringing such an appeal before the Queen's Bench Division has ceased, and the matter can and will now be dealt with in this Division. As LORD MERRIMAN, P., has said, however, there is nothing in those sub-rules which changes the method of appeal; H I

A all that is changed is the Division before which the appeal is heard. I agree, therefore, that this preliminary objection succeeds. *Order accordingly.*

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Bellyse & Eric Smith*, Nantwich, Cheshire (for the wife); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Sproston, Slaney & Swann*, Newcastle-under-Lyme (for the husband).

B [Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re MORTON (deceased). MORTON v. WARHAM AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), July 26, 1956.]

C *Administration of Estates—Partial intestacy—Hotchpot—“Any beneficial interest acquired by any issue of the deceased under the will of the deceased” —Accruer of share of residue—Trusts of accrued share void after successive life interests to testator’s son and son’s son—At what value successive life interests brought into hotchpot—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 49 (a), s. 47 (1) (iii).*

D Under the will of a testator who died in 1927 his residuary estate was held in trust to be divided into three parts on the death of his widow. In the events which happened one half of one of the third shares became held by virtue of an accruer clause on the trusts of another one-third share, viz., for the testator’s son and the son’s son successively for life and thereafter passed, as subsequent trusts declared by the will infringed the rule against perpetuities, as on a partial intestacy of the testator. On the question whether in calculating the amounts to be taken by the testator’s issue on his partial intestacy they ought to bring into hotchpot the value of the interests taken by them under his will,

E **Held:** (i) under s. 49 (a) of the Administration of Estates Act, 1925, issue of the testator taking on his partial intestacy, must bring into hotchpot whatever they took under his will whether an absolute interest or a life or other lesser interest.

F (ii) under s. 47 (1) (iii) life interests of the testator’s son and grandson, which had to be brought into hotchpot, must be brought in at actuarial valuations appropriate to life interests, and should not be brought in as if they were equivalent to an absolute interest in capital.

G *Re Young* ([1950] 2 All E.R. 1040) distinguished; *Re Gordon* ([1942] 1 All E.R. 59) applied.

[For the Administration of Estates Act, 1925, s. 47 (1) (iii), s. 49, see 9 HALSBURY’S STATUTES (2nd Edn.) 754, 757.]

Cases referred to:

- H (1) *Re Young, Young v. Young*, [1950] 2 All E.R. 1040; [1951] Ch. 185; 2nd Digest Supp.
 (2) *Re Gordon, Public Trustee v. Bland*, [1942] 1 All E.R. 59; [1942] Ch. 131; 111 L.J.Ch. 114; 166 L.T. 102; 2nd Digest Supp.
 (3) *Re Reeve, Reeve v. Reeve*, [1935] Ch. 110; 104 L.J.Ch. 101; 152 L.T. 254; Digest Supp.

Adjourned Summons.

I The plaintiff applied by originating summons for a determination of certain questions including the question whether in calculating the amounts to be taken by the testator’s children on a partial intestacy, each child ought to bring into hotchpot the value of the interest actually taken by such child or his or her issue under the will of the deceased.

The facts appear in the judgment.

M. Browne for the plaintiff.

N. S. S. Warren for the first defendant.

D. A. Thomas for the second defendant.

DANCKWERTS, J.: I have to construe, in the originating summons now before me, the will dated Feb. 20, 1924, of John Morton, who died on May 15, 1927. I am concerned only with the residuary bequest. He devised his residuary estate on the usual trust for conversion, and then directed his residuary estate to be held on trust (a) to pay the income thereof to his wife during her life and after her death (b) to divide his residuary estate into three equal portions and to pay the income of one third share to his daughter Florence Daisy Carter,

“during her life and from and after her death to pay and divide the capital of such one third share unto and equally between all her children.”

(Although Florence had a child, the child predeceased the testator and, therefore, Florence died without any children and the gift over to the children did not take effect.) As to another one third share to pay the income thereof to his daughter Edith Harriet Hutton

“during her life and from and after her death to pay and divide the capital of such one third share unto and equally between her children.”

Mrs. Hutton had one child that is alive, and so the trusts of her share take effect in that way. As to a further one third share to pay the income to his son Lewis John Morton

“during his life and after his death to pay the income of such one third share to his children in equal shares and from and after the death of each child of [his son Lewis John] to pay the capital of the share to which his her or their parent was or were entitled unto the grandchildren of [his son Lewis John] in equal shares.”

It is agreed that those last trusts in favour of grandchildren fail under the rule against perpetuities. Then there is a proviso:

“Provided always that if either of my said daughters shall die without leaving issue who shall attain a vested interest under the trusts aforesaid then the share of the one so dying shall be held in trust for my other daughter and my said son Lewis John and his issue upon the like trusts as are hereinbefore declared concerning the original share of such son and daughter.”

The result of that is that Mrs. Carter's share, as to one half, goes over to Mrs. Hutton and her child, but as to the other half, which would go over to Lewis John and his child, who is the plaintiff Eric Geoffrey Morton, the trusts in favour of grandchildren will fail, with the result that Lewis John and Eric Geoffrey Morton will take successive life interests and after that the trusts of the accruing share, like the trusts of the original share, will be void under the rule against perpetuities.

Consequently, there is a partial intestacy; and the question with which I have to deal is a tiresome and irritating subject, hotchpot. For some reason which is difficult to fathom, presumably with some idea of producing fairness, the draftsmen of the Administration of Estates Act, 1925, introduced hotchpot provisions into the sections dealing with intestacy. It seems to me that they made a great mistake in doing that and that it would have been far better to have left out the provisions. The provisions which I have to apply in the Act are these:

“49. Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:—(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons.”

I think that that is as bad a piece of draftsmanship as one could conceive in many respects. It says “the requirements”. What requirements? I am told the requirements are to be found in s. 47 (1) (iii). There one finds certain provisions

A which are not by themselves particularly apt for application to something else. They are as follows:

B “Where the property held on the statutory trusts for issue is divisible into shares, then any money or property [that is, supposedly, a reference to money or property as a physical or tangible fact and not to an interest in money or property] which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child . . .”

All that is referring to something which is paid or handed over. Then comes a parenthesis which entirely alters the sense in which the words are being used:

C “(including any life or less interest and including property covenanted to be paid or settled) . . .”

In that very parenthesis there is a mixture of property in the sense of some thing and property in the sense of some interest in some thing. The “life or less interest” must, of course, refer to an interest in property, and not property itself:

D “. . . shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives.”

E If those two sections in the Administration of Estates Act, 1925, apply to this case, whatever is taken by the persons taking on intestacy, being issue of the deceased, under the will of the deceased, has to be brought into account. The provisions of s. 49 are much more general in certain respects than the provisions of s. 47. Section 47 is confined, in the clause which I have read, to children; it seems plain, however, that s. 49 (a) applies to issue of any degree and it applies apparently to any beneficial interest acquired by any issue of the deceased under the will of the deceased. The result appears to be that people who take in the present case under the partial intestacy of John Morton must bring into account, against any shares which they take in that way, the beneficial interests of any kind which they take under the provisions of the will; and it seems plain, if s. 47 must be read as part of s. 49, there must be included something less than an absolute interest, that is to say, any life or less interest. Consequently, the life interest taken by those who do not take an absolute interest under the will will have to be accounted for under the provisions of s. 49 in a division of the testator's estate on intestacy.

H The question is: How are those life interests or lesser interests, if there be any, to be dealt with? I have been referred to *Re Young, Young v. Young* (1) ([1950] 2 All E.R. 1040) in which HARMAN, J., took the view that s. 49 was meant to produce a stirpital division and treated the gift* as a gift of the capital of the interest in which the father and children in that case had successive interests and directed that the whole capital be brought into account, and to *Re Gordon, Public Trustee v. Bland* (2) ([1942] 1 All E.R. 59), a case before UTHWATT, J., where life interests had to be brought in under the provisions of an express provision for hotchpot, and to that extent, of course, a different case from the present. I have also been referred to *Re Reeve, Reeve v. Reeve* (3) ([1935] Ch. 110), a decision of CLAUSON, J., which does not deal relevantly with the matter under consideration in the present case. It seems to me, reading s. 47 with such application as I can give to it, that the interests which are brought in, which are life interests or less interests and are to be at a valuation, must be brought in at a valuation appropriate to the nature of the interest and cannot be brought in as if they

* See [1950] 2 All E.R. at p. 1043.

were equivalent to an absolute interest in the capital. Thus the interest of the beneficiary for life should be valued according to the actuarial considerations which are relevant to a life interest. To value the interest as being equivalent to a gift of capital in a case where a person takes no more than a life interest seems to me contrary to fairness and common sense. Accordingly, I so hold.

Declaration accordingly.

Solicitors: *Gibson & Weldon*, agents for *L. G. Powell*, Kendal (for the plaintiff); *Beardall, Fenton & Co.* (for the first defendant); *Denton, Hall & Burgin*, agents for *Charles G. Lester & Russell*, Bournemouth (for the second defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

MCKENNA AND ANOTHER v. PORTER MOTORS, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Tucker, Lord Cohen and Lord Somervell of Harrow), July 9, 10, 26, 1956.]

Privy Council—New Zealand—Landlord and tenant—Recovery of possession—Premises reasonably required by landlord for his own “occupation”—Intention to demolish and reconstruct premises—Tenancy Act, 1948 (New Zealand) (No. 76 of 1948), s. 24 (1) (h), (m).

Since 1926 the appellants had been lessees of premises consisting of a private hotel. In 1941 the respondents bought the reversion of the premises, intending to demolish the hotel and build a garage for the purposes of their business as soon as they could get possession and obtain the necessary licences. The appellants' lease expired in 1944, and thereafter they continued in occupation as yearly tenants under an agreement with the respondents, dated Aug. 29, 1944. By the New Zealand Tenancy Act, 1948, s. 24 (1) (h)*, a landlord could recover possession of any urban property on the ground that the premises were reasonably required for his own occupation, and, under s. 24 (1) (m), he could recover possession on the ground that the premises were reasonably required by him for demolition or reconstruction. By s. 25 of the same Act, if a year's notice to quit had been given, then an order might be made under s. 24 (1) (h), although no offer of alternative accommodation had been made by the landlord; an order could not, however, be made under s. 24 (1) (m) unless alternative accommodation were offered. In September, 1951, the respondents served on the appellants the requisite notice under s. 25. The respondents made no offer of alternative accommodation. In 1953 they claimed possession of the premises relying on s. 24 (1) (h). The appellants contended that there must be an intention to occupy the hotel in order to satisfy s. 24 (1) (h), and that this intention was absent since the respondents intended to demolish the hotel, and that a landlord who intended to demolish must proceed under s. 24 (1) (m) not s. 24 (1) (h).

Held: the respondents were entitled to an order for possession under s. 24 (1) (h), and a landlord who intended to demolish premises was not confined to proceeding under s. 24 (1) (m) since the words “his . . . own occupation” in s. 24 (1) (h) so limited the operation of s. 24 (1) (m) that it only applied where the landlord required the premises for reconstruction or demolition with a view to making some use of them other than for his own occupation.

Dicta of WILLIAMS, J., in *Burling v. Chas. Steele & Co. Pty., Ltd.* ((1948), 76 C.L.R. at p. 490) applied.

Appeal dismissed.

* The relevant portions of s. 24 are set out at pp. 263, 264, post.

A [**Editorial Note.** Although there is substantial difference in language between the enactments considered in this case and s. 30 (1) (f) (g) of the Landlord and Tenant Act, 1954, 34 HALSBURY'S STATUTES (2nd Edn.) 414, yet the contrast between an intended demolition and an intended occupation which underlies those paragraphs is somewhat similar to that which lay between paras. (h) and (m) of s. 24 (1) of the Tenancy Act, 1948 (New Zealand).]

B Case referred to:

(1) *Burling v. Steele (Chas.) & Co. Pty., Ltd.*, (1948), 76 C.L.R. 485.

Appeal.

C Appeal by the tenants, Matthew James McKenna and Vincent Leo Gifford, from an order of the Court of Appeal of New Zealand, dated Dec. 8, 1954, affirming an order of the Supreme Court of New Zealand (COOKE, J.), dated Dec. 4, 1953, whereby it was ordered that the appellants should give the landlords, Porter Motors, Ltd., possession of premises known as the Rangitikei Private Hotel in the City of Palmerston North, New Zealand. The facts appear in the judgment of the Board.

J. G. Le Quesne for the appellants.

D *L. A. Blundell* for the respondents.

LORD SOMERVELL OF HARROW: This is an appeal from a judgment of the Court of Appeal, New Zealand, dismissing an appeal from an order of the Supreme Court, under which the appellants had to give to the respondents possession of premises known as the Rangitikei Private Hotel in the City of Palmerston North. The appellants have been lessees of the premises since 1926. E In 1941 the respondents bought with other adjoining property the reversion of these premises, intending to demolish the hotel and build a garage for the purposes of their own business as soon as they could get possession and obtain the necessary licences. The appellants' lease expired in 1944. By an agreement dated Aug. 29, 1944, the respondents granted to the appellants a new lease for one year from Aug. 1, 1944. The appellants continued in occupation on the terms of that lease. Before summarising the events which led up to the present proceedings, it will be convenient to set out the provisions of the Tenancy Act, F 1948 (No. 76), as amended, on which the present appeal depends.

" 2 (1).—Interpretation. In this Act, unless the context otherwise requires,— . . .

G ' Dwelling-house ' means any building or part of a building let as a separate dwelling; and includes any furniture or other chattels that may be let therewith; and also includes any land, outbuildings, or parts of buildings included in the tenancy; but does not include—(a) Any licensed premises; or (b) Any premises that include more than three acres of land where the tenant's income or a substantial part thereof is derived from the use of that land for agricultural purposes:

H ' Licensed premises ' has the same meaning as in the Licensing Act, 1908:

I ' Property ' or ' urban property ' means any land or interest in land or any building or part of a building let for any purposes under a separate tenancy; and includes any chattels that may be let therewith; but does not include—(a) Any dwelling-house; or (b) Any property that is used exclusively or principally for agricultural purposes; or (c) Any premises in respect of which a publican's licence, an accommodation licence, or a tourist house licence is in force under the Licensing Act, 1908, or any hotel maintained by a Licensing Trust constituted under any Act.

" 24.—Limiting grounds for recovery of possession.—(1) An order for the recovery of possession of any dwelling-house or urban property, or for the ejectment of the tenant therefrom, may, subject to the provisions of this Part of this Act, be made on one or more of the grounds following, but shall not be made on any other ground: (a) That the tenant has failed to pay the

rent lawfully payable in respect of the premises, or has failed to perform or comply with any other conditions of the tenancy: . . . (g) In the case of a dwelling-house, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation as a dwelling-house: (h) In the case of an urban property, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation: . . . (m) That the premises are reasonably required by the landlord for demolition or reconstruction: . . .

"(2) On the hearing by any court of any application for an order to which the last preceding sub-section relates, the court shall take into consideration the hardship that would be caused to the tenant or any other person by the grant of the application and the hardship that would be caused to the landlord or any other person by the refusal of the application, and all other relevant matters; and may in its discretion refuse the application, notwithstanding that any one or more of the grounds mentioned in sub-s. (1) of this section may have been established."

The effect of s. 25 on the present proceedings may be summarised as follows. If a year's notice to quit has been given, then an order may be made under s. 24 (1) (h), although the landlord does not offer alternative accommodation. The court has still to apply s. 24 (2), which has been set out. To succeed under para. (m), there must be an offer of alternative accommodation, and there was no such offer in the present case.

In 1949 the respondents sought an order for possession with a view to demolishing the hotel and building the garage. The respondents, among other grounds, submitted that, in the circumstances as stated, the premises were required for their own occupation under s. 24 (1) (h). HUTCHISON, J., before whom the case came, held that a landlord could not require premises for his own occupation within para. (h) if his intention was to demolish the existing building. In other words, a landlord who intended to demolish must proceed under para. (m), although he intends himself to occupy after demolition and reconstruction. No order for possession was made and the appellants continued in occupation.

A different conclusion had been expressed obiter by WILLIAMS, J., in the High Court of Australia in 1948 (*Burling v. Chas. Steele & Co. Pty., Ltd.* (1) (1948), 76 C.L.R. 485). The case arose under the National Security (Landlord and Tenant) Regulations* which contained provisions similar to para. (h) and para. (m), which were as follows:

"(g) that the premises . . . (ii) not being a dwelling-house—are reasonably required for occupation by the lessor or by a person associated or connected with the lessor in his trade, profession, calling or occupation . . . (l) that the premises are reasonably required by the lessor for reconstruction or demolition."

WILLIAMS, J., said (76 C.L.R. at p. 490):

"This ground [that is (g)] applies whenever the lessor requires the premises, which means the land leased together with the buildings thereon, for his own occupation or for a person associated or connected with him in his trade, profession, calling or occupation. As part of such occupation he is quite entitled to do what he likes with his own land, including reconstructing or demolishing the existing buildings. Ground (l) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them or making some use of them other than his own occupation or the occupation of a person associated or connected with him in his trade, profession, calling or occupation."

On Sept. 28, 1951, the respondents served on the appellants the year's notice under s. 25 referred to above. Apart from that fact, the events prior to the

* S.R. 1945 No. 97—1948 No. 22, reg. 58 (5).

A present proceedings which began in 1953 are not relevant. By their statement of claim, the respondents claimed possession on three grounds, only one of which, namely that based on para. (h), arises on this appeal. It was common ground that the decision of HUTCHISON, J., did not create an estoppel. COOKE, J., before whom the case came in the Supreme Court, held that the respondents reasonably required the premises for their own occupation, notwithstanding their intention to demolish the hotel. He then considered the matter under s. 24 (2), and made an order for possession. His conclusion on this latter point was challenged unsuccessfully in the Court of Appeal but was not challenged before the Board.

B In the Court of Appeal the judgment of the court was delivered by TURNER, J. After referring to *Burling v. Chas. Steele & Co. Pty., Ltd.* (1), TURNER, J., said this ([1955] N.Z.L.R. at p. 847):

C "Alternatively, Mr. Hardie Boys argued that a landlord cannot be said to require premises for his occupation when he really intends to demolish the buildings which form a part of those premises. He contended that occupation of the premises meant occupation of each part of the premises, and that this is inconsistent with an intention to demolish any substantial part. We do not think that there is any inconsistency. It may be worth noticing that, while in the case of a dwelling-house para. (g) provides that the premises must be reasonably required by the landlord . . . for his occupation as a *dwelling-house*, in para. (h), the corresponding provision relating to urban property, there are no words corresponding to those italicised. A landlord may, in our opinion, enter into occupation of premises intending, as part of his enjoyment thereof, to demolish the buildings, and substitute others therefor which he in turn will occupy: he is occupying the premises if he occupies the land and such buildings as from time to time are situate thereon. In the case of urban property, we do not find any words in the section which conflict with this view."

F After considering the points raised under s. 24 (2), the court dismissed the appeal. The appellants submit that the "premises" means the subject-matter of the lease and, in the present case, that included the hotel. There must, therefore, it is contended, be an intention to occupy the hotel in order to satisfy para. (h) and this intention is absent.

G Their Lordships agree with the submission that both in para. (h) and in para. (m) the word "premises" means the subject-matter of the lease. In this respect they cannot accept the views of COOKE, J., and the Court of Appeal. The demolition contemplated by para. (m) is demolition "on" and not "of" the premises. It is in the latter part of their submission that the appellants fail. The real question turns on the meaning of "his or their own occupation".

H Apart from para. (m), there would be no doubt that a landlord required demised premises for his own occupation although he was intending, for the purposes of his occupation, to make substantial alterations, or put up a wholly new building. The difficulty arises from the existence of para. (m). Is that to be construed as covering all demolition or reconstruction cases, including those where the landlord will remain in occupation, or do the words of para. (h) limit its operation in the way stated by WILLIAMS, J.?

I Their Lordships are of opinion that its scope is so limited. This gives their natural meaning to the words "for his or their own occupation" while leaving a scope for para. (m), which accords with the distinction plainly drawn by para. (g) and para. (h) between landlords who require to relet or resell and landlords who require to occupy. This construction is supported by s. 30, which provides, inter alia, that a landlord who within two years relets or resells premises of which he has obtained possession under para. (g) or para. (h), shall be guilty of an

offence. If the appellants' argument is right, one might have expected the demolition and reconstruction of a building within two years on premises of which possession had been so obtained also to have been made an offence. A

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

Appeal dismissed.

Solicitors: *Coward, Chance & Co.* (for the appellants); *Wray, Smith, Paterson & Co.* (for the respondents). B

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

KASUMU AND OTHERS v. BABA-EGBE. C

[PRIVY COUNCIL (Lord Radcliffe, Lord Cohen and Lord Somervell of Harrow), June 25, 26, July 17, 1956.]

Privy Council—West Africa—Moneylender—No memorandum of loan as required by Nigerian Money Lenders Ordinance—Right to return of security for loan—Whether borrower put on terms—Nigerian Money Lenders Ordinance (Consolidated Ordinances of Nigeria, c. 136), s. 19 (2), (3), (4). D

In August, 1945, the respondent mortgaged premises in Lagos of which he was the leaseholder, to K., a licensed moneylender, by which mortgage he assigned the leasehold premises as security for £2,000, which he acknowledged had been lent to him by K., and interest. K. went into possession of the premises in September, 1946, and thereafter possession or receipt of rents and profits was retained by K. until his death in June, 1948, and after his death by the appellants, his administrators. In February, 1950, the respondent claimed, inter alia, redemption of the premises. By the Nigerian Money Lenders Ordinance, s. 19*, a moneylender had to keep a book in which were to be entered details of every loan made, and, if he failed to comply with this requirement, he lost any right to take legal proceedings to enforce any claim in respect of the transaction of loan, besides incurring a monetary penalty. K. did not keep the book required by s. 19. On appeal against an order for the respondent's recovering possession of the mortgaged premises the appellants contended that the respondent should not have been given relief without putting him on terms as to repayment of so much of the loan (about £1,541) as was still outstanding. E

Held: the respondent was entitled to the relief given to him without being put on terms as to repayment of so much of the money borrowed as was still outstanding, since, by s. 19 of the ordinance, the loan was unenforceable, and the court could not recognise any right of the lender to enforce any claim in respect of the loan. F

Lodge v. National Union Investment Co., Ltd. ([1907] 1 Ch. 300) not followed. G
Appeal dismissed. H

[**Editorial Note.** The Nigerian Money Lenders Ordinance is in similar terms to the United Kingdom Moneylenders Act, 1927, 16 HALSBURY'S STATUTES (2nd Edn.) 377, but s. 19 of the ordinance has no counterpart in the Act of 1927. I

As to the position where transactions of loan are illegal under the Moneylenders Acts, 1900 to 1927, see 23 HALSBURY'S LAWS (2nd Edn.) 190, para. 279; and as to relief apart from those Acts, see *ibid.*, p. 206, para. 310.]

Cases referred to:

(1) *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; 76 L.J.Ch. 187; 96 L.T. 301; 35 Digest 205, 303.

* The relevant portions of s. 19 are set out at p. 268, letter F, post.

- A (2) *Cohen v. Lester (J.), Ltd.*, [1938] 4 All E.R. 188; [1939] 1 K.B. 504; 108 L.J.K.B. 276; 159 L.T. 570; Digest Supp.
- (3) *Chapman v. Michaelson*, [1908] 2 Ch. 612; *affd.* C.A., [1909] 1 Ch. 238; 78 L.J.Ch. 272; 100 L.T. 109; 35 Digest 209, 351.

Appeal.

- B Appeal by Patience Kasumu, Moses Adeleye Kasumu, James Basanya Ferguson Oduwale and Arthur Taiwo Olukoya, administratrix and administrators of the estate of C. O. Kasumu, deceased, who at all material times was a licensed moneylender, from an order of the West African Court of Appeal, dated Feb. 22, 1954, reversing an order of the Supreme Court of Nigeria, dated Feb. 26, 1952. The facts appear in the judgment of the Board.

- C *Phineas Quass, Q.C.*, and *R. K. Handoo* for the appellants.
J. Pennyquick, Q.C., and *Arthur Bagnall* for the respondent.

- LORD RADCLIFFE: This appeal from a judgment and order of the West African Court of Appeal dated Feb. 22, 1954, arises out of a suit relating to a moneylending transaction between one C. O. Kasumu, deceased, of whose estate
D the appellants are the administrators, and the respondent, who was the borrower in the transaction and the plaintiff in the resulting suit. The only question which is at issue in the appeal is whether the order of the Court of Appeal, which granted the respondent relief against the transaction in the form of an order for re-possession of mortgaged premises and delivery up of the mortgage deed and its accompanying title deeds, ought to have been made subject to a condition of
E relief that he should undertake to pay back so much of the money lent as was still owing, with or without some interest.

- There is no material point of fact which is now in dispute. The respondent held a building lease of some land known as No. 55, Great Bridge Street, Lagos, and, on Aug. 22, 1945, he executed a deed of mortgage in favour of Kasumu, a
F licensed moneylender, by which deed he assigned the leasehold premises as security for the sum of £2,000 acknowledged to have been paid to the borrower at the time of the mortgage, with interest at the rate of fifteen per cent. until repayment. Kasumu went into possession of the premises in September, 1946, and thereafter possession or receipt of rents and profits was retained by him and after his death by the appellants. On Feb. 14, 1950, the respondent instituted proceedings in the Supreme Court of Nigeria, claiming redemption of the
G premises or, alternatively, a declaration that the mortgage was void; an account of rents and profits received; and recovery of possession. He was met by a cross-action on the part of the appellants, the purpose of which was to set up a claim that there had been an agreement made between Kasumu and the respondent within a few months of the making of the mortgage, by virtue of which the respondent had undertaken to convey his equity of redemption to Kasumu,
H and to ask the court for an order that this agreement should be specifically performed. The two actions were consolidated and now form one set of proceedings.

- The alleged agreement to assign the equity to Kasumu has dropped out of the picture. The trial judge held that it was unenforceable and that there was "no effective sale." The respondent's claim that the mortgage was void does not
I seem to have been supported by any facts deposed to by himself or any other witness called by him, nor is it possible to say to what contention of law it was intended to be directed. The case would have remained simply a redemption action against mortgagees in possession had it not appeared on the face of the pleadings of both parties that Kasumu had committed a breach of s. 19 of the Money Lenders Ordinance (Consolidated Ordinances of Nigeria, c. 136) at the time of making his loan or instalments of loan to the respondent.

The introduction of this point came about somewhat accidentally. The respondent, in his statement of claim, made the statement that Kasumu had

kept no book in which the principal amount advanced had been recorded (a duty which s. 19 imposes on a moneylender) and that, because of this, the appellants were assuming, wrongly as he claimed, that the full £2,000 had been advanced. He did not otherwise make any complaint of the absence of record. The appellants, on the other hand, explicitly admitted that no book recorded the amount of the principal advanced, but denied that their assumption that £2,000 had actually been advanced was a mistaken one. It is sufficient, however, that the breach of s. 19 was brought to the attention of the judge. It became his duty to give it such effect on the rights of the parties as the law required. Indeed, it is plain from the terms of his judgment that the respondent's counsel had raised the point in the course of the hearing and had argued "that Kasumu was a moneylender and kept no books as required by our local ordinance, therefore he cannot enforce his mortgage".

The learned judge did not give effect to this submission in any way, though it is not possible to find in his judgment the process of reasoning which led him to treat it as having no bearing on the form of his order. The order that he made was one for redemption and recovery of the property after an account had been taken of what was due on the mortgage. The account was taken and a subsequent order entered judgment for the appellants for £1,541 2s. 6d. and interest. These orders were reversed by the Court of Appeal, who substituted for them a declaration that the mortgage transaction was unenforceable; an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises. Thus, on one view of the rights of the parties, the respondent gets the mortgaged property back on paying up the balance of moneys outstanding on the loan together with interest: on the other view, he gets it back without being obliged to pay up any money at all, even on the basis that there is as much as the £1,541 2s. 6d. outstanding.

At this stage it is convenient to set out the material portions of s. 19 of the Money Lenders Ordinance. They are as follows:—

"(2) Every moneylender shall keep a book (which shall be securely bound and paged so that leaves cannot be removed or inserted without apparent damage) in which he shall enter in connection with every loan made by him—(a) the date on which the loan was made; (b) the amount of the principal; (c) the rate of interest; (d) all sums received in respect of the loan or the interest thereon, with the date of payment thereof, and shall produce such books when required to do so by any court.

"(3) The entries in the said books shall be made forthwith on the making of the loan or the receipt of sums paid in respect thereof as the case may be.

"(4) Any moneylender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this ordinance and shall be liable on conviction to a fine of £10 or in the case of a continuing offence to a fine of £5 for each day or part of a day during which such offence continues."

One or two preliminary observations may be made with regard to this section. It was not in dispute that the effect of it was that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money. Secondly, their Lordships are satisfied that the words of deprivation "not be entitled to enforce any claim in respect of any transaction" are very widely drawn, and that they should not be confined to the assertion of rights by means of, or in the course of, legal proceedings. Thus, the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged, or the retention or taking possession of such property in assertion of the claim to repayment, is also precluded. Finally, s. 19

- A is only one of a comprehensive set of provisions contained in the ordinance which regulate the conditions under which moneylending can be carried on in Nigeria and the permitted effects of moneylending transactions. These provisions reproduce many of the sections of the current Moneylenders Act of the United Kingdom, the Moneylenders Act, 1927, though s. 19 itself has no counterpart in that Act, and the scheme of the ordinance is largely modelled on the legislation of the
- B United Kingdom. It does not appear that the Nigerian courts have laid down any principles of their own in the interpretation of the ordinance, and the decision of the Court of Appeal which is now under appeal consists essentially of a weighing of the authority of *Lodge v. National Union Investment Co., Ltd.* (1) ([1907] 1 Ch. 300), against that of *Cohen v. J. Lester, Ltd.* (2) ([1938] 4 All E.R. 188).

- The appellants' case is that, following the decision in *Lodge v. National Union Investment Co., Ltd.* (1), the court ought not to have made any order by way of giving relief to the respondent without putting him on terms as to repayment of such of the money borrowed as was still outstanding. And it is undoubtedly true that in that case PARKER, J., did require such terms from a borrower as a condition of granting him relief in the form of delivery up of securities, the money-lending transaction in question being an illegal contract by virtue of the non-
- D registration of the lender under the Money-lenders Act, 1900. But it is also true that in *Cohen v. J. Lester, Ltd.* (2), TUCKER, J., refused to impose any terms as to repayment when making an order for the return of a pledged chattel at the instance of a borrower, the contract and security being in that case rendered unenforceable by virtue of the Moneylenders Act, 1927, s. 6. The distinction exists between the respective circumstances of the two cases that one involved
- E an illegal and the other an unenforceable contract; but, although this may to some extent account for the course of reasoning that led to the respective decisions, it is not inherently satisfactory that the law should accord to the moneylender who has committed an offence and made an illegal contract more favourable treatment than one who has done no more than enter into an unenforceable bargain. It is necessary for their Lordships, therefore, to ascertain
- F clearly what principle is involved in the decision of *Lodge v. National Union Investment Co., Ltd.* (1), and then to decide whether that principle is capable of being applied consistently with the policy of the legislature shown by such an enactment as s. 19 of the ordinance.

- There are two main lines of reasoning to be found in PARKER, J.'s decision. Starting from the principle that the loan constituted an illegal transaction to
- G which the plaintiff had made himself a party, he concluded that he ought to treat him as one who could only take advantage of the illegality by submitting to do whatever the court considered fair to the defendant. His approach to the matter was governed by his view that the former statutes against usury with their prohibition of usurious contracts produced the same sort of situation as that produced by the Money-lenders Act, 1900, when an unregistered money-
- H lender lends money, and he followed, therefore, the line of certain old decisions in the courts of equity and common law in which plaintiffs had not been permitted to take advantage of contracts being "utterly void" under the Usury Acts and recover their securities without repaying money due. Even so, it is apparent from PARKER, J.'s careful citation of the earlier cases that the practice in the courts of common law was by no means uniform in this matter, and that
- I there had been differences of view between the Court of Common Pleas on the one hand and the Court of King's Bench on the other. Indeed, their Lordships find it very difficult to base any principle on the conception that the borrower under a contract tainted with usury was himself tainted with the illegality that avoided the transaction and so stood to some extent "in mercy" when resorting to the courts to claim the relief which would seem to have been his right if the contract itself was rendered void. There is nothing in any of the main Acts, 37 Hen. 8 c. 9, 12 Car. 2 c. 13, and 12 Ann. c. 16, which suggests that the victim

of usury was in any sense an offending party. Indeed, so little was this so that the courts did not even preclude him from recovering, as informer, his share of the triple penalty imposed. However that may be, it does become virtually impossible to transfer that principle to such cases as arise under the current legislation which regulates moneylending when the illegality that avoids the contract, or the breach of duty that renders it unenforceable, is produced by the act or negligence of the moneylender himself, and has nothing whatever to do with the inherent nature of the contract into which the borrower has entered. And s. 19 deals with one of those cases. It was not the fault of the respondent that Kasumu did not keep his books properly.

But it is evident that there was another line of argument that weighed with PARKER, J., and it is, perhaps, an easier one to support. The plaintiff before him was asking for equitable relief, and it is a basic principle of equity that he who seeks it must do it. Was it proper then for a court of equity to place its power of making orders at the disposal of the plaintiff without requiring him to submit to the condition of doing the honest thing and repaying the money he owed? This principle at least had an established position in the practice of the courts of equity when relieving against usurious contracts; and it is noticeable that, when the subject is treated by COMYN'S LAW OF USURY (see pp. 207-212) and by STORY ON EQUITY (3rd Edn.) (see para. 300, para. 301), the court's imposition of terms is based squarely on this rule and not on the more artificial conception that the borrower is an accessory to the lender's offence.

"While, however, the courts protect the borrower, they will be careful to observe that when he seeks relief, he does not himself become the oppressor",

says COMYN (p. 208). This is a persuasive way of putting the matter; but it is exposed to the criticism that it was not so much the courts who were protecting the borrower as the Act of Parliament which made the contract "utterly void". If the courts impose on themselves the obligation of protecting the lender while the Act protects the borrower, they may find themselves in the difficulty that they are, in effect, reversing the Act of Parliament in their endeavour to achieve a truly equitable solution.

Lodge v. National Union Investment Co., Ltd. (1) was a decision of a great equity lawyer, and it has stood as a decision since the year 1906. Nevertheless, it cannot be treated as having established any wide general principle that governs the action of courts in granting relief in moneylending cases. In *Chapman v. Michaelson* (3) ([1908] 2 Ch. 612), EVE, J., refused to put the representative of a borrower on any terms as to repayment when granting a declaration that a loan was illegal and void by virtue of s. 2 of the Moneylenders Act, 1900. His decision was unanimously upheld by the Court of Appeal ([1909] 1 Ch. 238). Thus, in a court of equity a borrower relying on the contract being illegal obtained the relief against the lender that he chose to ask for without being required to make any offer to pay the outstanding moneys. The plaintiff was, in fact, the borrower's trustee in bankruptcy, but this circumstance was not treated as having any special bearing on the result. Both courts distinguished *Lodge v. National Union Investment Co., Ltd.* (1), EVE, J., on the ground that the declaration which he was making was not "in the nature of equitable relief", the Court of Appeal on the ground that it was not "equitable relief" or "true equitable relief". It must be admitted that, now that all courts endeavour to give effect to the rules of both systems with predominance for equity in the case of conflict, a distinction which is based entirely on the nature or history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions of lender and borrower. No doubt a court of equity, operating in personam, could produce remedies for the return or cancellation of instruments of value where the common law remedies of trover and detinue did not lie;

A but the purpose of all such proceedings is the same, to restore the borrower to the position he occupied before the void or unenforceable transaction.

The effect of *Cohen v. J. Lester, Ltd.* (2) has already been stated. It is evident from what is said in the judgment in that case that it would be in accordance with prevailing practice for a court dealing with loans rendered unenforceable by the Moneylenders Act to make an order for the lender to surrender securities

B without imposing terms as to repayment.

It remains for their Lordships to consider whether the principle of *Lodge v. National Union Investment Co., Ltd.* (1) ought to be applied in the case of a transaction declared to be unenforceable by s. 19 of the Nigerian Ordinance. In their opinion, it should not. If it were, the result would be that a lender who,

C while offending against the ordinance, had fortified himself by taking any sort of security, would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who, by taking security, had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction, would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or

D in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the ordinance clearly intended. Not only would it seem anomalous for the court to bring about a distinction of this sort between loans each of which equally offends the statute, but it would also be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of terms of repayment, for by so doing he would be

E enforcing, directly or indirectly, "a claim in respect of the transaction".

In their Lordships' opinion, it is not possible to transfer the principle which guided the courts in dealing with claims based on the Usury Acts to claims for relief arising out of transactions rendered void or unenforceable under the system of regulation which is contained in the Moneylenders Act. For, in most respects, the purpose of the two sets of Acts is essentially different. According to medie-

F val ideas, the taking of usury involved the sin of avarice. It was not the lending of money or the circumstances in which it was lent that were the material matter, but the obtaining of profit from the use of money. When medieval conceptions began gradually to give way before the impulse of commercial and industrial activity, the sin of avarice turned into the offence of usury; but the usury prohibited was no longer the lending of money at profit but the lending

G of money at a rate of profit greater than that permitted by the statute. What the law penalised and made void was a particular kind of grasping contract; and it was evidently felt by equity judges at any rate that they were doing nothing that contravened the policy of the Acts if they insisted that the price of their remedies should be the return of the principal money and a reasonable rate of interest, so long as no effect was given to those elements of the loan in which the

H usury itself consisted.

But the Usury Acts disappeared in 1854, and much of the Money-lenders Act, 1900, and the Moneylenders Act, 1927, is directed to enforcing measures of control that have no concern with the intrinsic nature of the contract made. Such requirements as that the moneylender must be registered or licensed, must use his authorised name, must procure a note or memorandum of the contract signed

I personally by the borrower, must keep a book in which is entered a contemporary record of the transaction strike indifferently at all moneylenders' loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content

but with the vice of the conditions under which it was made. The provisions of s. 19 are not purposeless. They seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised at law. If a court, therefore, were to impose terms of repayment as a condition of making any order for relief, it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships' opinion, the court should not place itself in such a position. A
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For these reasons their Lordships will humbly advise Her Majesty that the decision of the West African Court of Appeal in this case was correct and that the appeal should be dismissed. The appellants must pay the respondent's costs.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellants); *Hatchett Jones & Co.* (for the respondent). C

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

MIDLAND RAILWAY CO. OF WESTERN AUSTRALIA, LTD. D v. STATE OF WESTERN AUSTRALIA. STATE OF WESTERN AUSTRALIA v. MIDLAND RAILWAY CO. OF WESTERN AUSTRALIA, LTD.

[PRIVY COUNCIL (Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen), June 11, 12, 13, 14, July 11, 1956.] E

Privy Council—Australia—Western Australia—Crown grants of land without reservation of petroleum rights—Effect of Western Australia Petroleum Act, 1936, on grants—Western Australia Petroleum Act, 1936 (No. 36 of 1936), s. 9, s. 10—Western Australia Constitution Act, 1890 (53 & 54 Vict. c. 26), s. 4 (2).

This appeal concerned the ownership of petroleum on or below lands in Western Australia. In 1886 by a contract ("the W. agreement") made between the government of Western Australia of the one part and W. of the other part, W. was obliged to build a railway some 250 miles in length in Western Australia. It was to be built by sections and the W. agreement showed that the construction was expected to take some seven years. W. was also obliged to procure the introduction into the colony from Europe of five thousand adults of European extraction. Clause 46 and cl. 49 of the W. agreement provided: "46. The government will at the expiration of three calendar months from the arrival in the colony of any such immigrants grant to [W.] in fee simple for each statute adult fifty acres of land . . . in blocks of not less than ten thousand acres . . . to be held in accordance with and in the form prescribed by the Land Regulations of the colony. 49. In consideration of the premises the government agrees to grant in fee simple to [W.] by Crown grants in the form prescribed by the Land Regulations of the colony a subsidy in land for and in respect of each section . . . at the rate of twelve thousand acres for every mile of the railway which shall be duly completed . . ." In June, 1890, W.'s rights under the W. agreement were assigned to the appellant. The Land Regulations existing in 1886 were made in 1882 under s. 7 of the Australian Waste Lands Act, 1855, and authorised the governor to dispose of the Crown lands within the colony. The prescribed form of grant which was specified in the Schedule to those regulations provided for the reservation of "all mines of gold, silver and other precious metals, in and under the said land," but not for the reservation of petroleum. By the Western Australia Constitution Act, 1890, s. 3, the management and control of the waste lands of the Crown F
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A in the colony and " of the proceeds of the sale, letting, and disposal thereof, including all royalties, moneys, and minerals " were vested in the legislature of the colony. By s. 4 (1) of that Act, s. 7 of the Act of 1855 was repealed, but all regulations made under that section were continued in force until altered or repealed. Section 4 (2) of the Act of 1890 provided that nothing in the Act should " affect any contract or prevent the fulfilment of any promise or engagement made before the time " at which the Act took effect, nor should it " disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within " the colony. From time to time after October, 1890, Crown grants pursuant to the W. agreement were made to the appellant of various lands in Western Australia, all such grants being in the form prescribed by the Regulations of 1882, and containing no reservation of petroleum or mineral oil. The last such grant was made in 1953. Accordingly subject to the effect on the W. agreement of any statutes passed by the Western Australia Parliament after the coming into force of the Western Australia Constitution Act, 1890, the petroleum in or under the land granted to the appellant pursuant to the W. agreement became vested in the appellant. Two such later statutes fell to be considered. The Land Act, 1898, repealed the existing Land Regulations so far as not already repealed, and, by s. 2, provided that such repeal should not affect any right, interest or liability already created, existing or incurred; and, by s. 15, that Crown grants under the Act should contain reservations of metals and mineral oil. The Petroleum Act, 1936, s. 9, provided that " notwithstanding anything to the contrary contained in any Act, or in any grant . . . whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this state whether alienated in fee simple or not . . . from the Crown is and shall be deemed always to have been the property of the Crown ". Section 10 required that all future grants of Crown land should contain a reservation of all petroleum. In 1952 the respondent granted a permit to a company to explore for petroleum over lands granted to the appellant under the W. agreement. The appellant claimed a declaration that the Petroleum Act, 1936, and in particular s. 9 and s. 10 thereof, had no application to the lands granted to the appellant and that, inter alia, all petroleum and mineral oil in or under lands granted to the appellant belonged to the appellant.

G **Held:** the appellant was not entitled to the declaration claimed because

(i) the W. agreement imposed on the Crown merely an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature would not at any time during the currency of the contract alter the prescribed form of grant; and

H (ii) grants of land made at a time when reservation of petroleum was not required by the prescribed form of grant were not exempt from the operation of s. 9 of the Act of 1936 by virtue of s. 4 (2) of the Western Australia Constitution Act, 1890, since no breach of the W. agreement would have occurred if the Crown, the day after executing the agreement and before the date on which the government were bound to issue any deed of grant, had modified the Land Regulations so as to require the reservation of petroleum, and, therefore, it could not be said that in this respect either the Land Act, 1898, or the Petroleum Act, 1936, affected the W. agreement or prejudiced the rights of the appellant thereunder.

Appeal dismissed. Cross-appeal allowed.

Appeals.

Appeal by the Midland Railway Co. of Western Australia, Ltd., from an order of the Supreme Court of Western Australia, dated June 10, 1955, and cross-appeal by the State of Western Australia from the same order, whereby DWYER, C.J., declared that the Western Australia Petroleum Act, 1936 (No. 36 of 1936), and s. 9 and s. 10 thereof in particular, did not apply to an area of 41,872 acres of land in the State of Western Australia, granted to the Midland Railway Co. by the State of Western Australia, after the coming into operation of the Act, but that the Act did apply to other large parcels of land in the state granted by the State of Western Australia to the Midland Railway Co. prior to the coming into operation of the Act. The Midland Railway Co. appealed against that part of the declaration which related to the grants prior to the commencement of the Petroleum Act, 1936, and the State of Western Australia cross-appealed against that part of the declaration which related to the grants after the commencement of the Petroleum Act, 1936. The facts appear in the judgment of the Board.

B. J. M. MacKenna, Q.C., and *R. I. Threlfall* for the appellant, and for the respondent on the cross-appeal.

Sir Garfield Barwick, Q.C., and *Kevin G. Walsh* (both of the Australian Bar) for the respondent, and for the appellant on the cross-appeal.

LORD COHEN: This appeal relates to petroleum on or below certain lands which were granted to the appellant in fee simple pursuant to a contract (hereinafter referred to as the Waddington agreement) made on Feb. 27, 1886, between the government of Western Australia of the one part and John Waddington (hereinafter called the contractor) of the other part. That agreement obliged the contractor to build a railway from Guildford to the southern terminus of a railway then about to be built from Geraldton to Greenough Flats. The railway was to be some 250 miles in length and was to be built by sections. Their Lordships were informed that the terms of the agreement showed that the railway was expected to take some seven years to build. The agreement further obliged the contractor within that period to procure the introduction into the colony from Europe of five thousand adults of European extraction. The provisions of the agreement which gave rise to the present dispute are those obliging the government of the colony to make fee simple grants of land to the contractor. Those provisions are to be found in cl. 46 and cl. 49 which read as follows:

"46. The government will at the expiration of three calendar months from the arrival in the colony of any such immigrants grant to the contractor or his nominees in fee simple for each such statute adult fifty acres of land to be selected as next hereinafter provided in blocks of not less than ten thousand acres each in extent, to be held in accordance with and in the form prescribed by the Land Regulations of the colony.

"49. In consideration of the premises the government agrees to grant in fee simple to the contractor by Crown grants in the form prescribed by the Land Regulations of the colony a subsidy in land for and in respect of each section or deviated section as hereinbefore defined at the rate of twelve thousand acres for every mile of the railway which shall be duly completed and open for traffic in accordance with the provisions of these presents and a proportionate quantity for and in respect of such length of line less than twenty miles which shall be over from the end of the last of such sections to the actual completion of the line."

The agreement entitled the contractor, subject to certain conditions, to select the lands to be granted to him under those provisions and provided (cl. 52) that, on the completion and opening of each section of the line and as soon as he had made his selection, the government would issue to him certificates or deeds of grant of one moiety of the lands so selected, and (cl. 53) that, on the completion and opening of the whole railway, the government would issue to the contractor

A like certificates or deeds of grant for the remaining moiety of the lands so selected.

On June 23, 1890, the contractor's rights and interest under the Waddington agreement were assigned to the appellant. Prior to June, 1898, the appellant encountered financial difficulties. As a result, an agreement (hereinafter referred to as the debenture agreement) was entered into on June 29, 1893, between the appellant and the respondent and others, pursuant to which the appellant issued certain debentures which were guaranteed by the respondent. It was a condition of the debenture agreement that, by way of security for any moneys which the respondent might pay under its guarantee, the respondent should have a first charge on, inter alia, 2,400,000 acres of the land which the appellant was or might be entitled to select by way of subsidy under cl. 49 of the Waddington agreement, and that such 2,400,000 acres should accordingly be vested in nominees of the government, to be held subject to the charge aforesaid in trust for the appellant, its successors and assigns.

At this stage their Lordships must refer to the provisions of the law of Western Australia in relation to Crown lands. At the date of the Waddington agreement the governing provision was s. 7 of the Australian Waste Lands Act, 1855, an Act of the Imperial Parliament. It provided as follows:

"It shall be lawful for Her Majesty, by instructions under her signet and sign manual, or through one of her principal secretaries of state, to regulate the sale, letting, disposal, and occupation of waste lands of the Crown in Western Australia, and the disposal of the proceeds arising therefrom, until Parliament shall otherwise provide."

In exercise of the powers thereby conferred, regulations were made on Oct. 11, 1882. The material regulations for the purpose of this appeal are reg. 3 and reg. 8, which read as follows:

"3. The governor is authorised, in the name and on behalf of her Majesty, to dispose of the Crown lands within the colony in the manner and upon the conditions prescribed by these regulations, or by any regulations amending or substituted for the same, and all grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with such regulations shall be valid and effectual in the law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned. The governor is authorised to make such grants and other instruments upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit.

"8. The Governor in Council may from time to time by order under his hand, to be published in the GOVERNMENT GAZETTE, prescribe the forms of Crown grants, leases, licences, and other instruments requisite for carrying these regulations into effect. Until otherwise notified, Crown grants, leases, and licences will be issued in the forms given in the schedules hereto, with such variations as may be necessary to meet the circumstances of any particular case. The forms given in the schedules hereto for applications and other matters under these regulations may be used with such variations as circumstances may render necessary in any particular case."

The relevant form is that in Sch. 2 to the regulations, which provided for a grant in fee simple to the grantee, subject to a peppercorn rent and to the reservation of

"all mines of gold, silver, and other precious metals, in and under the said land, with full liberty at all times to search and dig for, and carry away the same; and, for that purpose, to enter upon the said lands or any part thereof."

In 1887 these regulations were repealed, and new regulations were substituted. Regulation 1 of the new regulations contained a saving clause for transactions under the previous regulations, but it is not necessary to consider the effect of

the Regulations of 1887 in detail, since the relevant form scheduled thereto corresponded in all relevant respects to that set forth in the Regulations of 1882. A

In 1890 the Imperial Parliament passed the Western Australia Constitution Act. The new constitution which had been passed as a bill by the legislative council of Western Australia was scheduled to the Act and, by s. 1 of the Imperial Act, Her Majesty was authorised to consent to the bill. Prior to the passing of the Act, the management and control of Crown lands in Western Australia had been exercisable by the Colonial Office. Special provision was, therefore, necessary to vest that control in the Western Australia legislature. Section 3 of the Act provided as follows: B

"The entire management and control of the waste lands of the Crown in the Colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that colony." C

It was a necessary corollary of this provision that s. 7 of the Australian Waste Lands Act, 1855, should be repealed. Section 4 (1) of the Act accordingly provides, as follows:

"Section 7 of the Act of the session held in the eighteenth and nineteenth years of Her present Majesty, c. 56, is hereby repealed, but all regulations made under that section, and in force at the commencement of this Act, shall continue in force until altered or repealed in pursuance of the powers conferred by this Act; . . . " D

Section 4 (2), the effect of which on the appellant's rights under the Waddington agreement has been the principal topic of discussion before their Lordships, reads as follows: E

"Nothing in this Act shall affect any contract or prevent the fulfilment of any promise or engagement made before the time at which this Act takes effect in the Colony of Western Australia on behalf of Her Majesty with respect to any lands situate in that colony, nor shall disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within that colony." F

Returning to the facts of the case, no Crown grants had been made pursuant to the Waddington agreement before the coming into force of the Western Australia Constitution Act, 1890. From time to time after Oct. 20, 1890, Crown grants, pursuant to the Waddington agreement, were made to the appellant of various lands in Western Australia between Perth and Geraldton. All such grants were made in a form which corresponded to that prescribed by the Land Regulations, 1882. The grants contained no reservation of petroleum or mineral oil. The last such grant was issued on May 20, 1953, and grants of a total of approximately 41,866 acres were made to the appellant after the commencement of the Petroleum Act, 1936, hereinafter mentioned. Further, from time to time prior to 1911, Crown grants of various lands in Western Australia between Perth and Geraldton were made, in similar form pursuant to the Waddington agreement and the debenture agreement, to the Commissioner of Crown Lands and the Minister for Lands as nominees of the government. G H

By 1911 the debentures had been redeemed, and in that year the nominees of the government, to whom grants had been made pursuant to the debenture agreement, assigned to the appellant all lands then vested in them, pursuant to the debenture agreement and the benefit of all reservations of minerals made by such nominees on the sale of portions of the land which had been vested in them under that agreement. In the result, it is plain that, subject to the question as to the effect on the Waddington agreement of any statutes passed by the Western Australia Parliament after the coming into force of the Western Australia Constitution Act, 1890, the petroleum in or under the land granted to the I

A appellant pursuant to the Waddington agreement became vested in the appellant. Their Lordships' attention was called to two such statutes, the Land Act (No. 37 of 1898) and the Petroleum Act, 1936. The material provisions of the Land Act are sufficiently set forth in para. 10 of the appellants' Case as follows:

B "This Act repealed inter alia the existing Land Regulations, including the Land Regulations of 1887 so far as not already repealed. Section 2 of the Act provided that such repeal should not affect any right, interest or liability already created, existing or incurred."

The material provisions of the Petroleum Act, 1936, are to be found in s. 2, s. 9 and s. 10, which read as follows:

C "2. This Act shall be read and construed subject to the provisions of s. 4 of the Western Australia Constitution Act, 1890 (Imperial), so far as the same may be applicable.

D "9. Notwithstanding anything to the contrary contained in any Act, or in any grant, lease, or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this state, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.

E "10. All Crown grants and leases under any Act relating to Crown land issued after the passing of this Act shall contain a reservation of all petroleum on or below the surface of the land comprised therein, and also a reservation of the right of access, subject to and in accordance with the provisions hereinafter contained, for the purpose of searching for and for the operations of obtaining petroleum in any part of the land."

Having stated the relevant provisions of the Imperial and Western Australia statutes, their Lordships must now turn to the facts which led to the present proceedings.

F On Oct. 23, 1952, a permit to explore for petroleum was granted to the West Australian Petroleum Proprietary, Ltd. (hereinafter called W.A.P.P., Ltd.) under the Petroleum Act, 1936, over lands which included lands granted to the appellant pursuant to the Waddington agreement. On July 16, 1954, the appellant commenced proceedings against the respondent and W.A.P.P., Ltd., claiming, inter alia*, a declaration that the Petroleum Act, 1936, and, in particular, s. 9 and s. 10 thereof, had no application to the lands granted to the appellant, and that the permit granted to W.A.P.P., Ltd., in so far as it purported to extend to such lands, was void and of no effect. At the hearing before the Supreme Court of Western Australia (DWYER, C.J.), it appeared that the permit granted to W.A.P.P., Ltd. had expired, and all proceedings against that company were stayed. Dealing with the issues between the appellant and the respondent, the Chief Justice decided that s. 9 and s. 10 of the Petroleum Act, 1936, had no application to lands granted by Her Majesty to the appellant after the coming into force of that Act, but that these sections did apply to all lands granted to the appellant or to a nominee as trustee for the appellant under the debenture agreement. The ratio decidendi of the Chief Justice appears to have been as follows:—(i) As he construed the Waddington agreement, it bound the government for all time to issue land grants to the appellant in the form prescribed in the Schedule to the Regulations of 1882. (ii) Section 4 (2) of the Western Australia Constitution Act, 1890, obliged the government to continue to issue grants in that form but it went no further and did not restrict the plenary legislative powers conferred on the Western Australia Parliament by the Act of

* The appellant claimed also a declaration that all petroleum and mineral oil in or under the lands granted to the appellant belonged to the appellant.

1890. Therefore (iii) if the Parliament of Western Australia in exercise of its plenary powers passed an Act affecting grants of Crown land effect must be given to such Act. (iv) The Petroleum Act, 1936, was such an Act but, as he construed s. 9 thereof, it only applied to land alienated prior to the coming into force of the Act and was not appropriate to future grants. It is not clear from his judgment why he thought that s. 10 did not apply to such grants. A

From this decision both parties appealed to this Board. Two main questions were argued (i) as to the construction of the Waddington agreement; (ii) as to the effect of s. 4 (2) of the Constitution Act, 1890. B

On the first question, counsel for the appellant supported the opinion of the Chief Justice. Counsel for the respondent argued that the references in cl. 46 and cl. 49 of the Waddington agreement to "the Land Regulations of the colony" were references to the regulations in force at the time when, in accordance with the provisions of that agreement, the government might become bound to issue certificates or deeds of grant to the contractor. He pointed out that, by the very terms of the contract, the grants were not to be made until (i) each section of the rail was completed; (ii) the completed section was opened; (iii) the land had been selected. The period for completion of the railway was fixed by cl. 11 at seven years, but there was power to postpone the opening until certain works of the government were completed. The selection of the land could be deferred until such time as the contractor or his assigns desired. It was, therefore, apparent that the contract was one with regard to the making of grants which might be called for at an indefinite future date under a system whereby the authorised form of grant at any particular moment would depend on the form prescribed by regulations, which were themselves subject to amendment from time to time. Counsel for the appellant sought to meet this argument by saying (i) that the more natural construction of the agreement was that the reference to the regulations was a reference to the regulations in force at the date of the agreement, and (ii) that it was improbable that the contractor would have been willing to leave himself at the mercy of the government who would be free to extend the reservations beyond that of gold, silver and other precious metals for which provision was made in Sch. 2 to the Regulations of 1882. C D E F

The choice between these two constructions is by no means easy, but their Lordships have come to the conclusion that counsel for the respondent's argument must prevail. Reading the agreement as a whole and having regard to the provisions already referred to, their Lordships are satisfied that it imposes on the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature will not at any time during the currency of the contract alter the prescribed form of grant. Such a construction does not by any means leave the contractor at the mercy of the government or the legislature, for he has as his security the fact that he will get no less favourable a grant than any other applicant could get at the time when it is made. G H

This conclusion is sufficient to decide the cross-appeal in favour of the respondent, since the grants made after the commencement of the Petroleum Act, 1936, were made at a time when, under s. 10 of that Act, it had become obligatory to include a reservation of all petroleum in all Crown grants. What, then, is the effect of this conclusion on the appeal? I

Their Lordships were not informed as to the dates on which the various deeds of grant were made, but it is clear that many were made before the commencement of the Petroleum Act, 1936, and their Lordships will assume for the purposes of this judgment that some were made before the commencement of the Land Act (No. 37 of 1898) and, therefore, at a time when the form scheduled

A to the Land Regulations then in force did not require the reservation of petroleum*. The question, then, is whether these last mentioned grants were exempt from the operation of s. 9 of the Petroleum Act, 1936, by reason of the provisions of s. 4 (2) of the Western Australia Constitution Act, 1890. In their Lordships' opinion, this question must be answered in the negative.

B If, as counsel for the respondent argued, s. 4 (2) was merely a saving provision intended to preclude any argument that the validity of pre-1890 agreements had been in some way affected either (i) by the fact of the transfer to the legislature of Western Australia of the management or control of the waste lands of the Crown in that colony, or (ii) by the repeal of s. 7 of the Australia Waste Lands Act, 1885, that would conclude the matter in his favour, since the plenary powers in relation to peace, order and good government conferred on the legislature of Western Australia would remain unaffected. But, even if the true view be as counsel for the appellant argued, that s. 4 (2) involved some restriction on those plenary powers, the appeal, in their Lordships' opinion, must fail.

C On the construction which their Lordships have placed on the Waddington agreement, it would have involved no breach of it if the Crown, the day after executing that agreement and before the date on which the government were bound to issue any deed of grant, had decided to modify the regulations so as to extend the reservation in the form in Sch. 2 to cover petroleum. In these circumstances, it seems to their Lordships impossible to hold that the provisions of either the Land Act of 1898 or the Petroleum Act, 1936, affected the Waddington agreement or prejudiced the rights of the appellant thereunder. The contract by its terms exposed the appellant to the risk of such acts as the Petroleum Act, 1936, and, accordingly, the appellant cannot be heard to complain if the risk materialises. In reaching this conclusion, their Lordships have not overlooked s. 2 of the Petroleum Act, 1936. That section cannot extend the ambit of s. 4 (2) of the Act of 1890, and their Lordships have already expressed the opinion that, whatever be the effect of the sub-section, it does not assist the appellant in the case before the Board.

F In the course of the argument their Lordships' attention was called to a number of decisions of this Board, of Australian courts, and of the Supreme Court of the United States. These might have been of great assistance had it been necessary for their Lordships to determine (i) whether s. 4 (2) was a mere saving provision or a restriction on the powers of the legislature, or (ii) if it was restrictive, the extent of the restriction. Since their Lordships' conclusion depends solely on the construction they place on the contract, no useful purpose would be served by a consideration of these authorities.

G For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed, the cross-appeal allowed and the action dismissed. The appellant must pay the respondent's costs in the Supreme Court of Western Australia and before this Board.

H *Appeal dismissed; Cross-appeal allowed.*

Solicitors: *Markby, Stewart & Wadesons* (for the appellant, and for the respondent on the cross-appeal); *M. L. Moss & Son* (for the respondent, and for the appellant on the cross-appeal).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* The Land Act, 1898 (62 Vict. No. 37) of Western Australia, came into operation on Jan. 1, 1899, and s. 15 of the Act provided:

"An application for a Crown grant may be in the form or to the effect of Sch. 1, and all Crown grants issued under this Act shall contain a reservation of all gold, silver, copper, tin or other metals, ore, mineral or other substances containing metals, and all gems or precious stones, and coal, or mineral oil in or upon the land comprised therein, and shall be in the form or to the effect of Sch. 2 or Sch. 3, as the case may be, subject to the variations required to meet special circumstances."

Re WALE (*deceased*).

WALE AND ANOTHER *v.* HARRIS AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), January 19, 20, 24, April 19, 20, 23, 1956.]

Equitable Assignment—Voluntary settlement of investments for benefit of settlor's daughter after death of settlor—Investments held by settlor and two sons as trustees for settlor—Sons appointed trustees of settlement—Recital in settlement that settlor had transferred investments to trustees of settlement—No transfer executed—Legal estate outstanding in sons after settlor's death—Whether investments subject to trusts of settlement.

Gift—Incomplete gift—Perfecting gift—Appointment of intended donee as executrix of intending donor—Investments held by intending donor as beneficial owner—No continuing intention to hold investments for benefit of intended donee.

The settlor, a widow, had two sons and a daughter. A voluntary settlement, dated Aug. 1, 1939, and made between the settlor, of the one part, and her two sons as trustees, of the other part, contained a recital that the settlor was absolutely entitled to the investments specified in the schedule thereto and had transferred them into the names of the trustees to be held on the trusts thereafter declared. By cl. 2 of the settlement the trustees were directed to hold the investments on trust to pay the income thereof to the settlor during her life and after her death on certain trusts for her daughter and the daughter's children. The schedule of investments contained forty-one items. At the date of the settlement twenty-one items (referred to hereinafter as the "A" investments) were registered in the sole name of the settlor, who was the absolute owner thereof. The other twenty items (referred to hereinafter as the "B" investments) were registered in the names of the settlor and her two sons, but the settlor was absolutely entitled to them beneficially. ¶ None of the investments was transferred to the trustees of the settlement in the settlor's lifetime. There was evidence that the settlement was made in view of the marriage of the settlor's daughter, to a husband of whom the settlor did not approve. ¶ By a will which was dated the same day as the settlement the settlor divided her residuary estate between her two sons equally, and stated that she had made no provision for her daughter in the will as she had made suitable provision for her by a settlement. In 1942 the settlor made a new will revoking the previous will and leaving all her residuary estate to her three children equally, but not mentioning the settlement. The settlor's daughter left her husband in 1943 and subsequently they were divorced. In 1945 and subsequent years the settlor received the proceeds of certain of the "A" investments. She kept part of the moneys thus received for herself and gave the rest as presents to her three children. She often showed her wish to benefit the three children equally. On Nov. 5, 1950, the settlor made a will whereby, after appointing the three children executors and trustees thereof, she gave her residuary estate to such of them as should survive her in equal shares absolutely. The settlor died on Oct. 17, 1953, and the will of Nov. 5, 1950, was proved by the three children. On a summons by the sons to determine which of the investments specified in the schedule to the settlement were, or had at any time been, subject to the trusts of the settlement,

Held: (i) the settlement was effective in regard to the "B" investments because it constituted, on its true construction, a good equitable assignment of the settlor's beneficial interest in the "B" investments to the trustees of the settlement, and the court would direct the surviving legal owners of the investments (*viz.*, the two sons) to deal with the legal interest in the "B" investments in accordance with the settlor's intention shown in the settlement (*Lambe v. Orton* ((1860), 1 Drew. & Sm. 125) and dicta of LORD

- A MACNAGHTEN in *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.* ([1905] A.C. at p. 462) and of SARGANT, J., in *Re Chrimes* ([1917] 1 Ch. at p. 36) applied; but the settlement was ineffective as regards the "A" investments since in relation to them it was an imperfect gift (see p. 285, letter B, post; principle stated by SIR GEORGE JESSEL, M.R., in *Richards v. Delbridge* ((1874), L.R. 18 Eq. at pp. 14, 15) and by TURNER, L.J., in *Milroy v. Lord* ((1862), 4 De G.F. & J. at p. 274) applied).

- B (ii) the initial ineffectiveness of the settlement in relation to the "A" investments was not cured by the fact that the "A" investments became vested in the settlor's daughter and the sons as her personal representatives, since, on the facts, the settlor had forgotten the existence of the settlement before she died, and thus had not evinced such continuing intention to give the "A" investments for the benefit of her daughter as would, if shown, have validated the settlement of the "A" investments in accordance with the principle established in *Strong v. Bird* ((1874), L.R. 18 Eq. 315) and stated by NEVILLE, J., in *Re Stewart* ([1908] 2 Ch. at p. 254). See p. 285, letters E to H, p. 290, letter G, post.

- C [As to equitable assignments, see 14 HALSBURY'S LAWS (3rd Edn.) 574, 575, paras. 1067, 1068.

- D As to the distinction between incomplete gifts and declarations of trust, see 15 HALSBURY'S LAWS (2nd Edn.) 739, para. 1279; and for cases on the subject, see 25 DIGEST 536, 537, 251-262.

- E As to the completion of an incomplete gift by the appointment of the intended donee as an executor, see 15 HALSBURY'S LAWS (2nd Edn.) 740, para. 1280; and for cases on the subject, see 25 DIGEST 538-540, 268-280.]

Cases referred to:

- (1) *Richards v. Delbridge*, (1874), L.R. 18 Eq. 11; 43 L.J.Ch. 459; 43 Digest 560, 107.
- (2) *Milroy v. Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 40 Digest 533, 770.
- F (3) *Re Rose, Rose v. Inland Revenue Comrs.*, [1952] 1 All E.R. 1217; [1952] Ch. 499; 3rd Digest Supp.
- (4) *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 8 Digest (Repl.) 573, 230.
- (5) *Lambe v. Orton*, (1860), 1 Drew. & Sm. 125; 29 L.J.Ch. 319; 1 L.T. 394; 62 E.R. 325; 8 Digest (Repl.) 548, 49.
- G (6) *Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30; 27 Digest (Repl.) 113, 340.
- (7) *Tierney v. Wood*, (1854), 19 Beav. 330; 23 L.J.Ch. 895; 23 L.T.O.S. 266; 52 E.R. 377; 43 Digest 557, 79.
- (8) *Rycroft v. Christy*, (1840), 3 Beav. 238; 49 E.R. 93; 43 Digest 566, 148.
- (9) *Bentley v. Mackay*, (1851), 15 Beav. 12; 51 E.R. 440; 40 Digest 533, 769.
- H (10) *Paterson v. Murphy*, (1853), 11 Hare, 88; 22 L.J.Ch. 882; 21 L.T.O.S. 86; 68 E.R. 1198; 43 Digest 563, 133.
- (11) *Re Burton's Settlements, Scott v. National Provincial Bank, Ltd.*, [1954] 3 All E.R. 193; [1955] Ch. 82; 3rd Digest Supp.
- (12) *Strong v. Bird*, (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 25 Digest 538, 268.
- I (13) *Re Stewart, Stewart v. McLaughlin*, [1908] 2 Ch. 251; 77 L.J.Ch. 525; 99 L.T. 106; 25 Digest 539, 274.

Adjourned Summons.

The plaintiffs, Charles William Wale and Edgar Henry Wale, were the trustees of a settlement executed on Aug. 1, 1939, by the settlor, Mrs. Elizabeth Wale, for the benefit of the first defendant, Mrs. Bessie Mary Harris, and her children. The settlor died on Oct. 17, 1953, and the plaintiffs and the first defendant were the executors and trustees of her will, dated Nov. 5, 1950, and beneficiaries

under the will. The second defendant, Celia Elizabeth Harris, an infant, was the only child of the first defendant. The plaintiffs applied to the court by originating summons, dated Apr. 6, 1955, (i) to determine which of the investments specified in the schedule to the settlement were then or had at any time been subject to the trusts of the settlement; and (ii) for directions as to the manner in which (a) the plaintiffs should administer the trusts of the settlement, and (b) the plaintiffs and the first defendant should administer the trusts of the settlor's estate. A
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The facts and the relevant provisions of the settlement and the will appear in the judgment.

Raymond Jennings, Q.C., and *Raymond Walton* for the plaintiffs, the trustees of the settlement.

H. E. Salt, Q.C., and *H. E. Francis* for the defendants, beneficiaries under the settlement. C

UPJOHN, J.: The first question which arises is whether a voluntary settlement dated Aug. 1, 1939, constituted a complete and perfect settlement by the settlor of certain stocks and shares purported to be settled on certain trusts. The settlor was a Mrs. Elizabeth Wale, and the settlement was in favour of her daughter, the first defendant, Bessie Harris, who had then recently married, and her issue. The trustees thereby appointed were the plaintiffs, who were the two sons of the settlor and the brothers of the first defendant. D

The settlement, so far as is relevant, was in these terms:

"This settlement is made Aug. 1, 1939, between Elizabeth Wale . . . (hereinafter called 'the settlor') of the one part and Charles William Wale . . . and Edgar Henry Wale . . . (hereinafter called 'the trustees') of the other part Whereas the settlor is absolutely entitled to the investments specified in the schedule hereto and has transferred them into the names of the trustees to be held upon the trusts and with and subject to the provisions hereinafter declared and expressed. Now this deed made in consideration of the natural love and affection of the settlor for her daughter Bessie Mary Harris (hereinafter called 'the daughter') witnesseth as follows:—1. The trustees may either allow the said investments or any of them to remain as now invested so long as the trustees think fit or may at any time or times with the consent of the settlor during her life and after the death of the settlor at the discretion of the trustees sell call in and convert into money the same or any of them and shall with the like consent or at the like discretion invest the moneys produced thereby in or upon any investments hereby authorised with power with the like consent or at the like discretion to vary or transpose any investments for or into others of any nature hereby authorised. 2. The trustees shall hold the said investments and the investments for the time being representing the same (hereinafter together referred to as the trust fund) in trust to pay the income thereof to the settlor during her life and after her death if at the time of such death the daughter shall be living and a widow then in trust as to capital and income for the daughter absolutely but if at the time of such death the daughter shall be living but not a widow then in trust to pay the income of the trust fund to the daughter during the remainder of her life and subject as hereinbefore provided the trustees shall hold the capital and income of the trust fund in trust for all or any the children or child of the daughter who shall attain the age of twenty-one years and if more than one in equal shares."

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The schedule of investments contains some forty-one items. The first defendant has issue one child only, namely, the second defendant, Celia Elizabeth Harris, a spinster and an infant. The circumstance which gives rise to the difficulty is this. Of the investments, twenty-one were registered at the date of

A the settlement in the sole name of the settlor, and she was the legal and beneficial absolute owner thereof. I shall call those the "A" investments following the classification in the affidavits which have been put before me. The remaining twenty investments were registered in the names of the settlor and the plaintiffs as executors and trustees of the settlor's husband's will. That estate had been duly administered, and wound up, and the settlor was under the terms of the

B will solely entitled to such investments absolutely and beneficially. I will refer to these investments as the "B" investments. Those transfers were never executed in favour of the trustees of the settlement.

The relevant principles of law are not in dispute. As SIR GEORGE JESSEL, M.R., said in *Richards v. Delbridge* (1) ((1874), L.R. 18 Eq. 11 at p. 14):

C "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person."

There is one important principle also to be borne in mind. If the gift for any

E reason be imperfect, the court will not in effect approve that gift by construing an imperfect gift as a trust. In the same case SIR GEORGE JESSEL, M.R., dealt with that principle in this way (*ibid.*, at p. 15):

"The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise. In *Milroy v. Lord* (2) ((1862), 4 De G.F. & J. 264 at p. 274), TURNER, L.J., after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: 'The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust'."

H In *Re Rose, Rose v. Inland Revenue Comrs.* (3) ([1952] 1 All E.R. 1217), in the Court of Appeal, the donor was the registered proprietor of certain shares. He executed a transfer in proper form but could not secure registration of the donee in the companies' register in his place, that act being necessarily within the exclusive province of the directors of the company. It was held that, having done everything in his power to transfer his interest in the shares, the donation was complete.

I Another familiar principle is that an assignment of an equitable estate need not be in any particular form, as LORD MACNAGHTEN said in *William Brandt's Sons & Co. v. Dunlop Rubber Co.* (4) ([1905] A.C. 454 at p. 462): "The language is immaterial if the meaning is plain". That, in my judgment, applies as much to a voluntary assignment as to valuable consideration in that case: see also *Lambe v. Orton* (5) ((1860), 1 Drew. & Sm. 125). An equitable assignment may take many forms. It may, in terms, purport to operate as an assignment, or it may take the form of a direction to the trustees in whom the legal

estate is outstanding to hold the property on trust for the donee or on new trusts. A

That last method is a perfectly good equitable assignment, as SARGANT, J., said in *Re Chrimes, Locovich v. Chrimes* (6) ([1917] 1 Ch. 30 at p. 36):

"Now it is well established that in the case of an equitable interest outstanding in trustees or other holders a voluntary direction by the owner to the trustees or holders to hold the whole or part of that interest upon trust for a third person operates as a complete and effectual transfer of the interest to which the direction extends." B

SARGANT, J., then cited four cases: *Tierney v. Wood* (7) ((1854), 19 Beav. 330); *Rycroft v. Christy* (8) ((1840), 3 Beav. 238); *Bentley v. Mackay* (9) ((1851), 15 Beav. 12); *Paterson v. Murphy* (10) ((1853), 11 Hare, 88). It was submitted that something which I said in *Re Burton's Settlements* (11) ([1954] 3 All E.R. 193 at p. 199), distinguished between an equitable assignment and a direction to hold on new trusts. With all respect to that submission, I was merely striving in that judgment to emphasise the precise language which the settlor had used and not to draw any distinction between the two modes of assignment.

Finally, it seems to me clear that, if the legal estate be outstanding as in this case in three trustees, one of whom is the beneficial owner, it is sufficient if the beneficial owner gives expression of his or her intention to the other two trustees, and he or she need not go through the form of giving direction formally to all trustees including herself. If the beneficial owner gives directions to the other two, it is necessarily implicit that in his or her capacity as trustee the beneficial owner will, of course, conform in doing all that is necessary to carry out the directions he or she has given; see *Bentley v. Mackay* (9). Counsel for the plaintiffs made a careful examination of the facts in that case and, very properly, drew my attention to the fact that the headnote seems to be misleading, as the donor, in effect, gave directions to three of his co-trustees, and not to two only as stated in the headnote. C

The argument on behalf of the plaintiffs is this. They submit that the recitals in the settlement make it abundantly plain that the settlor has chosen to transfer all her investments into the names of the two trustees in the first place. They submit that cl. 2 operates only on the footing that the legal estate has been transferred to the two trustees. If in fact that has not been done, then the beneficial interest does not pass, they submit, in the way contemplated by the settlement. Therefore the argument proceeds on the basis that it is wrong to construe this settlement as operating to pass the equitable estate, for it was intended only as a declaration of trust to take effect on the footing that the transfer of the legal estate in favour of the two trustees had already been executed. That, at first sight, is an attractive argument. D

My real task, however, is to interpret the intention of the settlor as evinced in the settlement on a fair construction thereof in accordance with the usual canons of construction. The settlement starts with a recital which is erroneous as to the "A" investments in that they had not been transferred. As to the "B" investments the language is not only inaccurate; it is altogether inappropriate. It could never be literally true to say that the settlor, that is, the settlor alone, had transferred the "B" investments into the names of the two trustees; but "a misrecital will not affect the deed, if it be sufficiently clear what is intended"; see the principle stated in *NORTON ON DEEDS* (2nd Edn.) at p. 210. E

The words of cl. 2 of the settlement, taken by themselves, seem to me to be plain and unambiguous. "The trustees shall hold the said investments"—that is clearly a reference to the investments specified in the schedule and already recited as being the absolute property of the settlor—on certain trusts. Applying the principles which I have formulated, it seems to me a perfectly clear assignment of the settlor's equitable interest in the said investments. I do not see how I can, consistently with sound principles of construction, permit F

A the earlier misrecitals to control or qualify that plain and unambiguous language. That, however, would be the effect of acceding to the arguments of counsel for the plaintiffs. In my judgment, the settlor has made an assignment of the whole of her equitable interest in the "A" and "B" investments to the trustees constituted by the settlement.

B In regard to the "B" investments, it necessarily follows that this court, exercising its jurisdiction over trustees, has the power and duty to order the trustees in whom the legal estate is outstanding to deal with the legal estate in conformity with the intention of the owner of the equitable estate. Having assigned her equitable interest, the beneficial owner, qua trustee, cannot escape the consequences of her acts and ask the court not to administer the trusts declared by her. As regards the "A" investments the situation is admittedly C otherwise. The court cannot control the settlor, for she is not a trustee. It is a case of an imperfect gift. Accordingly, in my judgment, the settlement failed initially as to the "A" investments, but was and always has been valid and effective as to the "B" investments.

That brings me to the second point in relation to the "A" investments. I need state only one further fact, namely, that the settlor died in 1953 having D appointed the first defendant and the plaintiffs executors and trustees of her will dated Nov. 5, 1950, which has been duly proved by all of them. As the plaintiffs have together with the first defendant become clothed with the legal estate in respect of such of the "A" shares as remain in the name of the settlor at the date of her death, the question is whether the initial defect is cured. The relevant principle is frequently referred to as the principle of *Strong v. Bird* (12) E (1874), L.R. 18 Eq. 315, the case where it was first formulated by SIR GEORGE JESSEL, M.R. I take the statement of the principle from *Re Stewart, Stewart v. McLaughlin* (13) ([1908] 2 Ch. 251), a decision of NEVILLE, J., who said (*ibid.*, at p. 254):

F "[*Strong v. Bird* (12)] purports to lay down a principle of general application, and I think I am bound to apply that principle to the present case. The decision is, as I understand it, to the following effect: that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit. The reasoning by which the conclusion is reached is of a G double character—first, that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime, and, secondly, that the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor. The whole of the property in the personal estate in the eye of the law vesting in each executor, it seems to me immaterial whether the donee is the only H executor or one of several; nor do I think the rule is confined to cases of the release of a debt owing by the donee."

Counsel for the plaintiffs made a number of admissions for the purposes of argument. He admitted that the principle was capable of being applied to a settlement of stocks and shares which were on trusts for others than the executors, I and that the settlor in this case evinced the intention of making an immediate gift. He challenged the application of the principle solely on the ground that the intentions of the settlor did not continue unchanged until her death. That is purely a question of fact. When the matter was first before me in January, the evidence was very sparse, and it was stood over for further evidence to be filed. There is now a considerable body of affidavit evidence before me which has been slightly expanded by oral evidence, but there is still no direct evidence of the settlor's intentions. In view of the evidence it becomes necessary to

see what inferences of fact may properly be drawn from the admitted evidence before me. A

The settlor's husband, the father of the plaintiffs and the first defendant, died on May 21, 1938, and probate was granted to the settlor and the plaintiffs. By his will he left everything to the settlor if she should survive him by seventy-two hours, and, if she did not, the whole of his estate was to be divided between his children as to two-sevenths to Charles, two-sevenths to Edgar, and three-sevenths to Bessie, the first defendant, if she was unmarried at the time of his death, as she was. At this time the settlor was living in a house at Watford, and the son Edgar, who was unmarried and the first defendant were living with her. The elder son Charles, being married, was living elsewhere, but they appear to have been a united family. On Nov. 8, 1938, the settlor made a will in which, after giving a few legacies, she divided the whole of her residuary estate equally between her three children. There was a hotchpot clause in these terms: B

"I direct that each of my children shall bring into hotchpot against the capital of his or her share such sum as may have been given to them by my late husband or myself during his or my life." C

It appears to have been the practice of the father to give substantial gifts to his children from time to time. I need give only one example. He had given a sum of some £10,000 which stood in the joint names of Edgar and the first defendant, the income of which was to be used as a dress allowance for the first defendant. On Mar. 23, 1939, by the agreement of all parties that sum was split up between Edgar and the first defendant in, roughly speaking, equal moieties. At this time, 1938 and 1939, the first defendant was friendly with a Mr. Harris of whom the family strongly disapproved. She had been friendly with him during her father's lifetime, but at that time there was no question of her marrying him. Later, however, she told the plaintiffs and the settlor that she was going to marry him, and she did so on July 1, 1939, without the approval of her family. That is the background behind the voluntary settlement of Aug. 1, 1939. D

Charles in his affidavit puts the evidence, which is unchallenged, in this way:

"Sometime later [that is, after the marriage of his sister] in July, 1939, I saw my mother at her house at Watford. It was a Saturday or Sunday. She told me as near as I can recall, 'It is my intention to make a settlement to prevent Harris getting hold of any part of the estate if Bessie dies before him'. She asked me to supply her with a list of holdings or part holdings to represent a third of her estate having regard to those holdings which were already in my sister's name." E

The fact that the settlement was not an ordinary marriage settlement, but was expressly intended to prevent Mr. Harris laying his hands on any part of the first defendant's fortune, is amply borne out by the express terms of the settlement. In pursuance of the settlor's request Charles sorted out, obviously at great trouble, investments representing the first defendant's one-third share. He told me in the witness-box that he took one-third of what I may call the whole family estate, that is to say, one-third of the property belonging to the settlor at law or in equity (that is, property standing in the names of the father's trustees), and also sums which had already been advanced to the three children. He found that the whole value of the family estate was £36,378, of which one-third was £12,126. He then made some careful calculations and adjustments as is proved by the original figures which he produced to me to show that, as at June 30, 1939, when he valued the shares, those in the first defendant's name amounted to £4,471, and he allocated to the settlement in fixed interest stocks £3,425, and in ordinary stocks £4,084, making a total of £7,509. That gave her an income of £753 as against the £754 which was one-third of the total F

A income of the family estate. Those figures were supplied by Charles to the settlor and through her to the solicitors, and the next that the plaintiffs heard about this matter was that they were asked to attend at the solicitors' office to sign a declaration of trust.

Charles' account of the matter, which is substantially agreed to in Edgar's affidavit, was this:

B "I attended these offices with my mother and my brother . . . We saw Mr. Vazie Simons, the senior partner in that firm, who produced a deed of settlement, namely, the above named settlement. He directed us where to sign which we did. I recall that we did not even read the deed. Mr. C Simons told us we were trustees for my sister and, as he was the family solicitor, we troubled no further. I thought that our duties would not commence until my mother's death. I did not realise the implications of the settlement. In any case, it would have seemed strange to me that during my mother's lifetime I should have some supervisory duties over her actions. Mr. Simons did not tell us there would have to be any transfers nor did we notice the recital as to transfer in the settlement. I was not D supplied with a copy of the settlement and the original was left with Mr. Simons."

From that moment onwards, so far as the plaintiffs were concerned, the settlement was never mentioned again, and it is not surprising that both of them forgot all about it. It came to them as something of a shock when years afterwards, after the settlor died in 1953, the solicitor produced the settlement E from his records. I am told—and I accept it—that the first defendant was not informed of the settlement during the settlor's lifetime. It was for that reason that the settlement was never mentioned or discussed by anybody during the remainder of the settlor's life, but, unfortunately for me, there is no direct evidence on the question of the settlor's intention.

F At the same time that the settlement was executed, the settlor executed another will, which was dated the same day as the settlement [Aug. 1, 1939]. By this will the plaintiffs were appointed executors and trustees. After giving certain legacies the settlor gave the whole of her residuary estate to be divided

"equally between my two children the said Charles William Wale and Edgar Henry Wale or the survivors or survivor of them absolutely . . ." *

G She added:

"I have made no further provision for my daughter Bessie Mary Harris in this my will as I have by a settlement executed in my lifetime made suitable provision for her." ✓

H Naturally the first defendant left the settlor's home on her marriage, but Edgar continued to live with the settlor until, unhappily, their house in Watford was destroyed by enemy action in 1940. The settlor went to hospital for a time, and then went to live with the first defendant and her husband at Merthyr Tydfil in South Wales. Apparently that was not a great success, and after a short time the settlor returned to Watford and went to a nursing home while she looked for a house. Some time before August, 1942, she found a house, I 14, Mildred Avenue, Watford, and Edgar lived with her there until she went, many years later, to a nursing home.

On Aug. 10, 1942, the settlor executed another will. In that will she appointed all three children to be executors and trustees, and, after giving a few legacies, she left the residue of her estate ✓

"In trust for my said sons Charles William Wale and Edgar Henry Wale and my daughter Bessie Mary Harris in equal shares But in the event of the said Charles William Wale and Edgar Henry Wale or either of them

dying in my lifetime then my trustees shall hold the share of those so dying in trust for my said daughter Bessie Mary Harris.” A

There was a contemporaneous codicil dealing with advances.

Pausing there, counsel for the plaintiffs submitted that the inference at this stage was plain. He said that originally, in 1939, the settlor had desired that the first defendant should have her one-third share made up by the settlement, and had realised that it would be unfair that the first defendant should have anything more. Counsel submitted that the will of Aug. 10, 1942, showed that the settlor had wholly forgotten the settlement, and that, having regard to the equality which had always prevailed throughout the family, she could never have intended that the first defendant should have substantial sums under the settlement and at the same time participate equally with the plaintiffs in the family estate. Counsel said that that showed that the settlor no longer had any continuing intention to give effect to the settlement. On the other hand, counsel for the defendants said that the facts were perfectly consistent with a continuing intention. In 1942 the first defendant had a child, the second defendant (born in 1940); her earning capacity was not nearly as great as that of the plaintiffs; and the whole matter was consistent with an intention on the part of the settlor that the first defendant should have rather more than the plaintiffs. Therefore (according to the submission of counsel for the defendants), the settlor, while keeping the settlement in mind, still desired that the first defendant should have one-third of the family estate, bringing into account that which she had received in her own hands. Counsel further suggested that the settlor must have known of the imminent breakdown, as it turned out, of the first defendant's marriage, but, as I am informed that the first defendant was present in court and did not choose to give evidence on that matter, I do not think that it is open to counsel to take that point. However, the first defendant did in fact desert her husband on Mar. 18, 1943, and went to live with the settlor and Edgar at the house in Watford where they all remained until the settlor, a few months before her death in 1953 was, owing to failing faculties, taken to a nursing home. The first defendant was divorced by her husband for desertion and the decree was made absolute in 1947. B C D E F

On Nov. 13, 1944, the settlor made a note (I think it must have been for the purposes of a new will) regarding her estate. The note contained a reference to the fact that the first defendant had received about £5,000 in shares. That, of course, was literally true, and I get no assistance, one way or the other, from that document. Then on Jan. 11, 1945, the settlor wrote to Charles as follows: G

“ My Dear Charles, . . . I received the £1,000 cheque from Shakomato (worse luck) and am buying some Dormans and Bradford Dyers' with £900 and the £100 of [Stewart & Lloyds'] which has just fallen into Edgar. They are both very sound affairs I believe; not in my name as I wish to save any death duties for you children—hence also the £100 savings thing you each had at Christmas. They are in Edgar's and B.'s names. (Dormans & Bradford Dyers.) This is no slight on you, for later you of course share everything in dividing up but E. and B. will not share in Colonial Wharf or Wharves. Edgar suggested the dividing up as being most fair, in spite of costing a trifle more for stamps, thinking you might like to have a third of Stewart & Lloyds which he holds, as you know, you'll find E. very just in money matters. We think Stewart & Ll. a good thing, the solicitor here who made me a will most strongly pointed out that any advancements made must not be mentioned in the will, or the income tax people will give you no peace, but he points this out in a letter he wrote at the time. That adjustment must be made between you three privately & absolutely justly . . . ” H I

A It was submitted on behalf of the plaintiffs that that letter showed that Charles was going to have one-third of the whole estate, meaning the whole family estate, and that, if the settlor really thought that the settlement was in existence, it would have been a very curious letter to write. I am not at all impressed by that argument. It is, however, I think, an important letter in regard to the Shakomato investment, and I will deal with that at a later stage in my judgment.

B On Apr. 5, 1945, the settlor made yet another will. I do not think that I need read it, because the net effect was only to make certain alterations in the specific and pecuniary legacies, and there was no hotchpot clause. Then, finally, on Nov. 5, 1950, the settlor made her last will which was ultimately proved by the children in the Principal Probate Registry. In that will, after giving a number of legacies, the settlor left her residuary estate

“in trust for such of them my children the said Charles William Wale and Edgar Henry Wale and Bessie Mary Harris as shall survive me if more than one in equal shares for their own use and benefit absolutely.”

D As I have said, the family were always dividing things in equal shares. They seem to have been very fair with one another, and in September, 1953, as appears from para. 14 of Edgar's affidavit, there was a final adjustment between the children. At that time, leaving out altogether the investments in the settlement, all the money and shares which the children had received as gifts from the settlor and her husband were re-divided between the children on the basis, to use Edgar's words, of all of them sharing equally. The settlor died on Oct. 17, 1953.

E I must now deal with certain transactions which happened in relation to the shares which were in the settlement. I will deal first with the “A” investments. Amongst the A investments were nine Balijan Tea Co., Ltd. six per cent. mortgage debentures. They were redeemed and naturally the proceeds were paid to the settlor; that was on Dec. 31, 1946. Charles knew nothing of that, but F Edgar told me that the settlor's total holding was twenty-three debentures, and that she received £2,300 on Dec. 31, 1946. Of that, on Jan. 2, 1947, she gave to Edgar the sum of £2,050 as a present, as I understand it, which he invested in his own name. Then there was a holding of £334 Central Argentine Railway, Ltd. six per cent. cumulative preference stock. That was repaid on the liquidation of the company on Aug. 19, 1948, when the settlor received a sum of G £125 5s. Again Charles said that he knew nothing about the matter, and, so far as the evidence goes, the settlor kept that sum herself. I understand that the holding of £334 was part of a larger holding of £1,000. No doubt, for the purposes of the settlement in June, 1939, Charles had thought the fairest course would be to take exactly one-third of that holding. Then there were H ten Shakomato Tea Estates, Ltd. seven per cent. debentures of £100. They were redeemed at par, and the £1,000 was paid to the settlor on Sept. 30, 1944. That apparently was the whole holding in the name of the settlor. These were the shares which were mentioned in the settlor's letter to Charles in January, 1945, by which time, as he said in his evidence, which I accept, he had completely forgotten that they were in the settlement. What happened with regard to I that was that on Jan. 9, 1945, the settlor paid to Edgar the sum of £958, and he invested it in more or less equal shares in his own name and in that of the first defendant.

Pausing there for a moment, that is all we know about the “A” shares and about the intention of the settlor. The question is: What is the proper inference to be drawn? Looking at the whole of the evidence which is available, I ought I to assume that the settlor, like the plaintiffs, had completely forgotten the existence of the settlement and thought, when shares and investments were redeemed or paid off, that the money belonged to her, or ought I to make

a more limited inference and suppose that she changed her mind in relation to those shares, and to those shares only, or ought I to make the inference that, while recognising that the settlement was in existence, she had forgotten that those particular shares remained in the settlement? I have this in mind: the settlor was not in the position of some old ladies who find income getting short and want to spend capital. She seems to have had ample means, and, as the evidence which I have reviewed shows, in two cases she used the redemption moneys, not for her own purposes, but to make presents to one or more of her children. I cannot help feeling that, if she had any thought of the settlement in mind, she would have gone to her extremely able and businesslike eldest son, Charles, and said to him: "I am having some shares redeemed. You remember that settlement? Tell me: What is the position about it?" Of course, it is all a matter of impression, and when it is a question of drawing inferences from a somewhat flimsy background, different minds may come to different conclusions. The inference which I draw, on the whole, is that the settlor had in fact by the time when she died, and probably by the time when she executed the will of 1942, completely forgotten the very existence of the settlement. I think that it is rather unlikely—it cannot be put higher—that the settlor would have changed her mind between 1939 and 1942 and desired that the first defendant should have, either personally or through a settlement, substantially more than the plaintiffs would have. I think, as I have said, that she had forgotten the matter by 1942.

I have not so far referred to the transactions which took place in relation to the "B" investments after the execution of the settlement, because, on the view which I have taken, all the transactions in regard to those investments were mere breaches of trust, and it has not been argued whether, in those circumstances, it is or is not admissible and proper to regard what happened to the "B" investments in relation to the settlor's intentions as to the "A" investments. I will only say that, on six occasions, there were either sales or redemptions or payments in liquidation in very much the same way as there were in regard to the "A" shares. In each of those cases the settlor either kept the proceeds or made presents to her children. I have reached the conclusion, independently of the transactions in regard to the "B" investments, that the settlor had forgotten about the settlement. If it is permissible for me to take the transactions in regard to the "B" investments into account, that, in my judgment, affords strong further support for the view which I have already formed. Accordingly, in my judgment the testatrix did not evince any continuing intention in relation to the "A" investments so as to bring the principle of *Strong v. Bird* (12) into operation.

[HIS LORDSHIP directed that question (ii) of the summons should be dealt with in chambers.]

Order accordingly.

Solicitors: *Billinghursts* (for the plaintiffs); *Church, Adams, Tatham & Co.*, agents for *Wallington, Fabian & White*, Watford (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

A LLOYDS BANK, LTD. v. BRITISH TRANSPORT COMMISSION
AND ANOTHER.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), February 14, 15, 16, 1956.]

B *Railways—Accommodation crossing—Duties of British Transport Commission—Closing of gates—Provision of whistle-board—Driver of train failing to observe headlights of approaching car.*

At about 5.30 a.m. on the morning of Jan. 8, 1954, when it was dark, a motor car with its headlights on began to cross a level crossing across two railway lines, an up line and a down line, when the car was struck by a train on the down line and the driver of the car was killed. The level crossing was an accommodation crossing for a private road leading from a main road to a farm and four cottages. The railway had been built about one hundred years ago; there had been no substantial increase in traffic over the road subsequently and there was no evidence of any previous accident at the crossing. The crossing was aslant the railway, and the road met the railway at an acute angle of forty-five degrees. There were gates on either side of the crossing and the British Transport Commission had taken steps to ensure that, so far as was practicable, these were kept closed. These gates were about one hundred feet apart and, on the side of the line which the car approached, there was some thirty feet between the gate and the line. It was possible for a car to stop in this space. From this point by the line there was a clear view of the down line, which was the further away of the two railway lines, for about three hundred and fifty yards to the left, the direction from which trains came along the down line. There was no whistle-board for trains on the down line before reaching the crossing, but the engine-driver had whistled when some 175 yards away from the level crossing at the distance signal for a station which was some way beyond the crossing. On the morning of Jan. 8, 1954, the gates at the crossing had been left open by some person unknown. The driver of the car had not stopped at the crossing but, it seemed, had driven straight on; the car had crossed the up line and was struck as it passed over the down line. The engine-driver had been keeping a look-out on the left hand side of the line for the distance signal and did not see the car's headlights. By a census of the use of the road taken on Jan. 18-20, 1954, it was found that between 6 a.m. and 10 p.m. the road was used on an average by thirteen motor vehicles, twenty-four bicycles and eight pedestrians on each day. The personal representative of the deceased driver of the car brought an action against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging against them negligence by failing to take proper precautions at the crossing and vicarious responsibility for the alleged negligence of the engine-driver.

Held: the defendants were not liable because (a) in all the circumstances, having regard particularly to the road being a private road and the traffic on it not having substantially increased since the crossing was made, to the fact that there was no history of accidents at the crossing and to the fact that the defendants had taken steps to ensure that the crossing gates were closed, the defendants had discharged the duty on them of taking proper precautions for the safety of persons using the crossing, although they had not erected a whistle-board for the crossing, and (b) the engine-driver's duty was to keep a look-out for signals and on the track ahead and he was not at fault in not having seen the headlights of the car on the side road.

Smith v. London, Midland & Scottish Ry. Co. (1948 S.C. 125) and *Lloyds Bank, Ltd. v. Railway Executive* ([1952] 1 All E.R. 1248) distinguished.

Appeal dismissed.

[**Editorial Note.** The judgments in the present case draw clearly the distinction between the responsibility of the British Transport Commission for the proper management and operation of the railway at the crossing and their responsibility as employers of the engine-driver for any negligence on his part. On the latter aspect of the case it is material to note the distinction, as regards traffic at level crossings, between the duties of a driver of an engine on a track and those of a driver of a car on a road (see particularly per MORRIS, L.J., at p. 298, letters A to C, post), and the comment of PARKER, L.J., on dicta concerning any duty of an engine-driver to take note of traffic approaching a crossing (see p. 299, letter I, post). The driver of the car should have halted or almost halted at the crossing (see p. 295, letter D, and p. 299, letter I, to p. 300, letter A, post).]

As to the obligations of the railway authority in relation to accommodation crossings, see 27 HALSBURY'S LAWS (2nd Edn.) 88, para. 174.]

Cases referred to:

- (1) *Smith v. London, Midland & Scottish Ry. Co.*, 1948 S.L.T. 235; 1948 S.C. 125; 2nd Digest Supp.
- (2) *Lloyds Bank, Ltd. v. Railway Executive*, [1952] 1 All E.R. 1248; 3rd Digest Supp.
- (3) *Cliff v. Midland Ry. Co.*, (1870), L.R. 5 Q.B. 258; 22 L.T. 382; 34 J.P. 357; 38 Digest 313, 347.
- (4) *Burrows v. Southern Ry. Co.*, (1933), unreported.
- (5) *Knight v. Great Western Ry. Co.* [1942] 2 All E.R. 286; [1943] K.B. 105; 112 L.J.K.B. 321; 167 L.T. 71; 2nd Digest Supp.

Appeal.

The plaintiffs were the administrators of the estate of Ivon Walter Fenn, deceased, who was killed when the car which he was driving across a railway accommodation crossing, of which the gates had been left open, was struck by a train. The crossing had been provided by the Yarmouth and Haddiscoe Railway under the Yarmouth and Haddiscoe Railway Act, 1856 (19 & 20 Vict. c. lxxix), s. 1 of which incorporated the Railways Clauses Consolidation Act, 1845. The British Transport Commission, the defendants, the successors of the railway company, operated the railway over the crossing pursuant to the Act of 1856. The plaintiffs brought an action for damages for negligence under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants, claiming that they had failed in their duty to take proper precautions for the safety of persons using the crossing and that the driver in the railway engine had failed to keep a proper look-out. On Nov. 1, 1955, LYNSEY, J., at Norfolk found that the defendants had not been guilty of negligence and dismissed the action. The plaintiffs appealed.

Marven Everett, Q.C., and *R. M. O. Havers* for the plaintiffs.

Neil Lawson, Q.C., and *A. P. Babington* for the defendants.

DENNING, L.J.: There was a tragic accident on the early morning of Jan. 8, 1954, when a motor car was crossing a level crossing in Suffolk about three miles out of Great Yarmouth. A train ran into it and carried it nearly half a mile along the line, and both the driver and the passenger were killed. The driver's widow now claims against the British Transport Commission, the defendants, alleging that they were at fault. It has to be admitted that the driver of the car unfortunately must have been at fault in some degree himself; but it is said that the defendants were at fault, because this was a level crossing of such special peculiarities that they ought to have taken steps to safeguard people using the crossing, which they did not do.

I must therefore describe the nature of this crossing. The railway was built about a hundred years ago. At that time there was a farm with a lane (a private road) leading to a main road. The railway crossed the lane. An accommodation crossing was provided for the lane, so that the farmer and the people occupying

A the cottages near the farm could get across the railway to the main road. We are told that that farm and the four cottages were there when the railway was built. They are there now, and there has not been any increase of buildings or houses on that side of the railway. In those days I have no doubt there were horses and carts which used this level crossing; today there are lorries, tractors and cycles. So far, however, as one can judge, although the kind of traffic has altered, B the degree has not substantially varied in this last hundred years. At all events, there is no evidence that it has.

The lane did not cross the railway at right angles but on the slant at an acute angle of about forty-five degrees. The driver of a car coming from the main road along the lane to cross the railway would come first to a gate across the railway; then, owing to this slanting crossing, he would go, beyond the gate, C thirty-two feet four inches before he came to the first line of rails; then he would cross the two lines, the up line and the down line, which took twenty-seven feet one inch; and then there would be another forty feet seven inches before he got to the far gate on the other side; so altogether the distance between the gates was one hundred feet.

In the old days the railway company used to provide padlocks and keys for D use of the farmers and those entitled to use the crossing, so that they could keep the gates locked, and they had heavy gates there. A few years ago it was discovered that people were leaving these gates open and not closing them afterwards, the reason being that the gates were so heavy. It was difficult for the women to handle them. As the result of protests and representations that were made, lighter gates were installed, which are there to this day. According to the E evidence, those lighter gates have been closed and kept more regularly closed than the old gates used to be; but still people do leave them open from time to time. The ganger has instructions to close them whenever he sees them open, and the stationmaster himself kept an eye on them. That was the state of the crossing and the gates.

So far as the railway line was concerned, about twenty-five yards on the Yarmouth side there was the distance signal for the Yarmouth South station. On F the other side (from which the train in this particular case came) 350 yards away there was a bridge carrying a road over the railway. There was a clear view from the gates to that bridge; looking through the bridge a person might see as far as 425 yards; but the effective vision was 350 yards up in the direction of the bridge. After going through the bridge the railway had a bend in it. There G is nothing in the history of this crossing to show that there was ever an accident before this one.

On Jan. 8, 1954, Mr. Fenn, the deceased driver, who was employed by the Suffolk County Council and whose work was to go to farms and take samples of milk, started off very early in the morning from his home in Ipswich to get to the farm on the other side of the line, Capton Hall Farm. He had to start early H because they milk at 6 o'clock and he started from his home between 4 and 5 a.m. His wife did not want him to go out on this bitterly cold winter morning, but still it was his duty and he went and picked up a companion. About 5.30 in the morning, when it was quite dark, he drove his car up the lane. A bicyclist had seen him a little before and he certainly had his headlights on. He drove his car up the lane. On the evidence the judge found that the first gate had been I left open by the last person who had gone through. We do not know who it was. He had left the gate open and pushed it back against the hedge. So that, when Mr. Fenn came up in his car, there was the open gate, and no doubt he drove straight through. He drove over the distance of thirty-two feet; then over the up-line; then on to the down line; and just as he got on to the down line, the train carrying the early morning newspapers to Yarmouth, with only one engine and a brake carriage, came along, hit the car broadside, carried it for over six hundred yards along the line, and the two men in it were both killed.

It is said that the defendants were guilty of negligence in that at this crossing there ought to have been better precautions. In particular, it is said that there ought to have been a whistle-board on the far side beyond the bridge, say a quarter of a mile away, so that, if the engine had whistled there, it would have been a warning to anyone about to cross the line. A

That is the serious point for consideration. This was not an ordinary accommodation crossing, connecting two fields where an occasional cart or animal may be driven across say once or twice in a day. This was a level crossing, where there was an appreciable amount of traffic from this little homestead the other side of the railway. There was the acute angle at which the car had to be driven, and the driver, in order to look up the line, would have the difficult task of looking behind across his left shoulder to see if anything was coming along the line. There was the distance signal, which was horizontal in the day time and at night showed an orange or amber light. It was said to be a reddish light. If the driver of a car saw it, he might well think that no train was coming. He would think a train would only come if it was a green light. It is said that, in those circumstances, with a view of only 350 yards up the line, the railway company or the defendants ought to have put a whistle-board up, so that every train coming round should whistle. B C D

The case in the Scottish courts of *Smith v. London, Midland & Scottish Ry. Co.* (1) (1948 S.C. 125), in which a railway company was found guilty of negligence on a crossing, seemed at first sight to be very similar to this; but on close comparison of the two cases I think that case is to be distinguished. In that case the crossing served two villages, and there was a public right of way across it. In addition, the gates were nearly always left open. Those factors distinguish that case from this. E

Then take the latest case of a crossing near Peterborough (*Lloyds Bank, Ltd. v. Railway Executive* (2), [1952] 1 All E.R. 1248). There was a lot of traffic on the railway and over the crossing. The railway had been extended since it was originally made and there was a history of accidents. That again is a much stronger case for saying there must be a whistle-board or some other precaution must be taken. In all these cases the precaution which should have been taken depended on the degree of danger, and that depended on the particular circumstances of the case. In this case, where the situation is substantially as it was when the railway was built a hundred years ago, where there is no evidence of any increase in traffic and no evidence of any accident for all those years, it seems to me that the judge was justified in holding that the defendants were not negligent in their management of the railway. F G

I ought to say that the stationmaster at Yarmouth, who has left that district now, said: "I prophesied there would be an accident there." He prophesied it because the gates had been left open. He was not saying that there was any fault on the part of the defendants, but fault on the part of the people who left the gates open. The defendants did what they could to see that the gates were kept closed. They prosecuted on some occasions when people left them open. They told the ganger always to keep them closed. In my mind that statement of the stationmaster is not such as to import a failure on the part of the defendants. H

Then, apart from the management of the railway, it was said that the driver and fireman of the train were negligent because, if they had kept a proper look-out on this morning at 5.30 they would have seen the headlights of this car coming up the lane and going over the crossing. It was said that they could not fail to see them, because at that time of night the beam of the headlights was almost a searchlight across the countryside. I was at first very much impressed with that point, but I do not think it prevails, because you cannot treat a train going along a railway as you can a motor car going along a road. The driver and fireman on an engine must keep a good look-out ahead of them. They must, of course, keep I

- A a good look-out for signals and for the track ahead; but they cannot be expected to keep the same look-out for the side roads or lanes coming up to the railway. They might quite reasonably assume that people who approach a crossing will look out for the trains. Even if the driver sees headlights on a car, he would assume reasonably that the car would halt and stop for the train to go through. After all, a train cannot be brought to a standstill in much less than half a mile;
- B whereas a car can be brought to a standstill in a few feet. In this case the driver and fireman did not see the headlights of the car at all: but the explanation is that they were engaged on their proper duties of looking out for the distance signal, which they saw, and indeed they whistled 175 yards away from the crossing at the distance signal. They have not been proved to be guilty of negligence in not seeing the headlights.
- C In all these cases it is a matter of degree. It is for the tribunal of fact to make up its mind on that degree: and, although we have to form our own judgment on such a case as this, we must have particular regard to the view of the learned judge who tried the case. He thought that there was no fault on the part of the defendants, but that the misfortune was due to the fault of the driver of the motor car himself on this cold, wintry morning. The driver assumed, as most people
- D would, that all would be clear. Unfortunately, some one had left the gate open, and so he drove straight on to the railway. He kept his windows closed, which would make it more difficult to hear a train or whistle, and he drove across the crossing. It seems to me that he ought to have stopped before actually crossing the line. There was enough space—over thirty feet—in which to do it between the gate and the actual line. That was the time to stop and look in both direc-
- E tions. If he or his passenger had looked, they could have seen the lights of this train 200 or 250 yards away, and could have stopped and then crossed in safety. At all events the judge's view on the matter was that it was incumbent on those men who were crossing this level crossing to look out for themselves; and that is no doubt the case. The blame can only be attached to the defendants if it is proved against them. The judge held that it was not proved and I do not
- F see my way to take any different opinion from his. I would dismiss the appeal.

MORRIS, L.J.: I have reached the same conclusion. The railway crossed not a public carriage road but a private road. The road belongs to Mr. Riseborough, who is the occupier of Capton Hall. It is used by him, by his visitors and by those who reside in cottages which are near by. It is clear that there is what is called an accommodation crossing, and that there was a duty on the part

G of the defendants to do what was reasonably necessary in all the circumstances to provide against danger to persons or animals crossing the railway.

- We were referred to the Railways Clauses Consolidation Act, 1845. The duty imposed by s. 68 of the Act includes the duty to maintain gates. There is a provision that the company shall make and at all times maintain works for the accommodation of the owners and occupiers of lands adjoining the railway.
- H An obligation is included to make and maintain such convenient gates as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway passes.

- I think that there was a duty not to expose users of this crossing to any perils beyond those ordinarily inherent in the user of an accommodation crossing. In *Smith v. London, Midland & Scottish Ry. Co.* (1) (1948 S.C. 125) LORD RUSSELL, in the Court of Session, said (*ibid.*, at p. 139):

"It appears to me that the duty of a railway company whose line travels over what is called an 'accommodation crossing' is to use all reasonable precautions, care and skill to protect members of the public who may be using that crossing. The result accordingly is that every case requires its own formulation of the particular duty devolving upon the company, dependent upon the special features which are present, physically and otherwise, in relation to the particular crossing."

This case has been presented in two ways. First, it has been said that there was negligence on the part of the defendants in the planning and management of their railway system. It has been said that they failed to provide precautions in train operation which were necessary in the circumstances. Secondly, the case has been put as one in which there was negligence on the part of the driver operating the particular train on the particular day.

The law as stated in *Smith v. London, Midland & Scottish Ry. Co.* (1) does not seem to me to differ from the law as stated in the judgments in *Cliff v. Midland Ry. Co.* (3) ((1870), L.R. 5 Q.B. 258). MELLOR, J., and LUSH, J., referred to both negligence in system and negligence in operation. MELLOR, J., said (*ibid.*, at p. 261):

" . . . and in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway."

Subsequently he said (*ibid.*, at p. 262):

" I have already said that the legislature, when it authorises a railway company to construct a railway and to work it, does by implication require that the company shall work it in the ordinary way, and shall take all usual and reasonable precautions in the working of the traffic, in the management of the trains up and down the line, as experience shows to be proper and necessary . . . "

LUSH, J., said (*ibid.*, at p. 264):

" I think that where the legislature authorises a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But, it may be, and I am inclined to think that it is, a sound principle that if the railway company, in the construction of the works so authorised,—in the exercise of the discretion which the legislature has vested in them,—do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them."

Here was a private road across which this railway was constructed: thereafter there was this accommodation crossing with gates put in position by the railway company: there was clearly a duty on the part of the railway company to do what was reasonably necessary in the particular circumstances to provide against danger to those using the crossing. As LUSH, J., has stated, there are certain perils which must be incident to and inevitable in the user of a crossing of this kind. Those persons, however, who operate the system must take reasonable care not to expose people crossing to perils beyond those which are ordinarily incident to the user. For example, those responsible for the railway should consider whether the line is straight for a reasonable distance from the crossing, or whether there is a curve at such a distance as may create a danger to those who are using the crossing. If there is a curve near by, then those using the crossing may not see the approach of a train, and the railway authority must do what in particular circumstances is reasonable in order to minimise or not to add to the risk. So a railway authority should consider whether there are any unusual circumstances relating to a crossing which add to the danger of those who use it.

If there have been accidents and if there is a history of any troubles or disasters, it would be reasonable to make inquiry how and why they had come about, and if, in the light of such inquiry, steps ought reasonably to be taken which could

A minimise the perils, then doubtless such steps would have to be taken. Furthermore, regard must be had to the condition of the gates, their physical condition and everything that relates to the way in which they are used.

Many features distinguish the present case from the Scottish case, *Smith v. London, Midland & Scottish Ry. Co.* (1) (1948 S.C. 125). In that case the gate was more often open than not, and indeed the Lord President (LORD COOPER) in his speech says (1948 S.C. at p. 137):

“ . . . since 1940 there has been no gatekeeper, and I do not think that I am overstating the position when I say that the company's system of precautions has latterly been not only defective but non-existent. The gates are now, and have for some years been, normally open.”

C LORD RUSSELL referred to the gate as “ the almost ever-open gate ” (ibid., at p. 140).

Now, endeavouring to approach this part of the case in the light of the guidance given by the authorities, it does not seem to me that there are here any unusual circumstances which have created an added danger for those using this crossing beyond those which are necessarily incident to the user of the crossing. First of all, there was a view from the crossing which extended to a distance of over 425 or 440 yards. The police sergeant who gave evidence was asked:

“ Of course, if one gets through this gate in a car, one has got quite a substantial piece of roadway between the two crossing gates from which you get considerable visibility along the down line, do you not ? You get visibility of 440 yards from the centre of the gate ? A.—Yes.”

E Then it is shown by the evidence that the state of affairs now existing has been in existence for approximately a hundred years; and the lay-out here is such that a car could pass through the gate and be halted on the crossing before being near the lines, and so could be halted in a position from which a clear view could be commanded.

F Next, I think it is of great significance that there is no history of any accident having taken place. The user of this crossing was denoted by evidence as to a census that was taken on Jan. 18, 19 and 20. The census related to the hours from six in the morning till ten at night. The figures of those three days show that during those hours on those days there was an average per day of thirteen motor vehicles, twenty-four cycles and eight pedestrians.

G Furthermore, there seems to be no history of any lack of concern on the part of the railway authority in regard to the condition of these gates and to the necessity of having them closed. There was a difference of opinion between Mr. Riseborough, the owner of the farm, and the railway authority. They wanted padlocks put on the gates with keys for the users. Mr. Riseborough did not want them. He thought that the gates were too heavy, and, rather as a protest, he left a gate open. He, so to speak, invited a prosecution and he was prosecuted. Other people were prosecuted. The railway authority were insisting on the gates being closed.

I Furthermore, they required a ganger, the witness Cooper, to walk every day along the length of line which included this crossing. His instructions were to look at the gates, to test them every time that he walked the road and to inspect them. We were referred in detail to the evidence of various witnesses whether recently the gates have been open or closed. I do not pause to go through the references which were given to us in the very careful submissions made to us. It seems to me that the effect of the evidence is that in recent times it was really only occasionally found that the gates had been left open. The evidence seems to me to establish that the railway authority have been at pains to try to ensure that the gates are kept closed.

It seems to me, therefore, that no features in this case required the railway authority to take any steps which they failed to take in regard to this crossing,

and that they are not shown to have failed in their duties as to the system of train operation. A

Secondly, they are said to be liable because the train driver was guilty of negligence in the driving of the train. I think it is undesirable to seek to equate the approach to this matter to that made to the driving of a motor car along a public thoroughfare. The driving of a train and the driving of a motor car are two quite different things. A train has priority on its track; it is being driven on a fixed track; it is normally expected to proceed to a time schedule; the driver has obligations to look out for signals by which in the main the running of the train along the track is controlled. Of course, he has a duty to do all that is reasonable to keep a look-out along the path that he will travel, and to watch for any obstructions that there may be on the line. But I think that it would be too exacting to require him to look sideways to see whether something was approaching from a side road. He has the responsibilities of seeing that his engine is in proper condition and that the signals permit of his progress. B C

I was impressed by the submission that it was surprising that the lights of the motor car were not seen either by the driver or by the fireman. Negligence is alleged, not against the fireman, but against the driver. The driver was on the left-hand side of the footplate, looking through the side window. He was looking for his signal. He did see his signal. That is accepted. While it may be somewhat perplexing why neither the driver nor the fireman saw the headlights, I cannot but think that there is really some explanation. It may well be that at the time that the car reached the crossing the headlights were pointed away from the on-coming train with the result that the driver was not negligent in not having seen the beam of the headlights. I think there is great force in the submission made by counsel for the defendants that in any event this terrible calamity might not have been averted had the headlights been seen. The driver did whistle when he was 175 yards from the crossing. It seems very unlikely that, if that did not avert this accident, the sounding of a whistle a second or two sooner would have had any effect. Whether that be so or not, I am not satisfied on the evidence that the driver of the train is shown to have been guilty of any negligence. I therefore think that the learned judge came to a correct conclusion. D E F

PARKER, L.J.: I agree. **SCRUTTON, L.J.,** in *Burrows v. Southern Ry. Co.* (4) (unreported) in a passage set out in *Knigh v. Great Western Ry. Co.* (5) ([1942] 2 All E.R. 286), said (*ibid.*, at p. 287):

"Now I should be very reluctant to lay down a rule that at any private crossing the railway company is bound to use special precautions of some kind. I can quite conceive of cases where owing to a sharp turn in the railway, or the presence of large numbers of trees in a cutting obstructing the view, a jury may find: 'We think some reasonable precautions should be taken even at a private crossing'. But I ask myself, and I have considered the evidence very carefully, whether at this crossing as we see it, and on the facts we know, there was anything to distinguish it from any other private crossing where the railway company has for some reasons granted rights to particular people in the locality, but not to the whole public, because obviously there are great differences between cases where any member of the public, not having seen the crossing before, may come to a crossing and cases where the crossing is only used by people who are always using it because they are in the locality, and using it for the purposes of their business." G H I

That seems to me to be a useful passage, and approaching the matter in the way in which **SCRUTTON, L.J.,** approached it, I can see nothing in what I may call the lay-out of this crossing which called for special precautions on the part of the defendants. It is true that the crossing was at an angle, but any difficulty in looking to the left along the down line was largely obviated by the very

A considerable space which existed between the south gate and the lines themselves, the space in which any prudent driver of a motor car would pull up and stop and look carefully in both directions.

Secondly, it is said that there was an insufficient look-out to the left in that there was a railway bridge and a bend in the line. But the evidence here is that from a position in the centre of the south gate one can see 440 yards along the down line, which distance would decrease as you crossed the crossing; but at all times one could see up to the bridge, which was 350 yards away. It seems to me, as the learned judge held, that that is an ample distance in which to be able to see an on-coming train.

Finally, it is said that the presence of the distance signal in this case constituted a trap, in that if the signal was horizontal, a driver of a car might think that no train was in the vicinity and that he could safely cross. So far as this case is concerned, that is pure speculation. One does not know whether the deceased did look up at the signal which was at rather a sharp angle; and, if so, whether he did see the light and position of the signal, and whether he was misled. But, having regard to the fact that on the evidence the light shown was an orange or amber light, I do not think any person would be likely to be misled. And finally, and, as it seems to me, almost conclusively, there is no history of any accident whatsoever at this crossing in the period of some hundred years during which it has existed.

Indeed, I think throughout this case the mainstay of the plaintiffs' case has been *Smith v. London, Midland & Scottish Ry. Co.* (1) (1948 S.C. 125), to which my Lords have referred. At first sight the facts in that case bear a very striking resemblance to the facts of this one. On analysis, however, I think it was an entirely different case. In particular, the road there which crossed the railway was not a private road in the sense that it merely served, as in this case, the farm and cottages appertaining to the farm. It was a road, albeit not a highway, used by the public at large going from one village to another village. That seems to me to be an entirely different position. Again in *Smith v. London, Midland & Scottish Ry. Co.* (1), no doubt owing to that public user, it was impossible for the railway company to take any effective steps, and indeed they took no steps, to secure that the gates were kept closed. That is quite different from the present case, where the evidence shows that there was a very considerable attempt through the owner of the farm, Mr. Riseborough, and by the defendants' servant, the ganger, to keep these gates closed. The evidence is that in recent years, at any rate, they are kept closed most of the time.

Finally, in *Smith v. London, Midland & Scottish Ry. Co.* (1) there was evidence, which was accepted, that the driver of the car had slowed to five miles an hour, had seen the distance signal with the signal horizontal and had really been misled by it.

So far as the alleged negligence of the crew of the engine is concerned—and for this purpose I am not making any real distinction between the fireman and the driver, although no negligence is alleged against the fireman—I am satisfied for the reasons given by my Lords that no negligence is proved on their part. I am not unmindful of the fact that both the Lord President and LORD KEITH in *Smith v. London, Midland & Scottish Ry. Co.* (1) held that on the facts there was negligence on the part of the crew in failing to keep a proper look-out. As I have said, that is a very different case. But, if and in so far as the Lord President and LORD KEITH were saying that it was the duty generally of drivers and firemen to take note of any traffic approaching a crossing as distinct from forming an obstruction on it, I would respectfully feel that they had gone too far.

The truth of the matter in the present case is that the unfortunate deceased must in a moment of forgetfulness or a moment of rashness have driven right on to and across this crossing. The learned judge has so held and it seems to me that it is an almost irresistible conclusion, because if he had stopped or reduced his

speed and had looked, he must have seen the approaching train and have seen it in ample time to avoid it. For these reasons and for those given by my Lords, I would dismiss this appeal. A

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the plaintiffs); *M. H. B. Gilmour* (for the defendants). B

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] B

Re HOUGHTON MAIN COLLIERY CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), May 30, July 30, 1956.] C

Company—Winding-up—Proof—Pensioner entitled by contract to pension—Assessment of claim—Allowance for income tax.

Contract—Breach—Damages—Measure—Loss of pension rights—Allowance for income tax prospectively payable by pensioner in respect of his pension.

A limited company went into members' voluntary liquidation. The company was then under contractual obligation to pay pensions to B. and to F. at the respective rates of £166 13s. 4d. and £75 per month. Their claims in respect of these pensions were valued for the purposes of proof in the liquidation at £14,140 and £10,238 respectively. On a summons to determine what sum, if any, should be deducted from those amounts in respect of the income tax and surtax which B. and F. would have had to pay on their pensions had they continued to be paid, D

Held: a deduction for income tax (including surtax) should be made in each case from the sum which otherwise would have been payable to B. or F., since the £14,140 and £10,238 were compensation for the breach of contract involved in the termination of the pensions on the liquidation (principle of *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796 applied); and the summons would be stood over to afford opportunity for the parties to agree figures. E

Points of guidance given on the approach to the calculations involved (see p. 304, letters B to F, post). F

[**Editorial Note.** The pensions were payable as a matter of contractual right, and it is only in relation to pensions payable as of right that the question considered in the present case arises, since a pensioner to whom a pension has been granted by a company *ex gratia* will not have a right to prove in the liquidation of the company for the capital value of the pension; see 6 HALSBURY'S LAWS (3rd Edn.) 655, para. 1293, and see generally as regards proof for breach of contract, *ibid.*, 654. G

As to collateral liabilities and benefits in assessing damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408; and for cases on the subject, see 17 DIGEST (Repl.) 80, 81, 27-33.] H

Cases referred to:

(1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.

(2) *Re Newman, Ltd., Raphael's Claim*, [1916] 2 Ch. 309; 85 L.J.Ch. 625; 115 L.T. 134; 1 Digest 543, 1957. I

(3) *Beach v. Reed Corrugated Cases, Ltd.*, [1956] 2 All E.R. 652.

Summons.

This summons was issued by the liquidator in the voluntary winding-up of the Houghton Main Colliery Co., Ltd. for the determination of questions relating to the assessment of the amounts for which the first and second respondents should be admitted to rank in the winding-up of the company as creditors. Each of the said respondents was (until the date of the liquidation) in receipt of a

A pension which he enjoyed by virtue of a contract with the company. When the summons came before the court, a formula for the calculation of the capital sums for which the said respondents should be admitted to proof was laid down, but consideration by the House of Lords of *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796) was pending, and the question whether in this case any deduction should be made from the said capital sums in respect of income tax and surtax was, therefore, adjourned until after the decision of the House of Lords was known.

R. B. S. Instone for the applicant, the liquidator.

T. D. D. Divine for the first and second respondents, the pensioners.

J. G. Monroe for the third respondent, representing the shareholders.

Cour. adv. vult.

C July 30. WYNN-PARRY, J., read the following judgment: This company was a successful colliery company which went into members' voluntary liquidation on June 30, 1953. At that date the company was under obligation to pay to the respondents, Mr. Brass and Mr. Francis, pensions at the respective rates of £166 13s. 4d. and £75 per month. The supervision of the liquidation made it necessary to quantify the claims of those two respondents, and, after a hearing in October, 1954, I laid down a formula which, when worked out by an actuary in accordance with actuarial principles, resulted in this, that the capital sums for which the respondents should be admitted to proof in respect of their pension expectations were found to be respectively £14,140 and £10,238.

E At that time there was a case on its way to the House of Lords, which came before the House on Oct. 4, 1955, and is reported under the name of *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796). This case raised the question whether, in the case of an award to a plaintiff of damages in respect of loss of earnings actual and prospective, regard should or should not be had to the income tax and surtax which he would have had to pay on the amount of such earnings had he not been injured. In that case the cause of action lay in tort; but, although the rights of the two respondents in question arose here out of contract, it seemed convenient to adjourn until after the decision of the House of Lords had been given the question whether any, and, if so, what, deduction should be made from the respective sums on account of the income tax and surtax which the two respondents in question, Mr. Brass and Mr. Francis, would have had to pay on their respective pensions had those pensions continued to be paid.

G This course appears to me to have been fully justified, because in my view a perusal of the opinions delivered in the House of Lords in *British Transport Commission v. Gourley* (1) leads inevitably to the conclusion that the opinions expressed by the majority of their Lordships govern this case, and that some deduction must be made as regards each pension on account of such income tax and surtax.

H It is true that EARL JOWITT in the course of his speech said ([1955] 3 All E.R. at p. 800):

"There may well be a difference between actions for personal injuries and actions for wrongful dismissal in regard to the obligation of the plaintiff to pay tax on the amount of damages received; and cases on the one topic may, therefore, be a dangerous guide to follow on the other."

I On the other hand, LORD GODDARD, with whose opinion LORD RADCLIFFE and LORD SOMERVELL OF HARROW agreed, said (*ibid.*, at p. 807): "In this opinion, I am dealing solely with damages in personal injury and wrongful dismissal cases." Clearly, therefore, he put personal injury cases, which arise out of tort, and wrongful dismissal cases, which arise out of contract, on the same footing. This also appears to be the view of LORD REID, who said (*ibid.*, at p. 809):

"In a case where the wrongdoer is the plaintiff's employer, it has sometimes been said that he would have had to continue to pay the plaintiff's

full wages or salary if there had been no accident or wrongful dismissal, so why should he take advantage of his own wrong to diminish his liability? That argument has lost some of its force since the introduction of the system of P.A.Y.E., but it would be strange if the introduction of a new method of collecting tax altered the legal position and, in any event, the argument would remain for surtax. The real answer is, I think, that before the wrong the employer was paying for the plaintiff's services, whereas now he is paying the plaintiff's loss, and he will have to pay someone else to perform the services. And this argument also if valid would go too far, for it would seem to involve the proposition that, if a dismissed employee gets other work, the employer ought not to be able to take advantage of that."

Finally, I would refer to a passage in the opinion of LORD TUCKER, who said (*ibid.*, at p. 810):

"I agree that the phrase *res inter alios acta* does not assist in the solution of the problem, but the difficulty is, I feel, in deciding what items of expenditure which follow the earning of profits are to be taken into consideration and which are to be ignored. Such items are clearly distinguishable from those which are incurred in the process of earning the profits and which have to be deducted in the computation thereof. I think the true answer is that expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt is relevant to the ascertainment of the loss suffered by the party injured."

The nature of the payment which is made is compensation, whether the payment is made as damages for personal injuries or damages for breach of contract. LORD GODDARD in *British Transport Commission v. Gourley* (1) is reported as saying (*ibid.*, at p. 805):

"Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation, and this is as true with regard to special damage as it is with general damage."

In *Re Newman, Ltd., Raphael's Claim* (2) ([1916] 2 Ch. 309), LORD COZENS-HARDY, M.R., said (*ibid.*, at p. 322):

"The contract between the company and Mr. Raphael was broken when the winding-up order was made. That is quite plain. There is no doubt that he is entitled to claim compensation by way of damages for the breach."

I therefore come to the conclusion that *British Transport Commission v. Gourley* (1) covers the present case and the main question to which I have referred above must be answered in the affirmative. I think that this conclusion is supported by the decision of PILCHER, J., in *Beach v. Reed Corrugated Cases, Ltd.* (3) ([1956] 2 All E.R. 652). That case involved a claim for damages for wrongful dismissal, and PILCHER, J., held that *British Transport Commission v. Gourley* (1) applied.

On this basis a number of subsidiary questions fall to be considered. The first arises as a result of an observation in the opinion of LORD GODDARD in *British Transport Commission v. Gourley* (1). He is reported as saying ([1955] 3 All E.R. at p. 806):

"In cases where surtax is payable, and the rate has been affected by private income, the nature of that private income will be relevant. If it is a life annuity under a will or settlement, it may well be expected to continue. If it is disposable investments, which might be sold at any time or transferred to a child, less, perhaps little, regard should be had to it."

In *Beach v. Reed Corrugated Cases, Ltd.* (3), PILCHER, J., had to consider and apply that passage, but he was able to apply it because he had detailed evidence

- A as to the nature of the private income of the plaintiff and of his intentions in dealing with it. In the present case I have no evidence at all as to the nature or amount of the private income of either Mr. Brass or Mr. Francis, or whether or not they propose to deal with it or the capital from which it is derived in any particular way. In these circumstances, it appears to me that at the present time I can do no more than express the view that full effect must be given to the
- B passage from the opinion of LORD GODDARD ([1955] 3 All E.R. at p. 806) which I have read, and that the parties with the aid of their accountants should endeavour to agree the actual extent to which regard should be had to the investment income of Mr. Brass and Mr. Francis respectively. If they should unfortunately fail to come to an agreement, the matter must be brought back and the necessary evidence placed before the court to enable it to pronounce on this
- C point.

The next question debated was: what is the relevant fiscal year to be taken for the purposes of calculating the amount of the deductions. I have no evidence as to the basis on which the actuary proceeded so far as concerns the number of years which he took into account in each case, but it appears that in each case his calculations were made on the basis of a pension beginning on June 30, 1953,

D the date of the liquidation. It was therefore agreed that, in so far as a calculation over a number of years was concerned, the first fiscal year involved in that calculation should be the fiscal year in which the liquidation occurred, viz., the fiscal year ending Apr. 5, 1954.

- There remains the difficult question: how is the notional liability to income tax and surtax to be calculated in each case? Certain guidance is to be obtained
- E from the opinions of the House of Lords in *British Transport Commission v. Gourley* (1). EARL JOWITT said ([1955] 3 All E.R. at p. 803):

“It would, I think, be unfortunate if, as the result of our decision, the fixation of damages in a running-down case were to involve an elaborate assessment of tax liability. It will, no doubt, become necessary for the

F tribunal assessing damages to form an estimate of what the tax would have been if the money had been earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering

G endured.”

- It is true, as I have pointed out, that EARL JOWITT was confining his opinion to cases of claims for damages for personal injury, but I cannot help feeling that this language is as applicable to cases of claims for damages for wrongful dismissal and other breaches of contract as it is to claims for damages for personal injury.
- H It is, therefore, in my view, a principle which ought to be taken into consideration in estimating the deductions proper to be made in this case.

Again, LORD GODDARD in his opinion says (*ibid.*; at pp. 805, 806):

- “But, in considering special damage in these cases, the rate of tax to be taken must, as it seems to me, be the effective rate of income tax and, if
- I necessary, surtax, which would have been applicable to the sums in question if they had been earned. That rate depends on the combination of a number of factors that may vary with each case—allowances, reduced rates, surtax rates, other income of the claimant or his wife, charges or reliefs. The task of determining it may not always be an easy one, but, in complicated cases, it is to be hoped that the parties, with the help of accountants, will be able to agree figures. If not, the court must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one.”

The suggestion which emerges from that last passage, that in the first place the parties should endeavour to agree the figures with the help of their accountants, appears to me, if I may say so with respect, an eminently common-sense suggestion. In my view it is only in the last resort that a judge should assume the task of fixing the figures, and he should not do so without all the available help. Obviously if an attempt, even though unsuccessful, has been made by the parties' accountants to arrive at a figure, the judge cannot but be helped by having the views of those skilled professional gentlemen. A B

Bearing those considerations in mind, I do not propose to attempt to fix figures today. I propose to allow the parties and their accountants an opportunity to agree the figures, giving them such guidance as I can. This guidance will consist, first of all, of drawing their attention to the last two passages which I have read from the opinions of EARL JOWITT and LORD GODDARD. Secondly, I express the view that I can find no good reason for the suggestion that the notional amounts which as a result of the calculations are to be added to the actual incomes of Mr. Brass and Mr. Francis should be regarded in either case as representing the top slice of those incomes. To my mind, the proper way of looking at the matter is to say that, if, taking the case of Mr. Brass, the company had continued to function, his income would have been greater by the amount which will emerge from the calculations to be performed, but it cannot be said that it represents the top slice, or for that matter the bottom slice, of his income: the only effect of making the calculation for the purposes of applying *British Transport Commission v. Gourley* (1) will be that his income for the relevant period must be treated as larger than in fact it was. C D

In the third place, I would observe that the basis of the majority opinions in *British Transport Commission v. Gourley* (1) is (per EARL JOWITT (*ibid.*, at p. 802)) that to "ignore the tax element at the present day would be to act in a manner which is out of touch with reality". Bearing that consideration in mind, it would, to my mind, amount to ignoring the realities if the whole of these two sums were brought into account in the fiscal year ending Apr. 5, 1954. In the calculations which will have to be made they must be spread over a period of years, and the proper period appears to me to be the number of years which in each case the actuary took into his calculations in arriving at the respective capital sums. E F

Having given these points of guidance, I propose to stand the summons over, in order to give the parties an opportunity, with the aid of their accountants, of arriving at agreed figures. If their efforts are unsuccessful the summons will have to be restored, and then I should desire to have the benefit of the views of the respective accountants. I hope, however, that this will not be found necessary. It is eminently a case for agreement, because there is no hostile element involved; the real necessity for the summons very properly issued is to provide protection for the liquidator. G

Order accordingly.

Solicitors: *Johnson, Weatherall & Sturt*, agents for *Parker, Rhodes & Co.*, Rotherham (for the applicant); *Stafford Clark & Co.*, agents for *Simpson, Curtis & Co.*, Leeds (for the first and second respondents); *Middleton, Lewis & Co.*, agents for *Alex. I. Braid & Co.*, West Hartlepool (for the third respondent).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

WARRELOW v. CHANDLER & BRADDICK AND ANOTHER
(G. F. LESTER & CO. (BIRMINGHAM), LTD. Third party).

[SHROPSHIRE ASSIZES (Lynskey, J.), June 25, 26, 27, 1956.]

Indemnity—Licence to occupy railway premises—Indemnity by licensee against liability for personal injury, except when caused solely by licensor's negligence, and "which, but for the permission hereby granted, would not have arisen"—Accident to servant of licensees—Accident due partly to negligence of licensor's servants and partly to negligence of licensee's servant.

By an agreement, dated June 5, 1942, and made between the licensors, the owners of a railway, and the licensees, the licensees were granted a licence to use a garage on railway premises for their business. The agreement contained a clause providing that ". . . the licensees will be responsible for and will release and indemnify the [licensors] and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) . . . and any other loss, damage, costs and expenses however caused (except when proved to have been caused solely by the neglect or default of the [licensors] their servants or agents) and which, but for the permission hereby granted, would not have arisen". The garage adjoined a shunting yard, and during a shunting operation a workman employed by the licensees at the garage was fatally injured while passing through the yard after leaving the garage. The accident was due partly to his own negligence and partly to that of the servants of the British Transport Commission, in whom the railway and the premises had become vested. Damages having been awarded against the British Transport Commission in an action by the deceased's administratrix, the commission now claimed indemnity from the licensee under the agreement of June 5, 1942.

Held: the British Transport Commission were entitled to an indemnity from the licensee under the indemnity clause in the agreement, because their liability in respect of the accident to the deceased "would not have arisen" "but for the permission . . . granted" by the licence, since if the relationship of the deceased to the commission at the time of the accident had not been that of licensee to licensor, but that of a trespasser, the commission would not have been liable in damages to his administratrix and the relationship of licensee to licensor had existed only by virtue of the licence.

Dictum of SIR RAYMOND EVERSHED, M.R., in *John Lee & Son (Grantham), Ltd. v. Railway Executive* ([1949] 2 All E.R. at p. 583) applied.

[**Editorial Note.** In the present case the deceased's presence on or near the railway line at the time when the accident happened was not a trespass since he was there by virtue of the licence of June 5, 1942. Persons using habitually a particular railway crossing or way along a line may also, however, be persons to whom a duty of care is owed, although there has never been any express licence to them; see 27 HALSBURY'S LAWS (2nd Edn.) 257, para. 535 and *Slater v. Clay Cross Co., Ltd.* ([1956] 2 All E.R. 625).

As to liability under a contract of indemnity, see 16 HALSBURY'S LAWS (2nd Edn.) 17, para. 14; and for cases on the subject, see 26 DIGEST 233, 234, 1821-1827.]

Case referred to:

(1) *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581; 2nd Digest Supp.

Third-Party Proceedings.

The plaintiff, Mrs. Hilda Mary Warrelow, the widow of Daniel Warrelow, deceased, and the administratrix of his estate, claimed damages against the first defendants, Chandler & Braddick (a firm), and the second defendants, British Transport Commission, under the Fatal Accidents Act, 1846, and the Law

Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband, who was fatally injured during shunting operations in a shunting yard of a goods station. The first defendants were the owners of a lorry which was involved in the accident. Both the first defendants and the second defendants denied negligence or breach of duty, and each alleged negligence and breach of duty on the part of the other and negligence on the part of the deceased man. The second defendants issued a third-party notice to G. F. Lester & Co. (Birmingham), Ltd., the employers of the deceased, claiming indemnity against them in the event of the second defendants being held liable in damages to the plaintiff. The indemnity was claimed under the provisions of two licences granted to the third party to occupy certain premises on railway property adjoining the shunting yard. On June 26, 1956, LYNSEY, J., gave judgment for the plaintiff against the second defendants for £1,852 17s. with costs and ordered the second defendants to pay the first defendants' costs. He found that there was no negligence on the part of the first defendants, that the second defendants' servants were guilty of negligence, and that the deceased was partly responsible for the accident which caused his death, his responsibility being assessed at one quarter.

The report deals only with the third-party proceedings. The facts are stated in the judgment.

J. C. D. Harington for the second defendants.

G. K. Mynett for the third party.

LYNSEY, J.: In this case, in the action in which Hilda Mary Warrellow, widow of Daniel Warrellow deceased, claimed damages against Chandler & Braddick, as first defendants, and the British Transport Commission, as second defendants, a third-party notice was issued by the second defendants against G. F. Lester & Co. (Birmingham), Ltd., and the third-party proceedings now come before me for decision. I have already disposed of the claim made by the plaintiff in the action against the two named defendants, and the third parties are bound by the judgment which I gave, because they were allowed to take part in the case and to cross-examine, and, if necessary, call evidence. I came to the conclusion that the cause of the deceased man's death, although mainly the negligence or breach of duty of the second defendants' servants, was partly also the negligence of the deceased man himself, to the extent of one quarter.

The facts relevant to the third-party proceedings were that in 1933 the third party acquired a licence, dated May 30, 1933, to occupy certain premises adjoining a shunting yard of a goods station now belonging to the second defendants. Under that licence the third party were permitted to carry on the business of dealers in scrap metal. In 1942 they decided to start a new business, not dissimilar in type but entirely separate, and for that purpose they acquired a licence, dated June 5, 1942, in respect of other premises, also adjoining the shunting yard (these premises being referred to hereinafter as a "garage"). The third party there carried on the business of buying old motor cars, stripping them, and selling serviceable parts as spare parts to other dealers. In 1948 they were granted another licence in respect of another garage, and carried on a further business there. The deceased man was employed by the third party in their work of dismantling motor cars and selling the serviceable parts. According to the evidence, he had nothing whatever to do with the scrap metal business which was carried on in the yard and premises which had been licensed to the third party under the agreement of 1933. On Feb. 11, 1953, in the afternoon, shunting operations were taking place along the line known as Chapman's siding, and, although nobody saw the deceased actually coming from the garage where he had, apparently, been working, he came out and was seen walking along the side of Chapman's siding, and about a yard away. He was seen by Mr. Chandler, one of the men on the first defendants' lorry which was later involved in the accident. Mr. Chandler said that he saw the deceased walking along, that he said "Good night" to him, that the lorry then proceeded on its way across the

A railway lines over a crossing composed of a number of sleepers placed across the lines, and that before the tail of the lorry had cleared the sleeper crossing it was struck by a Portland cement wagon which was being shunted by the second defendants' servants. In addition to the lorry being struck the deceased man was also struck in some way and knocked on to the railway line. He had his leg and arm cut off there and then by the accident and he died on the same day.

B In the third-party proceedings the second defendants now claim an indemnity from the third party under the terms of the two licences. [HIS LORDSHIP held that it was not necessary for him to consider the provisions of the first licence, which was dated May 30, 1933, and related to the premises where the third party carried on the business of dealers in scrap metal, since the deceased man was not employed in connection with that business. HIS LORDSHIP continued:] In the

C second licence, that of June 5, 1942, the premises let are described as:

"All that wooden building formerly known as fitter's shop and having a floor space of eighty four and four ninths square yards in the company's goods yard at Castle Foregate Station, Shrewsbury."

D On the plan used in the action the premises are marked "garage". Clause 4 of the licence reads:

E "The premises shall not, without the previous consent in writing of the company's estate agent for the time being be used by the licensees otherwise than for the purpose of a depot for scrap and machinery and part for dismantling scrap motor cars which shall have been conveyed or intended to be conveyed over the company's railway; nor shall the same premises, without such consent be used at any other time than when the station yard there of the company may open for the purpose of trade; and the licensees their agents or servants shall at all times conform to the reasonable regulations of the company with respect to the use of the premises."

By cl. 12:

F " (a) The licensees shall not store deposit or allow to be placed upon or in any portion of the said premises any offensive explosive or inflammable material, substance or liquid and shall not carry on or permit to be carried on any works likely to lead to an outbreak of fire, and the company shall not in any case be liable to the licensees for any loss of or damage to property caused by fire, whether due to the act or default of the company, their G servants or agents or not. (b) Subject thereto the licensees will be responsible for and will release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss, damage, costs and expenses however caused (except when proved to have been H caused solely by the neglect or default of the company, their servants or agents) and which, but for the permission hereby granted, would not have arisen."

I As the deceased man was on the second defendants' premises by virtue of this licence at the time when he met with his accident, I have to interpret the terms of the licence. The document is described as "An agreement" made between the Great Western Railway Co., who were then the owners of the premises, and Messrs. G. F. Lester & Co. (Birmingham), Ltd. (the third party) "hereinafter called 'the licensees'", and the operative words are:

"Whereby the company agree to grant to the licensees a licence to use the premises described in the following schedule and the company and the licensees mutually agree that the conditions hereunder written shall be the terms of the licence and that each of them will in all respects abide by and perform such conditions."

In other words, the document is a licence; the third party are described as "licensees", the operative part of the document is the grant of a licence of the premises which are described in the annexed schedule, and the words "the terms of the licence" obviously mean the terms and conditions under which that licence is to be held. The terms are headed "Great Western Railway. Premises at stations". I am informed that those conditions are printed conditions which were in operation in 1942, and that they were also the conditions in respect of the further licence which was granted in 1948. I do not think that I ought to draw any inference from that, because it seems that no one objected to those printed conditions either in 1942 or in 1948, notwithstanding the fact that in 1945 the Law Reform (Contributory Negligence) Act, 1945, was passed, which might make a considerable difference as to liability, particularly when a question of contributory negligence arises.

In cl. 12 (b) the lines which I have to consider in particular are:

"... the licensees will be responsible for and will release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss, damage, costs and expenses however caused (except when proved to have been caused solely by the neglect or default of the company, their servants or agents) and which, but for the permission hereby granted, would not have arisen."

Thus the licensees, viz., the third party, undertake the liability for all loss or damage of the kind described, "which, but for the permission hereby granted, would not have arisen", and which was not "caused solely by the neglect or default of the company".

I was referred to *John Lee & Son (Grantham), Ltd. v. Railway Executive* (1) ([1949] 2 All E.R. 581), a decision of the Court of Appeal. That case was very similar from the point of view of the document, except that it was a tenancy agreement and not a licence. The headnote to the case reads:

"Goods stored in a railway warehouse let to a tenant were damaged by fire and the tenant brought an action against the Railway Executive alleging that the accident was due to their negligence because a spark or other combustible material ejected from their railway engine had caused the fire. The Railway Executive set up a clause in the tenancy agreement providing that: 'The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen'."

The Court of Appeal held that:

"the words 'which but for the tenancy hereby created... would not have arisen' were confined to liabilities which arose by reason of the relationship of landlord and tenant; the fact that the tenant was occupying the warehouse under an agreement from the Railway Executive was immaterial to the allegation in the present case of negligence; and the tenant, therefore, could not be called on to release or indemnify the Railway Executive in the event of negligence being established."

It was submitted that that was an extremely strong case in favour of the third party, but the cause of action in that case was the fact that the Railway Executive had ejected a spark from their railway engine which set fire to goods in premises adjoining the railway line, and that the fire was due either to some defect in the engine or a faulty control of the firing, or something of that kind—something which had nothing whatever to do with the terms of the tenancy between the

A plaintiffs in that case and the Railway Executive. In his judgment in that case
 SIR RAYMOND EVERSHED, M.R., said ([1949] 2 All E.R. at p. 583):

“ Although it may have been the defendants’ intention to protect themselves from possible claims of that character, the difficulty I have found in considering this clause is that the parties, not being willing to be explicit in their language or to confine themselves to damage of this kind, have evolved
 B a form of words which, if counsel’s construction of the material words ‘ but for the tenancy hereby created ’ is right, seems to me to have most remarkable, if not extravagant, results. ‘ The tenant . . . shall . . . indemnify the company . . . against all liability for personal injury . . . which but for the tenancy hereby created . . . would not have arisen.’ What is the
 C meaning of that ? Counsel for the plaintiffs has taken the example of a customer of the first plaintiffs, who sets forth from London for the express purpose of visiting the first plaintiffs at their warehouse, and owing to the negligence of the defendants the customer is injured in an accident between Kings Cross and Grantham. Is such a case covered ? Counsel for the defendants may well say: ‘ Everything is covered assuming such a case can be proved ’. But if it is covered—and I would agree with the argument that,
 D reading ‘ but for the tenancy hereby created ’ as equivalent to ‘ but for the existence of the tenancy ’, it would be covered—then the clause has a scope which I regard as too vague and too extravagant to be supported if a narrower construction presents itself and can be adopted with equal justice to the language. There is an alternative construction equally available on the language, namely, that the words ‘ which but for the tenancy hereby
 E created would not have arisen ’ mean, and are confined to, liabilities which only arise by reason of the relationship of landlord and tenant which this document creates. On that construction, a proper test would be, on any given claim: Is the fact that the first plaintiffs are the tenants of the defendants under the agreement of June 13, 1939, a necessary or material allegation ? If that test be applied in the present case, the answer would be: ‘ No ’.
 F Examples again have been given of the kind of case that, on this view, would be covered in possible claims against the defendants under implied covenants for quiet enjoyment and so on, but limiting the liability to that which is really related to the relationship of landlord and tenant which the agreement creates.”

G That is a statement of the law in relation to that particular case and these various guides on construction are merely guides, which are not binding on one but are often very helpful. It was submitted that the present case was distinguishable from *John Lee & Son (Grantham), Ltd. v. Railway Executive* (1) because in that case the words used were “ which but for the tenancy hereby created . . . would not have arisen ”, and, in the present case there was not a
 H tenancy. With great respect to counsel, it seems to me that the words in cl. 12 (b) of the licence, “ which, but for the permission hereby granted, would not have arisen ”, mean the permission as given by the licence and by nothing else, and that that licence in fact, in this case, gave permission. I can see no difficulty, from the point of view of the wording, in saying that “ the licence hereby granted ” is equivalent, in the context in which the words arise here, to the words
 I “ the permission hereby granted ” and I would so construe that clause.

I have come to the conclusion that the reasoning applicable to the case of landlord and tenant in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (1) is equally applicable to the present case, reading cl. 12 (b) as being a clause as between a licensee and licensor and not as between a landlord and tenant. To apply that, therefore, and to adopt the narrower construction which the Master of the Rolls suggested should be adopted, does not help the third party in this case, because in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (1) it was not necessary to invoke the tenancy agreement in defining the cause of action.

In this case, however, it is true to say that if the deceased had not been on the railway premises this accident would not have happened. Moreover, in the present case, one must ask the question whether in fact it would be necessary to allege and prove, for the purpose of establishing the plaintiff's claim, that the cause of action really arose because of the existence of the licence at the time. The result would be that, unless the deceased man was there under the licence, he would have been a trespasser and would have had no cause of action, as the duty of the second defendants arises out of the relationship of licensee and licensor, and only in that way. A B

In those circumstances, I apply the statement of SIR RAYMOND EVERSHED, M.R. ([1949] 2 All E.R. at p. 583), in regard to construction:

"that the words 'which but for the tenancy hereby created would not have arisen' mean, and are confined to, liabilities which only arise by reason of the relationship of landlord and tenant which this document creates" C

—I substitute the words "licensor and licensee" for "landlord and tenant"—it seems to me then, if one applies the test that only those liabilities are relevant which arise by reason of the relationship of licensor and licensee which the document of June 5, 1942, creates, it is the existence of that document which gives the plaintiff a cause of action. There would be no duty on the second defendants but for that licence and it is necessary to invoke that licence, and the relationship under that licence. Accordingly, applying the narrower construction which the Master of the Rolls applied in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (1), and with which the other members of the court agreed, I am bound to hold that in the present case the liability in respect of the accident to the deceased man was one which would not have arisen "but for the permission . . . granted" by the licence of June 5, 1942. D E

The only other question is that in connection with the word "solely". Counsel for the third party has not pressed his argument very strongly as to the meaning of that, because, on the face of it, there is no room, as far as I can see, for argument. I should have liked to be able to construe the word rather differently, but in view of my findings I do not think it is open to me to make that construction and I am bound to construe that word in its ordinary meaning. In this case I have already held that the accident was caused by the neglect of the second defendants, but was partially caused by neglect on the part of the deceased man. It seems to me that cl. 12 (b) applies and that the second defendants are entitled to an indemnity against the third party. F

Judgment for the second defendants against the third party. G

Solicitors: *M. H. B. Gilmour* (for the second defendants); *J. C. H. Bowdler & Sons*, Shrewsbury (for the third party).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

A NIZAM OF HYDERABAD AND ANOTHER v. JUNG AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), June 27, 28, 29, July 2, 30, 1956.]

B *Conflict of Laws—Impleading foreign sovereign state—Money deposited with bank in London—Transferred, on instructions of agent of former owner, to credit of account of servant of foreign state—Legal title to money vested in servant of foreign state in his official capacity—Action by former owner against bank and servant of foreign state claiming return of money.*

C In September, 1948, a sum of £1,007,940 9s. (referred to hereinafter as “the debt”) was standing to the credit of an account in the name of the government of the Nizam of Hyderabad with a bank in London. The account could be operated only by two persons, one of whom (referred to hereinafter as “Moin”) was then the Finance Minister of the Nizam’s government, and the other of whom was Mir Jung, the Agent-General for Hyderabad in London. During September, 1948, the State of Hyderabad was invaded by forces of the government of India. In the middle of September either Moin or Mir Jung called on R., who was then High Commissioner for Pakistan in the United Kingdom, at his official residence and asked him to accept a transfer into his name of the moneys standing to the credit of the Nizam’s government with the bank. On the instructions of the Foreign Minister of Pakistan, who was present at the interview, R. agreed to accept the transfer in his official capacity. On Sept. 20, pursuant to written instructions from Moin, dated Sept. 16, the bank closed the account of the Nizam’s government and transferred the debt to the account of “[R.] High Commissioner for Pakistan in London”. Some two days later the bank received cables from Hyderabad asking for the debt to be re-transferred to the Nizam’s account, but the bank was unable to act on the cables as the account now stood in the name of R. In 1950 the bank learnt that the government of India laid claim to the debt. In 1952 R. ceased to be High Commissioner for Pakistan in the United Kingdom, and in 1953, acting on the instructions of his government, he asked the bank to transfer the debt into the name of the person who was then the High Commissioner, but the bank refused to do so, on account of the conflicting claims. On July 8, 1954, the Nizam and the State of Hyderabad issued a writ in an action against Moin, the bank and R. Against the bank and R., the plaintiffs claimed payment of the amount of the debt as money held in trust for the plaintiffs or due and owing to them, or as money had and received to the use of the plaintiffs. The claim against Moin was in respect of breach of trust, but, even if any breach of trust could be established against Moin, there was no evidence that R. or the bank knew of it. By an order dated Jan. 11, 1955, leave was given to issue and serve a concurrent writ of summons out of the jurisdiction of the court on R., who was then in Pakistan. On an application by R. to set aside the writ and the concurrent writ as against him, and to stay all further proceedings against the bank, on the ground that the action impleaded the government of Pakistan, or, alternatively, sought to interfere with the right or interest of that government to or in the debt,

I **Held:** (i) the debt, being vested in R. as a servant of the government of Pakistan, must be treated as a debt which was due at law to the government and to which the government had a title that was not illusory or manifestly defective (principle stated by EARL JOWITT in *Juan Ysmael & Co. Incorporated v. Government of the Republic of Indonesia*, [1954] 3 All E.R. at p. 240, applied), although the government showed no equitable title to the debt;

accordingly the proceedings against the bank for the debt would be stayed, since to continue them would be to interfere with the property of the government, and

(ii) the government of Pakistan were entitled to immunity from proceedings to investigate the equitable title to the debt, and accordingly the writ and concurrent writ against R. would be set aside.

Dicta of LORD MAUGHAM in *Compania Naviera Vascongado v. Cristina S.S., The Cristina* ([1938] 1 All E.R. at p. 739) and of EARL JOWITT, LORD PORTER and LORD RADCLIFFE in *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* ([1952] 1 All E.R. at pp. 582, 585, 587) applied.

[As to the jurisdiction of the courts to entertain an action in respect of property in which a foreign sovereign or state has an interest, see 7 HALSBURY'S LAWS (3rd Edn.) 266, para. 569.]

Cases referred to:

- (1) *Compania Naviera Vascongado v. Cristina S.S., The Cristina*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (2) *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England*, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.
- (3) *Haile Selassie v. Cable & Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 107 L.J.Ch. 380; 159 L.T. 385; Digest Supp.
- (4) *Juan Ysmal & Co. Incorporated v. Government of the Republic of Indonesia*, [1954] 3 All E.R. 236; [1955] A.C. 72; 3rd Digest Supp.
- (5) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; Digest Supp.
- (6) *The Jupiter (No. 3)*, [1927] P. 122; *affd.* C.A., [1927] P.250; 97 L.J.P. 33; 137 L.T. 333; 11 Digest (Repl.) 613, 423.
- (7) *Strousberg v. Costa Rica Republic*, (1880), 44 L.T. 199; 1 Digest 48, 389.
- (8) *Brunswick (Duke) v. Hanover (King)*, (1844), 6 Beav. 1; 6 State Tr. N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 49 E.R. 724; *affd.* H.L., (1848), 2 H.L. Cas. 1; 9 E.R. 993; 38 Digest 12, 62.
- (9) *Gladstone v. Musurus Bey*, (1862), 1 Hem. & M. 495; 32 L.J.Ch. 155; 7 L.T. 477; 71 E.R. 216; 11 Digest (Repl.) 628, 514.
- (10) *Larivière v. Morgan*, (1872), 7 Ch. App. 550; *revsd. on the facts*, H.L. sub nom. *Morgan v. Larivière*, (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 1 Digest 48, 390; 43 Digest 641, 779.
- (11) *Bradford v. Chase National Bank of City of New York*, (1938), 24 Federal Supplement 28.
- (12) *Johore (Sultan of) v. Abubakar Tunku Aris Bendahara*, [1952] 1 All E.R. 1261; [1952] A.C. 318; 3rd Digest Supp.
- (13) *The Charkieh*, (1873), L.R. 4 A. & E. 59; 42 L.J. Adm. 17; 28 L.T. 513; 1 Digest 49, 393.

Motion.

The third defendant, Habib Ibrahim Rahimtoola, moved to set aside the writ of summons, issued on July 8, 1954, the concurrent writ of summons, issued pursuant to an order of WYNN-PARRY, J., dated Jan. 11, 1955, and all subsequent proceedings against the third defendant and against the second defendant, Westminster Bank, Ltd., in an action by the Nizam of Hyderabad and the State of Hyderabad against Nawab Moin Nawaz Jung (the first defendant) and the second and third defendants, or, alternatively, to stay all further proceedings in the action against the second defendant and the third defendant on the ground, among other grounds, that the action impleaded a sovereign state, the government of Pakistan, which declined to submit to the jurisdiction of the court.

By the action the plaintiffs claimed, against the second defendant and the third defendant, payment of a sum of £1,007,940 9s. to the second plaintiff,

A (a) as money held in trust for the first plaintiff or for the government of the State of Hyderabad; alternatively (b) as money due and owing to the first plaintiff or to the said government; or, alternatively (c) as money had and received to the use of the first plaintiff or of the said government. The plaintiffs claimed payment of the said sum of £1,007,940 9s. against the first defendant as money paid away by him in breach of trust.

B The second defendant entered an appearance on July 23, 1954, and by its defence, delivered on Dec. 20, 1954, stated, among other things, that it held the money as banker and claimed no beneficial interest therein and that it would deal with the money in accordance with the directions of the court. Alternatively, the second defendant pleaded that the statement of claim disclosed no cause of action against it. The second defendant also referred to correspondence

C between its solicitors and those of the third defendant which disclosed that the government of Pakistan claimed to be entitled to the money but declined to submit to the jurisdiction of the court.

By his notice of motion, the third defendant alleged that the sum of £1,007,940 9s. referred to in the writs, which sum now stood to the credit of the third defendant's account with the second defendant, was transferred to the credit

D of the third defendant as the agent of the government of Pakistan, which claimed to be entitled thereto, and that, therefore, the action impleaded the government of Pakistan, or, alternatively, sought to interfere with the right to or the interest of that government in the said sum. The third defendant asked, alternatively, for the order of Jan. 11, 1955, whereby liberty was given to issue and serve the concurrent writ of summons on the third defendant in Pakistan, to be discharged,

E and for the service of the writ and all subsequent proceedings in the action to be set aside as against the third defendant, on the ground that the affidavit in support of the application for the order did not disclose relevant facts which were known to the plaintiffs at the time of the application.

The facts appear in the judgment.

F *B. J. M. MacKenna, Q.C.*, and *O. R. Smith* for the third defendant, Habib Ibrahim Rahimtoola (the applicant).

Sir Andrew Clark, Q.C., and *S. B. R. Cooke* for the plaintiffs, the Nizam of Hyderabad and the State of Hyderabad.

Geoffrey Cross, Q.C., *Eustace Roskill, Q.C.*, and *Peter Foster* for the second defendant, Westminster Bank, Ltd.

G The first defendant, Nawab Moin Nawaz Jung, did not appear.

Cur. adv. vult.

July 30. **UPJOHN, J.**, read the following judgment: This is a motion to set aside the writ issued in this action on July 8, 1954, and the concurrent writ issued pursuant to the order of **WYNN-PARRY, J.**, on Jan. 11, 1955, as against the third defendant, Habib Ibrahim Rahimtoola (whom I will call "Rahimtoola"), and to stay all proceedings against the second defendant, Westminster Bank, Ltd., on the ground that the action impleads the government of Pakistan or, alternatively, seeks to interfere with the right or interest of that government to or in the sum of £1,007,940 9s. which stands to the credit of Rahimtoola with the Westminster Bank. I will call this "the debt." Alternatively, the motion seeks to discharge the order of **WYNN-PARRY, J.**, giving leave to issue and serve the concurrent writ of summons on Rahimtoola, on the ground that the affidavit in support thereof did not disclose the relevant facts known to the plaintiffs at the time of the application for the order.

I This is an action by the Nizam of Hyderabad and his government claiming as against the three defendants payment of the debt. The circumstances in which the claim is made are as follows. In September, 1948, there was standing to the credit of the government of the Nizam of Hyderabad with the Westminster Bank this debt. It represented part of larger sums formerly standing to the credit

of two accounts in the name of the Nizam or his government which were earmarked for the purchase of machinery. Two persons, and two persons only, had power to operate the account, namely, the first defendant, Nawab Moin Nawaz Jung (whom I will call "Moin"), who was then Finance Minister of the Nizam's government, and the Agent-General for Hyderabad in London, whose name was Mir Jung (whom I will call "Mir"). At this time the forces of the Indian government were invading the State of Hyderabad, and four or five days before Sept. 20 Moin or Mir (probably the former, but it does not matter which), called on Rahimtoola, then High Commissioner for Pakistan in the United Kingdom, at his official residence in Hampstead, and there was an interview at which Moin (or Mir), Rahimtoola himself and Sir Zafrullah Kahn, then Foreign Minister of Pakistan, were present. Rahimtoola has given on affidavit a detailed account of the interview, which has not been disputed. He says that the representative of the Nizam came to ask him to accept a transfer into his name of the funds standing to the credit of the Nizam's government with the Westminster Bank. Sir Zafrullah Kahn instructed him to accept such transfer. Rahimtoola objected on the ground that the government of Pakistan should not become involved, but his objection was overruled by Sir Zafrullah, who directed him to agree to a transfer to an account in his name but to be described as the High Commissioner for Pakistan. Sir Zafrullah also directed Rahimtoola to sign the necessary specimen signature forms, and he did so. Rahimtoola states that he would never have agreed to the transfer unless he had been expressly instructed to do so as High Commissioner for Pakistan and on behalf of his government by Sir Zafrullah, under whose instructions he, as High Commissioner, was bound to act. It was never suggested to Rahimtoola that he was to accept the funds on his own account as a private individual as agent or trustee for the Nizam, and, had it been so suggested, he would have refused to do so, as he would have considered it improper so to act while holding the position of High Commissioner. He did not know whether the moneys so transferred to him were personal moneys of the Nizam or state moneys and whether Moin or Mir had been given any instructions on the matter. He further says that he would have refused to deal with this debt except in accordance with the instructions of his government.

Moin appears to have been temporarily in London at this time, and on Sept. 16 he gave written instructions to the Westminster Bank to close the Nizam's government's account

"... by transfer of the balance to the credit of Mr. Habib Ibrahim Rahimtoola High Commissioner for Pakistan in London whose specimen signatures are enclosed herewith."

The bank received this letter by hand on Sept. 20, and immediately carried out its instructions, and so informed Rahimtoola on the same day. Two days later a series of cables started to arrive from Hyderabad asking the bank to arrange that no withdrawals were permitted from the Nizam's account until further instructions were received from the Nizam and to arrange for a re-transfer of the debt. Some of these cables, it may be observed, were routed through the government of India, but, of course, it was too late. The title of the account in the books of the bank to which the transfer was made was "Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London."

In 1950 it came to the ears of the Westminster Bank that the government of India was laying claim to the debt. On July 8, 1953, Rahimtoola (who had some seventeen months previously ceased to hold the office of High Commissioner for Pakistan in the United Kingdom and was then ambassador to France), acting on the instructions of his government, instructed the Westminster Bank to transfer the debt, together with all interest accrued thereon, into the name of Mr. Ispahani, the then High Commissioner for Pakistan in the United Kingdom. The bank refused to do so, referring to the fact that shortly after the transfer the Nizam's government had purported to object to the transfer and also to the

A fact that the government of India laid claim to the debt. Lengthy correspondence ensued, during the course of which the Westminster Bank, not unnaturally, suggested interpleader proceedings; but the government of Pakistan was not prepared to waive its immunity, and the suggestion was dropped. Finally, the writ in this action was issued.

B A statement of claim was delivered on Nov. 5, 1954, in which the plaintiffs claim payment of the debt on three grounds: (a) as money held in trust for the plaintiffs; (b) as money due and owing to the plaintiffs; or (c) as money had and received to the use of the plaintiffs. The plaintiffs also claim as against the defendant Moin the debt as money paid away in breach of trust.

C There are certain preliminary matters with which I must deal before turning to the real point in this motion. It was submitted by counsel for the plaintiffs that the debt, even before its transfer to Rahimtoola, was a trust fund constituted by the Nizam under a firman dated June 26, 1948, for the purchase of machinery and that Moin, in breach of trust and in breach of his duty as the officer of the Nizam's government, illegally transferred the said sum to Rahimtoola. Even if that be established, it does not advance the plaintiffs' case against Rahimtoola or the bank, for they have failed to establish, on the evidence before me, that D Rahimtoola knew of that illegality, and they do not even allege knowledge by the bank in the statement of claim. In fact, however, the plaintiffs have not, in my judgment, established that part of their case. According to the evidence, the Nizam was at the material time an absolute monarch who enjoyed uncontrolled sovereign powers, and there was no difference between state property and the Nizam's personal property. The Nizam normally acted by issuing decrees E or firmans, but he could at any time alter or revoke any firman, as I understand it, by another firman or other orders. The fact that by a firman the fund had been earmarked for the purchase of machinery could not be said to have constituted it a trust fund. It remained throughout the Nizam's own money, and he could deal with it as he pleased at any moment, revoking any instructions with regard to its use which he had given to his officials and substitute other F instructions. Nor, in my judgment, is it proved that Moin or Mir acted in breach of his duty in ordering transfer of the debt to Rahimtoola. It is clear on the evidence that they had no implied authority to give directions with regard to the debt by virtue of their respective offices. They could act only on the instructions of the Nizam, but the Nizam could at any moment give directions that might be by a public firman or by a personal order. True, no record of any G such order by the Nizam can be found, but, in the circumstances, that is not surprising. The State of Hyderabad was being overrun. If this was an attempt to cover up property of the Nizam against subsequent depredations by a possibly victorious Indian army, publicity would be fatal. No one has sworn that the transfer was against the personal orders of the Nizam; it was only sworn that no trace of any such order could be found. In these circumstances I H do not accept it as proved that Moin or Mir acted in breach of his duty as an officer of the Nizam.

I One further preliminary matter must be stated. The legal title to the debt remains in Rahimtoola. He does not make and never has made any claim to any personal beneficial interest in the fund. He claims it on behalf of his government. While Rahimtoola has very fully explained what took place at the interview, there is no evidence on behalf of the government of Pakistan why the transfer was made, and the government declined my invitation, as it was perfectly entitled to do, to file evidence on that matter. Therefore, I can only draw an inference as to the probable reason for the transfer from the evidence before me in the light of the important consideration that at the time of the transfer Hyderabad was under invasion. The probable reason was a desire, and a reasonable desire, to try to keep this sum from being claimed by a possibly victorious Indian government; but, whether that be so or not (and I express no concluded

view on that), in so far as the equitable title of the government of Pakistan to the debt is relevant, in my judgment, for the purposes of this motion, that government does not establish a scintilla of such a title; and in his reply counsel for Rahimtoola concedes that he cannot rely on an equitable title. In these circumstances the government of Pakistan claims that to sue Rahimtoola is to implead a foreign sovereign state.

The locus classicus for the statement of the relevant principles is to be found in the speech of LORD ATKIN in *Compania Naviera Vascongado v. Cristina S.S., The Cristina* (1) ([1938] 1 All E.R. 719 at p. 720); but it is sufficient for my purpose to take a briefer statement of the law to be found in the speech of LORD RADCLIFFE in *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* (2) ([1952] 1 All E.R. 572 at p. 587). After referring to LORD ATKIN'S speech, LORD RADCLIFFE said:

"For myself, I think that the range and purpose of our rule is expressed as well as may be in DICEY'S CONFLICT OF LAWS, 3rd Edn., p. 215: 'The court has . . . no jurisdiction to entertain an action or other proceeding against (1) any foreign sovereign . . . An action or proceeding against the property of [a foreign sovereign] is . . . an action or proceeding against such person'."

There was some debate before me as to the distinction which has been drawn in some of the authorities between direct and indirect impleading and as to the meaning of the latter phrase. The preponderance of judicial authority is in favour of the view that indirect impleading is merely a convenient method of describing proceedings in rem against a ship in which a sovereign claims some interest, as in such proceedings claimants are not actually named as parties in the writ: see *Haile Selassie v. Cable & Wireless, Ltd.* (3) ([1938] 3 All E.R. 384 at p. 386), and per EARL JOWITT in *United States of America v. Dollfus Mieg et Compagnie S.A.* (2) ([1952] 1 All E.R. at p. 580).

It is unnecessary for me to discuss this matter, for it is clear that in this case the sovereign is not directly impleaded; that is to say, he is not named as a party. No claim to immunity is made on behalf of Rahimtoola personally, for example that he is in the position of an ambassador, for at the date of the writ he held no such position. The claim to immunity can, therefore, only succeed in this action if it be shown that some property of the foreign sovereign is thereby affected, and it does not seem to matter very much whether or not that be described as indirect impleading.

In the next place, there has been much discussion in the authorities as to what is a sufficient interest in the property to establish a claim for immunity from process. When the subject-matter of the dispute is a chattel such as a ship or bar of gold, possession or control is a very relevant matter to consider on the claim to immunity; but in relation to a pure debt, unsupported by pledge or other security such as a bearer bond, the question must depend on title and nothing else. There can be no possession or control of a pure debt: see *Haile Selassie v. Cable & Wireless, Ltd.* (3) ([1938] 3 All E.R. at p. 388).

Next, it must now be taken as settled law that it is not sufficient to establish a claim to immunity that the foreign sovereign should merely make a claim to such property. I take the law to be as stated in the judgment of EARL JOWITT in the Privy Council in *Juan Ysmael & Co. Incorporated v. Government of the Republic of Indonesia* (4) ([1954] 3 All E.R. 236 at p. 240):

"In their Lordships' opinion, a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be

A decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

B The question, then, which I have to consider is whether the government of Pakistan establishes a title to this debt which is not merely illusory or manifestly defective. It is submitted that a sufficient title is in the government of Pakistan by reason of the fact that the legal title to the debt is admittedly in Rahimtoola in his official capacity of High Commissioner for Pakistan and in no other capacity whatever. The fact that, on the evidence as it stands at present, the government shows no equitable title, counsel submits, matters not. He submits (rightly, in my view) that it is well settled in the case of chattels that a proprietary interest need not be established, but possession or control is sufficient, and in such cases rightful possession or control has always been considered irrelevant. Thus in *The Jupiter* (5) ([1924] P. 236) it was regarded as irrelevant that the possession of the Union of Socialist Soviet Republics was wrongful, as it was subsequently proved to be: see *The Jupiter* (No. 3) (6) ([1927] P. 122); but that was a case of impleading a sovereign state in an action in rem. However, in *United States of America v. Dollfus Mieg et Compagnie S.A.* (2), where no question arose of impleading the foreign governments by making them parties directly or in an action in rem, the rightfulness of the claim to some bars of gold was regarded as irrelevant.

E The judgment of the Privy Council in *Juan Ysmael & Co. v. Republic of Indonesia* (4) clearly proceeded on the footing that the claim to title of the ship there in question was plainly bad and that the claim to immunity therefore failed; but it is plain that the whole case proceeded on the footing that the Indonesian government did not at the relevant time have possession or control of the ship, for the acting captain of the ship always remained true to his masters, the appellants. The law was briefly summarised by LORD MAUGHAM in *The Cristina* (1) ([1938] 1 All E.R. at p. 739) thus:

F "If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to, or any interest in, such property."

G Counsel for the plaintiffs, on the other hand, submits that Rahimtoola was a trustee of the debt for the true owner, the Nizam. He referred me to a number of authorities which, he submits, establish the proposition that, where property such as a debt is in a third party claiming no beneficial interest therein, as in this case, then before a foreign sovereign can be said to be impleaded he must show a title to that property which is not illusory or manifestly defective. He relies on two lines of cases. The first deals with the position at common law. LORD MAUGHAM, in *The Cristina* (1) ([1938] 1 All E.R. at p. 738) put it thus:

I "An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction, but there is no authority for the view that, if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Dicey's rule, he would, in my opinion, be bound to prove his title."

This statement of the law, however, is not universally accepted: see the observations of EARL JOWITT in *United States of America v. Dollfus Mieg et Compagnie S.A.* (2) ([1952] 1 All E.R. at p. 582) which I quote later.

In equity the courts have been less tolerant of a claim to immunity than at common law. Counsel for the plaintiffs cited to me a number of authorities which

establish the proposition that the court will not decline jurisdiction to administer a trust fund merely because a foreign sovereign claims to be interested therein. It was put in this way by JAMES, L.J., in *Strousberg v. Costa Rica Republic* (7) ((1880), 44 L.T. 199 at p. 201):

"There is one other class of cases to which the Master of the Rolls has referred, which may appear to be also an exception, and that is the case in which a foreign sovereign may be named as a defendant, for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction. The trustee is within the jurisdiction of the court, and the trustee holds the funds; and if a person says, 'I call upon A.B. the trustee of the fund to pay it to me because it belongs to me,' and A.B. the trustee says, 'I cannot pay it to you because there is a foreign sovereign interested,' then you say, 'Well, the foreign sovereign may, if he thinks fit, come here to defend himself'; and if he will not come here to defend his right or his interest in that fund, in that case the trustee must do it for him, or leave it undone. The only jurisdiction of the court in that case is not a jurisdiction over the sovereign, or over the sovereign's property; but simply over its own subjects, and over property which is within its own jurisdiction."

See also *Duke of Brunswick v. King of Hanover* (8) ((1844), 6 Beav. 1); *Gladstone v. Musurus Bey* (9) ((1862), 1 Hem. & M. 495); *Larivière v. Morgan* (10) ((1872), 7 Ch. App. 550) (reversed on the facts in the House of Lords.)

If Rahimtoola is, indeed, to be regarded as truly a third party holding the debt as a trustee for the true owner, then, in my judgment, both at common law and in equity, before the government of Pakistan can be said to be impleaded it must establish a title to the debt. That title must necessarily be an equitable title in the circumstances of this case, for the legal right to the debt is in Rahimtoola. It may be that, if a court is administering a trust, the sovereign must establish a true title, whereas at common law it is only necessary to establish a title not manifestly defective; but it is not necessary to consider that further, for in this case the sovereign establishes no title in equity, and, in my judgment, neither in law nor in equity is the sovereign impleaded.

The crux of this case, therefore, is whether Rahimtoola is to be regarded as a third party holding the debt for the true owner. Although Rahimtoola makes no claim to immunity on any ground personal to him, it seems to me clear that the debt was vested in him as an official of his government. The debt was not vested in "the government of Pakistan" *eo nomine*, but it was vested in a servant of that government in his capacity as such. That was a natural course to take in the circumstance. I do not think I ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant.

EARL JOWITT, in *United States of America v. Dollfus Mieg et Compagnie S.A.* (2) ([1952] 1 All E.R. at p. 581) said:

"JENKINS, J., in the course of his judgment, to which I would desire to express my indebtedness, expresses the matter as follows ([1949] 1 All E.R. at p. 960): 'A foreign sovereign state (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign state were essential to immunity on the score of possession by such state, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign state (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign state might

- A happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold was brought to this country by a foreign sovereign state to be applied in the purchase of goods for the public purposes of that state and placed in the hands of a servant of the state concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign state, irrespective of any immunity from process the servant might be entitled to claim in his own person.
- B If, on the other hand, gold brought to this country by a foreign sovereign state for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think that it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn on nice distinctions of this kind.”
- C

D EARL JOWITT continued ([1952] 1 All E.R. at p. 582):

- “Although I agree with the observations of LORD MAUGHAM in *The Cristina* (1) that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited, the result would be that, if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee claiming the delivery of the article which had been deposited by or on behalf of that sovereign.”
- E

In the same case LORD PORTER said (*ibid.*, at p. 585):

- F “No doubt, the doctrine should, as LORD MAUGHAM suggested in *The Cristina* (1), be narrowly watched, but it has always to be remembered that governments must act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession.”

- G Those were all cases dealing with chattels; but, in my judgment, the same reasoning ought to apply to the case of a debt. No case in this country has been cited to me which is on all fours with this case; but a claim to immunity in respect of a debt has been upheld in the District Court of New York in *Bradford v. Chase National Bank of City of New York* (11) ((1938), 24 Federal Supplement 28), a case reversed on its facts on appeal. However, the recent authorities undoubtedly contain warnings against extending the doctrine of sovereign immunity from process; see, especially, the observations of LORD MAUGHAM in *The Cristina* (1). There is, then, no absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances: see *Sultan of Johore v. Abubakar Tunku Aris Bendahara* (12) ([1952] 1 All E.R. 1261). Furthermore, this is not a case where the foreign sovereign has brought any property to this country; it has been transferred to him by the servants of another sovereign.
- H In my judgment, however, the general principle must be applied. The debt being in Rahimtoola as the servant of his government, the matter must be treated as though the debt was due to the government, although that does not, of course, entitle the government to claim immunity on the ground that it is being directly impleaded.
- I

The plaintiffs, however, seek to go behind that legal title and to show that, on an investigation of the circumstances surrounding the transfer and applying the municipal law of England, the equitable title is in the plaintiffs. In my judgment,

however, it is to that very investigation into the equitable title which the government of Pakistan being, in effect, clothed with the legal title, as a sovereign state is entitled to decline to submit. In my judgment, its insistence on its legal title is sufficient to support the claim to immunity, even though no equitable title is shown, and the claim would, therefore, seem to involve a wrong against the equitable owner. A

The theory behind the claim to immunity has been variously described, and I attempt no repetition; but I think that the following quotation from SIR ROBERT PHILLIMORE in *The Charkieh* (13) ((1873), L.R. 4 A. & E. 59 at p. 97), seems particularly appropriate to the circumstances of the present case: B

"The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state . . . " C

The present transaction was an inter-governmental transaction: let it be solved by inter-governmental negotiations. The writ and concurrent writ must be set aside as against Rahimtoola. D

With regard to the bank, the plaintiffs are suing the bank for the debt due at law to Rahimtoola. Proceedings must be stayed against them, for to continue to sue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detainue: see *United States of America v. Dollfus Mieg et Compagnie S.A.* (2). This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the thirteen bars of gold in *United States of America v. Dollfus Mieg et Compagnie S.A.* (2), there is no claim for damages against the bank. Nor does this case resemble *Haile Selassie v. Cable & Wireless, Ltd.* (3). The question there was: To whom were Cables & Wireless, Ltd., indebted? In this case, so far as the bank is concerned, there is only one answer to that question—Rahimtoola. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs can reach the debt only through Rahimtoola. Therefore, the action against the bank must be stayed. E F

It becomes unnecessary, therefore, to consider the second ground on which the motion is based, namely, that the relevant facts were not fully disclosed on the application for leave to issue a concurrent writ. It is right, however, that I should say that it is now conceded that there was not a full disclosure; but I accept the apology which, on affidavit, has been tendered to this court, and am satisfied that there was no intention whatever to mislead. G

Writ and concurrent writ against the third defendant set aside. Action against the second defendant stayed. H

Solicitors: *Sanderson, Lee, Morgan, Price & Co.* (for the third defendant); *Stanley Johnson & Allen* (for the plaintiffs); *Freshfields* (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A

R. v. AGRICULTURAL LAND TRIBUNAL FOR THE
EASTERN PROVINCE OF ENGLAND, *Ex parte* GRANT.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), July 25, 26, 27, 1956.]

B

Agriculture—Agricultural holding—Notice to quit—Consent of Minister—Matters for consideration—In the interests of efficient farming—Whether only the holding can be considered—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 25 (1) (a).

C

Tenants farmed agricultural land comprising sixty-three acres almost surrounded by land farmed by the landlord. The tenants held other land some half a mile distant from the sixty-three acres, and they farmed all their land as one unit. The landlord gave the tenants notice to quit the sixty-three acres and the tenants gave a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1)*. The landlord, whose intention was to farm the sixty-three acres himself, applied for the Minister's consent to the operation of the notice to quit, which was granted. The tenants required the matter to be referred to the agricultural land tribunal. The tribunal considered that although the tenants' standard of management did not reach the exceptionally high standard attained by the landlord, the tenants were farming reasonably well and were accordingly entitled to the protection afforded by the Act of 1948. In its statement of the reasons for its decision, the tribunal referred to "two main purposes of the Agriculture Act, 1947 . . . namely, to ensure not only efficient production but protection to tenants who were maintaining a reasonable standard of efficient production". The tribunal also considered that any increase in production from the farming of the land to which the notice to quit related by the landlord would not offset the adverse effect of the loss of the said land on the production of the tenants' farm. The tribunal decided that consent to the notice to quit should be withheld, finally stating its conclusion in the words "having regard to the said determination . . . the conditions contained in para. (a) of s. 25 (1)* of the Agricultural Holdings Act, 1948, were not fulfilled." On appeal from an order of the Divisional Court of the Queen's Bench Division directing that the decision of the tribunal be quashed and that the tribunal should re-hear the reference and determine it according to law,

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Held: as the Minister's discretion to give consent to quit did not arise unless the landlord satisfied him that the requirements of para. (a) of s. 25 (1) of the Agricultural Holdings Act, 1948, were satisfied, the first question to be decided was whether the requirements of that paragraph had been fulfilled and, if they had been fulfilled, a second question would then arise, viz., how the Minister's discretion under s. 24 (1) and s. 25 (1) of the Act should be exercised; in the present case the tribunal had made a wrong approach in law either (per SINGLETON, L.J.), in that it had not first decided whether those requirements were fulfilled or (per MORRIS and ROMER, L.JJ.), in that any decision that those requirements were not fulfilled had been reached on grounds which in part at any rate were invalid grounds, and accordingly, the tribunal's decision withholding consent to the notice to quit should be quashed and the reference should be re-heard.

Per SINGLETON, L.J.: the words "in the interests of efficient farming" in s. 25 (1) (a) of the Act of 1948 should be read as meaning in the interests of "the efficient farming of the land in respect of which the notice is given" (see p. 325, letter F, post); cf. per MORRIS, L.J., p. 330, letter B, post.

R. v. Agricultural Tribunal for the Wales & Monmouth Area, Ex p. Davies ([1953] 1 All E.R. 1182) applied.

* The relevant terms of s. 24 (1) and s. 25 (1) are printed at p. 324, letters D and E, post.

Observations on the factors of the landlord being an excellent farmer and on the land being enclosed by other land of the landlord (see p. 327, letter D, p. 328, letter I, post).

Appeal dismissed.

[Editorial Note.] In considering references whether the Minister's consent should be given to or withheld from notices to quit two questions are separate. The first is whether the requirements of a paragraph of s. 25 (1) of the Agricultural Holdings Act, 1948, are fulfilled and the second is how, if those requirements are fulfilled, the discretion of the Minister should be exercised. It should be of help, in determining whether consent to notices to quit should be given, to bear in mind that the two questions are separate and should be considered separately (see particularly, p. 324, letter, I, post).

As to the giving or withholding of consent to notices to quit, see 1 HALSBURY'S LAWS (3rd Edn.) 289, para. 607.

For the Agricultural Holdings Act, 1948, s. 25 (1) (a), see 28 HALSBURY'S STATUTES (2nd Edn.) 48.]

Case referred to:

- (1) *R. v. Agricultural Land Tribunal for the Wales & Monmouth Area, Ex p. Davies*, [1953] 1 All E.R. 1182; 3rd Digest Supp.

Appeal.

This was an appeal by the tenants from an order of the Divisional Court of the Queen's Bench Division dated Mar. 20, 1956, made on motion for certiorari and mandamus and directing that an order of the Agricultural Land Tribunal for the Eastern Province of England be quashed and that the tribunal should hear and determine the reference according to law. The tribunal had withheld consent to the operation of a notice dated Mar. 31, 1955, given by the landlord to the tenants to quit an agricultural holding.

Richard Elwes, Q.C., and *Geoffrey Lane* for the tenants.

Melford Stevenson, Q.C., and *John Hobson* for the landlord.

SINGLETON, L.J.: The appeal arises out of a notice to quit given by a Mr. Grant (to whom I shall refer as "the landlord"), the owner of land in regard to a piece of land sixty-three acres in extent. The land is in Lincolnshire. Its position is well shown on a plan which is exhibited to the affidavit of the landlord. On the plan the land is coloured green. Around it, or almost around it, there is land edged red on the plan which belongs to or is in the occupation of the landlord. The landlord owns or is tenant of an area of something like eleven hundred acres which he farms at Frieston in Lincolnshire. A little to the north of the land, with a portion of the landlord's land in between, is the land or some of the land farmed by the tenants, Mr. Pearson and his son. They are perhaps more properly described as market gardeners than farmers, though nothing turns on that. They also have a considerable area of land, and they are tenants of the area of sixty-three acres edged green on the plan. The Pearson family have had an interest in the sixty-three acres for a number of years, but the tenancy which they now have has not been of long duration.

On Mar. 31, 1955, the landlord gave notice to quit to the tenants, which notice was intended to terminate the tenancy as from Apr. 6, 1956. On Apr. 16, 1955, a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), was given on behalf of the tenants. On May 9, 1955, application was made by the landlord for the Minister's consent to the operation of the notice to quit, which is necessary under s. 24 and s. 25 of the Act of 1948. The duties of the Minister under this Part of this Act are delegated to the Lincolnshire (Holland) County Agricultural Executive Committee*. On July 14, 1955, the Minister of Agriculture and

* By the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948, S.I. 1948 No. 187; see 1 HALSBURY'S STATUTORY INSTRUMENTS 255.

A Fisheries gave his consent to the operation of the said notice to quit, on grounds set out in s. 25 (1) (a) of the Act. That consent was really a consent of the county agricultural executive committee, to whom the powers of the Minister were delegated. The tenants required, in due form, the decision of the Minister to be referred to the Agricultural Land Tribunal for the Eastern Province of England. The Minister, through the agricultural executive committee, set out in a statement
B which is before us, for the benefit of the tribunal and of the parties, the general grounds in connection with the Minister's consent to the operation of the notice to quit.

The matter came on in due course before the agricultural land tribunal, and the tribunal took a different view from that which had been expressed by the county agricultural executive committee. The county agricultural executive
C committee had found this:

"The executive committee considered that both the landlord and the tenant were farming their land satisfactorily, but had formed the opinion that the all-round level of production and standard of farming of the landlord was slightly higher and also, from the information put before them at the hearing and the situation of the land in question in relation to the other land occupied by the parties, it was in the interests of farming efficiency to
D grant consent to the operation of the notice to quit."

The county agricultural executive committee consists, we are told, of farmers from the area.

The decision of the tribunal is set out in a number of paragraphs. It is agreed that some of the paragraphs are not very easy to follow, but it is said on the other hand that the tribunal came to a determination which ought to be regarded as final. The last paragraph in the statement of reasons for the decision of the tribunal reads:

"Having regard to that determination, therefore, the tribunal came to the conclusion that the conditions contained in para. (a) of s. 25 (1) of the Agricultural Holdings Act, 1948, were not fulfilled and, accordingly, withhold its consent to the operation of this notice to quit, and direct accordingly."

It is claimed on behalf of the tenants that that is final, that it is a decision of the tribunal which cannot be successfully attacked. It was attacked; and on Mar. 20 of this year counsel on behalf of the landlord moved the Divisional Court for an order of certiorari to bring up and to quash the order of the tribunal. Application was also made for an order of mandamus. The Divisional Court directed that the order be quashed and that the tribunal "do hear the said reference and determine the same according to law". From the decision of the Divisional Court the tenants appeal to this court. Counsel on their behalf have submitted
G to this court that the Divisional Court took a wrong view of the matter, and that the finding and decision of the tribunal should be restored.

Both before the county agricultural executive committee and the tribunal questions were raised whether or not the tenants were farming efficiently the land which they had, including this land, sixty-three acres. That was considered
H by both bodies. The finding of the tribunal (and, I might say, of the county agricultural executive committee) was that the landlord was an exceptionally good farmer of the land which he had, quite a first-class farmer. The tribunal did not find, as the landlord asked that it should find, that the tenants were farming inefficiently the land in question. The tribunal found as follows:

"[The tribunal] considered that although the standard of management of [the tenants] did not reach the exceptionally high standard of that of [the] landlord], nevertheless [the tenants] were farming reasonably well, having
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regard to the character and situation of the unit, and accordingly were entitled to the protection afforded by the Act to reasonably efficient tenants."

Thus, in so far as we are concerned, no attack can be made on the farming efficiency of the tenants. That is no longer a matter for consideration; but there are other questions which arise, I think almost wholly, under s. 24 and s. 25 of the Agricultural Holdings Act, 1948.

The Act of 1948 is a consolidation Act. It followed closely on the Agriculture Act, 1947. The Act of 1947 was an Act "to make further provision for agriculture", and one of its purposes was to encourage good estate management and good husbandry. The provisions in regard to those matters are found in Part 2 of the Act of 1947*; there is no doubt that the Act was intended to encourage good farming, and at the same time to give protection to tenants.

Now I come to the Act of 1948. Section 24 (1) provides:

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

The Minister may consent. He is not bound to consent. Section 25 (1) provides:

"Without prejudice to the discretion of the Minister in a case falling within paras. (a) to (e) of this sub-section, the Minister shall withhold his consent under the last foregoing section to the operation of a notice to quit an agricultural holding or part of an agricultural holding unless he is satisfied —(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise."

The first thing I would point out is that in the first line of the sub-section there is a reference to the discretion of the Minister, and it appears to me to be clear that there is a discretion of the Minister to be exercised as he thinks fit if the provisions of s. 25 (1) (a) are found to be satisfied. Before any question of discretion arises, the Minister, or the tribunal, must be satisfied

"that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming",

and those words are followed by "whether as respects good estate management or good husbandry or otherwise." Thus, if the landlord serves a notice to quit and a counter-notice is served by or on behalf of the tenant and the matter comes to be considered either by the county agricultural executive committee or by the agricultural land tribunal, the first question which arises is: Is the tribunal satisfied that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming? If the tribunal is not so satisfied, the question of discretion does not arise. If the tribunal is satisfied that that which is set out in para. (a) of sub-s. (1) is fulfilled, thereafter the tribunal has to consider whether or not in its discretion it should consent to the notice. I believe that it would help those who have to consider such matters if it were borne in mind throughout that the two questions are separate and should be considered separately.

* Part 2 of the Agriculture Act, 1947, was saved by s. 100 (10) of the Agricultural Holdings Act, 1948, and is still in force.

A The most difficult question which arises in the case comes from the words "the interests of efficient farming". One of the matters raised on the different hearings is this: It was said that if the landlord, whose other land is practically all around this particular piece of land, was allowed to farm it, he (with his greater skill in farming and with his farm buildings and other land close to this particular piece of land) would be able to produce better results than the tenants could; and thus it was said that it was in the interests of efficient farming that the landlord should have this piece of land of which he is the owner. Against that it was said that if the sixty-three acres of land were taken away from the tenants, they would be confronted with some difficulty, because it would be taking away from them part of the holding which they were administering as one—though in fact there was about half a mile between this piece of land and the rest of their holding. The question which arises is: How far is that consequence, which might mean that the tenants would produce less proportionately on the rest of their holding, relevant to the immediate question under s. 25 (1) (a) of the Act of 1948?

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That question was considered two years ago in the case of *R. v. Agricultural Land Tribunal for the Wales & Monmouth Area, Ex p. Davies* (1) ([1953] 1 All E.R. 1182). In dealing with the question LORD GODDARD, C.J., said (*ibid.*, at p. 1183):

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"The tribunal apparently thought that the words 'in the interests of efficient farming' in s. 25 (1) (a) entitled them to consider, not merely the efficient farming of the holding to which the notice to quit related, but also the efficient farming of the property which the landlord was occupying at the time when he gave the notice to quit. They thought that, if the landlord could not farm efficiently the land which was in his own occupation, the tenant, who was farming efficiently, could be required to vacate his holding. That is contrary to the intention and to the proper construction of s. 25 (1) (a). The words in s. 25 (1) (a), '... the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming ...', must mean the efficient farming of the holding to which the notice to quit relates, and it seems to me extraordinary that the tribunal should have thought the contrary."

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I do not regard it as a very easy question. Still, I am of opinion, that the words "in the interests of efficient farming" should be read as meaning "the efficient farming of the land in respect of which the notice is given". I should have had more difficulty in coming to this conclusion except for two considerations. The first is that I think that extraordinary difficulties would be encountered if one had to consider by way of comparison other pieces of land held by the tenant in various parts, perhaps a little distance away. There would be no end to the inquiry. The second reason which makes me the more ready to adopt that reading is that it does not mean that the tribunal would of necessity give its consent if it would mean a considerable loss in the way of production on some holding of the tenant a little distance away. That could be considered, and would be considered, on the issue as to discretion. I do not think it is likely that a tribunal would give consent in a case if it found that the land in question would be more productive or more efficiently farmed if consent were given when the giving of consent would result in great loss of production elsewhere. I am satisfied that the sensible way and the true way to read the words is that they should be confined to the land in respect of which the notice is given.

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In order to make the position a little clearer, let me add that when the landlord's position is being considered it is important to bear in mind the words in s. 25 (1) (a) "whether as respects good estate management or good husbandry or otherwise". If, as in this case, a piece of land is almost surrounded by other land of the landlord and is close to his farm buildings, questions of good estate

management and of good husbandry are of importance and they can properly be considered by the tribunal. I do not disguise from myself the fact that the position as shown by the plan is of importance. Every farmer would like to have his land close together in a kind of ring fence. It gives him a better opportunity of managing it; it enables him to keep an eye on his workmen the more easily; and it makes the whole task of farming easier than it otherwise would be. If those conditions exist, they of themselves would appear to point towards increased farming efficiency if all other things were equal. Therefore I think, from the point of view of the landlord, there is importance in the words "as respects good estate management or good husbandry or otherwise. LORD GODDARD, C.J., in *R. v. Agricultural Land Tribunal for the Wales & Monmouth Area* (1) continued his judgment ([1953] 1 All E.R. at p. 1184):

"With regard to the discretion conferred on the Minister by s. 25 (1), the opening words of the sub-section are: 'Without prejudice to the discretion of the Minister in a case falling within para. (a) to para. (e) of this sub-section . . .' When one reads the sub-section with care, it is clear what those words mean. The sub-section provides that, before giving his consent, under s. 24 (1), to the operation of a notice to quit, the Minister must be satisfied that the case falls within para. (a) to para. (e) of s. 25 (1), but, even if the case does fall within one of those paragraphs, he is given a discretion to withhold his consent. In other words, even if the Minister finds certain facts, e.g., bad farming on the part of the tenant, which would entitle him to give his consent to the operation of the notice, he may, in the exercise of his discretion, determine not to do so. He has not got a discretion to give his consent to the operation of the notice to quit if none of the circumstances set out in para. (a) to para. (e) exists."

That is the position as I understand it and as I think that I have expressed it.

Reference was made in the course of the hearing to s. 76 of the Act of 1948, which provides:

"(1) In any case where by any of the provisions of this Act a person is empowered to require that a proposal of the Minister to take any action shall be referred to the agricultural land tribunal, then, if within the prescribed time and in the prescribed manner the said person so requires, the proposal shall be referred accordingly. (2) On any such reference the tribunal shall determine—(a) whether the conditions as to which the Minister must be satisfied before taking the action are fulfilled; and (b) whether, having regard to their determination under the foregoing paragraph and to all the circumstances of the case, the Minister should or should not take the action proposed, and shall report to the Minister accordingly . . ."

It was thought, I think, at one time that sub-s. (2) of that section was a guide to the tribunal in dealing with a case under s. 25. I am not sure that that is so, strictly, for I doubt whether there is here a proposal such as is mentioned in s. 76 (1); but it does not matter, for it is clear that there is a discretion in the tribunal and the first thing that the tribunal has to do is to consider whether or not the condition laid down in s. 25 (1) is fulfilled; and if it is fulfilled, then the tribunal has to consider whether, in its discretion, it will grant consent to the notice. The considerations arising under s. 76 really are the same as would arise under s. 25 (1) if there was not a s. 76; and s. 76 may in fact be brought in by sub-s. (4) of s. 25 itself.

Let me go back to the facts of the case. I do not say more about the decision of the county agricultural executive committee, which body, considering its duty under s. 24 and s. 25, thought that it was right that consent to the operation

A of the notice should be given. Those who went into the matter and who viewed the land at that time were of opinion that it would be in the interests of efficient farming that the notice to quit should operate. I must read the statement of reasons given by the tribunal. It is on its statement of reasons that the Divisional Court decided that its decision should be quashed. Paragraph 2 reads:

B “ [The tribunal] was very much impressed with the extremely high
C standard of management and farming attained by the landlord as shown by his records at the hearing and as was evident on the tribunal’s subsequent inspection on Dec. 30. [The tribunal] appreciated that [the landlord] was a very efficient farmer of a large unit comprising land of the highest quality and that the level of production was probably the maximum that could be reached.”

D That is a very fine tribute to the landlord’s farming ability and practice, and it was in accordance with the finding of the county agricultural executive committee. When that is borne in mind, and when it is coupled with the situation of this piece of land, almost surrounded by the landlord’s other land, it is clear that a strong case was put forward on behalf of the landlord. LORD GODDARD, C.J., so said. I recognise that the facts are to be found by the tribunal and that we are bound by the facts it finds, but I should think it is seldom that one will find a case so strong in two ways, the first in the tribute to the landlord’s farming and the second in regard to the location of the piece of land, almost surrounded (as it is) by the landlord’s other land. It cannot often happen that one will
E find so strong a case in these two respects. It is not conclusive, but I agree with the Lord Chief Justice that this is a strong case for the landlord.

Other paragraphs of the statement are:

F “ 3. [The tribunal] was bound, however, to have regard to two main purposes for which the Agriculture Act, 1947, was designed, namely, to ensure not only efficient production but protection to tenants, who were maintaining a reasonable standard of efficient production. 4. [The tribunal] considered that although the standard of management of [the tenants] did not reach the exceptionally high standard of that of [the landlord], nevertheless [the tenants] were farming reasonably well, having regard to the character and situation of the unit and, accordingly, were entitled to
G the protection afforded by the Act to reasonably efficient tenants.”

I am not sure that that can be regarded as a finding whether the requirements of s. 25 (1) (a) of the Act were satisfied by the landlord. It seems to me to go rather to the question of discretion. Paragraph 5 is:

H “ With regard to the landlord’s contention that Caythorpe Farm would be better farmed if worked as one unit with Coupledyeke Hall Farm [the landlord’s land] the tribunal formed the opinion that any increase in production resulting therefrom would not offset the adverse effect the loss of these sixty-three acres would have on [the tenants’] total holding of 280 acres and, therefore, from the point of view of overall production it was desirable that Caythorpe Farm should remain part of [the tenants’] unit.”

I That paragraph again seems to me to go to the question of discretion rather than to a consideration of the position under the main part of s. 25 (1). The next paragraph, para. 6, is not quite in accord with para. 5:

“ The tribunal, having given careful consideration to the arguments of counsel and to all the evidence tendered at the hearing, and from its inspection, did not consider that the difference in the overall production of the units, namely those both of the landlord and of the tenants, resulting

from the giving of consent to the notice to quit, would be such as to justify terminating the tenants' occupation of Caythorpe Farm, which had been in the possession of the tenants' family for a long time."

That again, as para. 5 did, contrasts two things—the position of this land as it would be under the landlord, on the one hand, and the position of the tenants, on the other hand, if they were deprived of this land and so had to run their holding without it. That, for the reasons given by the Lord Chief Justice in *R. v. Agricultural Land Tribunal for the Wales & Monmouth Area* (1), which I have cited, seems to be out of order. The position on s. 25 (1) (a) should be considered apart from that, though, as I have said, those questions which are mentioned in the two paragraphs, 5 and 6, may well be relevant to the question of the exercise of discretion. In passing I would say that I find it difficult to see that there would be much effect on the rest of the tenants' holding if they lost the sixty-three acres half a mile away from the rest of their holding—though I recognise that that is not a question for me.

The last paragraph in the statement of the tribunal is:

"Having regard to that determination, therefore, the tribunal came to the conclusion that the conditions contained in para. (a) of s. 25 (1) of the Agricultural Holdings Act, 1948, were not fulfilled and, accordingly, withhold its consent to the operation of this notice to quit and direct accordingly."

I think that the submission on behalf of the landlord is right that that is not a determination of the first question under s. 25, for it begins "Having regard to that determination"; that is, to that which has gone before. Nowhere is there found the answer to the question arising on the words in s. 25 (1),

"unless he is satisfied—(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise."

There is no finding either way, unless the last paragraph can be read as amounting to that; and I do not think, for the reasons I have given, that it can.

Thus, it appears to me that the decision of the Divisional Court was right and should be supported by this court. That means that the case must be re-heard. It will then be the duty of the tribunal to consider the words which I have just read. It will be entitled to bear in mind the quality of the farming of the landlord. It will ask itself whether it is satisfied that it is desirable that consent should be given in the interests of efficient farming, and it will be entitled to bear in mind the position of the landlord's present holding and farm buildings in relation to this land, which must, I think, have a bearing on the efficient farming of this piece of land. If it comes to the conclusion that it is satisfied that the requirements of sub-s. (1) (a) are fulfilled, it will ask itself whether or not, in its discretion, it should give its consent to the notice. On the question of discretion—and I say this only for the purpose of giving such help as I can in this matter—it appears to me that the first question really is the public welfare. It is for that reason that I have said that I do not think that any tribunal would consent to a notice if it appeared that in the result there would be loss of production rather than gain in production. If, by reason of the place at which this land is situate, it can be more efficiently farmed by the landlord, and if the landlord's skill and management is so great that he, by that alone, can get increased production, and if in the result there would be a gain to the community as well as to the landlord in this case, then the tribunal might well think fit to refuse to exercise a discretion in favour of the tenants. That is a matter for the tribunal and not for us.

I think that I made it clear that I appreciate the difficulties of any tribunal on a matter of this kind. That is shown, indeed, by the difference in the view

A of the tribunal from that of the county agricultural executive committee. They were all trying to do their best. I do not know what the result of this case will be. Many of the matters mentioned in the statement of the tribunal are matters for consideration if the question of its discretion arises, and I am not saying that it ought not to consider any of them then. There are many factors which it will have to consider. I share the difficulties which HILBERY, B J., felt, as I have shown already. The landlord is entitled to have a determination in the first place whether the conditions set out in s. 25 (1) (a) of the Act of 1948 have been satisfied by him. If that stage is reached the question of discretion arises, and those who have to determine this matter finally will bring their minds to bear on it, remembering (as I am sure they will) that the object of the Act is twofold at least: (i) to protect the efficient farmer; (ii) and, as is very C important, to promote the efficient farming of land, for which purpose the state provides subsidies.

In my judgment, the appeal should be dismissed.

D **MORRIS, L.J.:** I have reached the same conclusions. After the landlord had served his notice to quit and the tenants had served their counter-notice, the matter went first before the agricultural executive committee. The result of the appearance before them was that the Minister consented to the operation of the notice to quit. By notice in writing of July 14, the Minister gave his consent to the operation of the notice to quit. That made it possible for s. 25 (4) to come into operation. That sub-section reads as follows:

E "If the landlord or the tenant is dissatisfied with the Minister's decision to withhold or to give his consent as aforesaid, the landlord or tenant may within the prescribed time and in the prescribed manner require that the matter shall be referred to the agricultural land tribunal and, where a reference to the tribunal under this sub-section is duly required, sub-s. (1), and para. (a) of sub-s. (2), of the last foregoing section and sub-s. (1) of this section shall have effect with the substitution (except in so much of para. (d) F of sub-s. (1) of this section as relates to the application for the Minister's consent) for references to the Minister of references to the tribunal."

G The result of the operation of that sub-section was that s. 24 provided that the notice to quit did not have effect unless the tribunal consented to its operation; so the notice to quit was once more inoperative. A further result of the sub-section was that s. 25 (1) had effect, so that it would provide, with an exception not material to this case, rather as follows: "Without prejudice to the discretion of the tribunal in a case falling within paras. (a) to (e) of this sub-section, the tribunal shall withhold its consent under s. 24 to the operation of a notice to quit an agricultural holding or part of an agricultural holding unless it is satisfied of one or other of the matters provided in paras. (a) to (e)."

H The only paragraph which is relevant in this case is para. (a). The position therefore was that the tribunal was under compulsion to withhold its consent unless it was satisfied as to para. (a). If so satisfied, then (and only then) would the tribunal consider whether, in the exercise of its discretion, a discretion to be exercised in a judicial spirit, having regard to all the circumstances of the case, it would or would not consent to the operation of the notice to quit. I I desire to express my concurrence with the way in which this approach is dealt with by LORD GODDARD, C.J., in his judgment in *R. v. Agricultural Land Tribunal for the Wales & Monmouth Area, Ex p. Davies* (1) ([1953] 1 All E.R. at p. 1184).

Paragraph (a) begins with the words "that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable". I think in this case it is quite clear what was the purpose for which the landlord proposed to terminate the tenancy. That purpose can be ascertained from the document which was prepared for the use of the tribunal by the agricultural executive

committee. The purpose is set out under para. 4 of the landlord's case. Shortly A
 stated, I suppose the purpose was that it was proposed to terminate the tenancy
 of the sixty-three acres so that the landlord, rather than the existing tenants,
 should farm that land. It seems to me, therefore, that the question under para.
 (a) was whether a change which would bring it about that the landlord rather B
 than the tenants would be farming these sixty-three acres was desirable in the
 interests of farming efficiency; that is to say, the efficient farming of the sixty-
 three acres considered from the point of view of good estate management or
 good husbandry or otherwise. In my judgment, the question to be considered was
 the efficient farming of the sixty-three acres; or, stated otherwise, whether it
 was desirable, in the interests of the efficient farming of the sixty-three acres,
 that there should be a change. The position of the land, i.e., the unit of sixty- C
 three acres, in relation to other land of the landlord would, in my judgment, be a
 relevant circumstance. So also it would be relevant to consider how the landlord
 was farming his other land. Those considerations would be relevant to the
 extent to which they affected or threw light on the question whether it was
 desirable, in the interests of efficient farming, that these sixty-three acres should
 be farmed by the landlord rather than by the tenants. So it seems to me that the
 tribunal had first to approach that question. If the tribunal decided that, in the D
 interests of efficient farming, so judged, it was desirable that the landlord rather
 than the tenants should farm the sixty-three acres, then the tribunal would be
 empowered to give consent to the operation of the notice to quit. Whether the
 tribunal would or would not give consent would be for it to decide, on a fair and
 impartial consideration of all the relevant circumstances.

I do not propose to say any more in regard to the actual statement of reasons E
 for the decision of the tribunal, to which my Lord has fully referred. With
 every respect, it seems to me that the statement sets out a mixture of considera-
 tions, some of which are clearly not relevant when deciding the first issue; that
 is to say, the issue whether the conditions of para. (a) were or were not fulfilled.
 The last paragraph of all I can only read as being a conclusion in regard to para.
 (a), for the paragraph reads: F

"Having regard to that determination, therefore, the tribunal came to the
 conclusion that the conditions contained in s. 25 (1) (a) of the Agricultural
 Holdings Act, 1948, were not fulfilled and, accordingly, withhold their
 consent to the operation of this notice to quit and direct accordingly."

The decision appears, therefore, to be a decision that para. (a) is not fulfilled. G
 The mere fact, however, that the tenants have been there for a long time cannot,
 by itself, be relevant to that issue. It seems to me that on the fact of this
 document the tribunal shows an erroneous approach in law and therefore that it
 was right to quash this decision and to order that the matter be decided again
 and be determined according to law. How the tribunal will decide, I do not
 know, and it is entirely a matter for the tribunal. It must decide first the ques- H
 tion under para. (a). If it is not satisfied that para. (a) is fulfilled, that is an
 end of the matter. If it is satisfied, then the tribunal will proceed to consider
 whether, in its discretion, it will or will not give its consent.

For those reasons, I agree that this appeal fails.

ROMER, L.J.: I also agree. **LORD GODDARD, C.J.,** expressed the view in I
 the course of his judgment that the key, if one may so describe it, to the tribunal's
 decision was to be found in para. 3 and para. 4 (and particularly, I think,
 para. 4) of the statement of reasons for the decision, which is amongst our papers.
HILBERY, J., felt some doubt about that and thought that some, at all events,
 of the grounds for the decision of the tribunal appeared from other parts of the
 statement. For my part, I am inclined to think that para. 3 and para. 4 did not
 in themselves constitute the foundation of the tribunal's decision. The question
 of the tenants' efficiency had been put in issue by the landlord. The tribunal

- A accordingly had to deal with it, and decided it in favour of the tenants. The tribunal's reference in para. 4 to the tenants being entitled to the protection afforded by the Act of 1947 was, I think, rather unfortunate and misleading; but it was, I think, made either by way of introduction to the substantive matter which was before the tribunal, viz. (whether or not the landlord had satisfied it in the terms of s. 25 (1) (a) of the Act of 1948) or was related to the question of
- B discretion. It seems to me, on the whole, that the real grounds for the tribunal's decision on the s. 25 point appears from para. 5 and para. 6 of the statement. These paragraphs are ambiguous and are to some extent in conflict with each other. I am not altogether sure that the tribunal was not intending to say by these paragraphs that the landlord had not satisfied the tribunal that the sixty-three acres would be more efficiently farmed if effect were given to the proposals.
- C If the tribunal had clearly said that, then the landlord would not have discharged the onus of showing that the Minister should be satisfied within s. 25 (1) (a). On the other hand the true view of the matter is probably, I think, that the tribunal was intending to say that the proposals would result in more efficient farming of the sixty-three acres, but in less efficient farming of the tenants' other land. If that was the tribunal's view, it would seem that the landlord had brought
- D himself within s. 25 (1) (a), in which case the effect on the tenants' other land if consent to the proposal were given would be a matter relevant to the exercise by the tribunal of the discretion which is vested in the tribunal by s. 24 and s. 25 of the Act, but irrelevant, in my judgment, to the applicability to the case of s. 25. Having regard to the doubt as to the precise grounds on which the tribunal came to its decision and to what I think is an obvious fact, that the tribunal
- E founded it to some extent at least on invalid grounds—and I refer in that connection, amongst other things, to the length of the possession of the tenants' family—I agree that it is better that the matter should be re-considered.

The one question for the tribunal's decision, as I see it, so far as s. 25 (1) (a) is concerned, is whether the landlord has satisfied the tribunal that the purpose which the landlord has in mind, viz., the union of the sixty-three acres with his other land, will result in the sixty-three acres being so much more efficiently

F farmed than they are being farmed at present by the tenants that it is desirable that the proposal should receive the Minister's consent. It is only if the tribunal is so satisfied that it should turn to the other and wider aspects of the position to which my brethren have referred and which are relevant to the exercise of the discretion which the tribunal possesses.

- G I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.*, agents for *Dyer, Morris & Frost*, Boston (for the tenants); *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Spalding (for the landlord).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A

NOTE.

Re ROPNER'S SETTLEMENTS TRUSTS.
ROPNER v. ROPNER.

[CHANCERY DIVISION (Harman, J.), May 10, 11, 1956.]

B

Trust and Trustee—Powers of trustee—Power of advancement—Exercise of power proposed partly with a view to lessening the incidence of death duty on the death of the life tenant—Whether new voluntary settlements to be approved by trustees a valid exercise of power of advancement—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 32.

C

Case referred to:

- (1) *Re Vestey's (Baron) Settlement, Lloyds Bank, Ltd. v. O'Meara*, [1950] 2 All E.R. 891; [1951] Ch. 209; 2nd Digest Supp. *

Each of four settlements expressly empowered the trustees to advance not more than one quarter of the trust fund and to apply it for the maintenance or benefit of beneficiaries (who included the children of the first defendant who had a protected life interest), and the settlements provided that the first defendant's consent to the exercise of the power should not work a forfeiture*. Under the will, made in 1922, of the settlor, who died in 1933, the first defendant had a protected life interest and by virtue of s. 32 of the Trustee Act, 1925, there was power to advance up to one half of the trust fund in favour of the first defendant's children. The will provided that the first defendant's consent to the exercise of the power should not work a forfeiture*. The first defendant was over fifty years of age. The trustees of the settlements and of the settlor's will applied by originating summons for direction whether they should exercise the powers of advancement by transferring investments from the respective trust funds to trustees of settlements to be made for the benefit of the children of the first defendant, viz., the second, third and fourth defendants. The proposal was that settlements should be executed by each of the children of the first defendant other than his infant son on whose behalf the first defendant would enter into the settlement, and that aliquot parts of the trust funds should be transferred to the trustees of the proposed new settlements†, the proportion transferred being one quarter in the case of each trust fund subject to a settlement and one half in the case of the trust fund subject to the will. There were in all fourteen defendants, those other than the first four defendants being members of the class of persons who might be interested under discretionary trusts under the settlements and will taking effect on the forfeiture of the life interest of the first defendant. Not all defendants were represented.

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A. A. B. Fuller for the plaintiffs.

G. A. Rink, Q.C., and *J. B. Morcom* for the first, second and third defendants.

Milner Holland, Q.C., and *M. G. Johnston* for sixth, seventh, tenth, eleventh and fourteenth defendants.

Geoffrey Cross, Q.C., and *E. G. Wright* for the fourth defendant.

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HARMAN, J., after summarising the facts, said: One of the considerations which has moved the trustees to their present position is that if they exercise the power of advancement in favour of the first defendant's three children they will

* See *Re Rees' Will Trusts, Lloyds Bank, Ltd. v. Rees* ([1954] 1 All E.R. 7).

† In an unreported case, *Re Tetley's Settlement* (Mar. 31, 1952), **WYNN-PARRY, J.**, held on similar facts that trustees could properly exercise a power of advancement by making a settlement on infant objects of the power.

- A lighten the burden of estate duty on the first defendant's death in the event of his surviving the next five years. That is a perfectly legitimate consideration. It is not suggested that either of the first defendant's two daughters, who are over twenty-one, or his son, who is well under that age, are in need of money being spent on them or for their immediate advancement; but it is suggested that it will be for their benefit that the power of advancement should be exercised. [His LORDSHIP stated the proposal for the transfer of investments to trustees of new settlements and continued:] Mr. Milner Holland whose duty it was to argue against the course proposed found himself unable to do so. In my opinion that concession was rightly made. In my judgment, particularly having regard to the decision of the Court of Appeal in *Re Baron Vestey's Settlement, Lloyds Bank, Ltd. v. O'Meara* (1) ([1950] 2 All E.R. 891), where it was held to be an application of money merely to set it aside to accumulate for a child's eventual benefit, it must be an application of money to transfer it to the trustees of a settlement to be made for the child's benefit. I do not think that there is any difference between the position of the infant son and that of the adult children; although it is true that the infant son could not consent or request the trustees to make the advancement for his benefit, but the transfer of his contingent share to the trustees of a settlement for him must advance his interest and must thus be for his benefit, provided that the new settlement, on consideration, is thought to be a beneficial one. It is only proper for the trustees of the existing settlements or will to make an advance if they consider that the terms of the settlement into which the property advanced is to be transferred are such as will benefit the child. The trustees inform me through their counsel that they do not surrender their discretion to the court and therefore it is not for me to interfere with their discretion; it is not suggested that they will not take into consideration all the factors which they ought to take into account.
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I, therefore, feel that the court has no power to interfere, but should confine itself to saying that, if the trustees are of opinion that the proposed settlements are for the benefit of the objects of the powers, it will be for the benefit of those objects that the fractions of their shares in the trust funds should be applied by transferring them to the trustees of the proposed settlements.

Declaration accordingly.

Solicitors: *Gibson & Weldon*, agents for *Archer, Parkin & Townsend*, Stockton-on-Tees (for all parties).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Ex parte BLACKBURN.

[COURT OF APPEAL (Singleton, Morris and Romer, L.JJ.), July 23, 1956.]

Mandamus—Attorney-General—Refusal of application for certificate authorising appeal to House of Lords—No duty to re-consider application—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 1 (6)—Criminal Justice Act, 1925 (15 & 16 Geo. 5 c. 86), s. 16 (1).

Criminal Law—Appeal—Certificate for appeal—Refusal of Attorney-General to re-consider application for certificate—Mandamus—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 1 (6)—Criminal Justice Act, 1925 (15 & 16 Geo. 5 c. 86), s. 16 (1).

The applicant was convicted at the Central Criminal Court of offences under the Prevention of Fraud (Investments) Act, 1939, and sentenced to imprisonment. He appealed to the Court of Criminal Appeal and his appeal was dismissed on Mar. 29, 1955. Within the time allowed by s. 16 (1) of the Criminal Justice Act, 1925, viz., seven days of the dismissal of his appeal, the applicant applied to the Attorney-General under s. 1 (6) of the Criminal Appeal Act, 1907, for his certificate authorising an appeal to the House of Lords, and later gave reasons in support of his application. The Attorney-General considered the application but refused to grant a certificate. At a time more than seven days after the dismissal of his appeal by the Court of Criminal Appeal the applicant renewed his application to the Attorney-General for a certificate authorising an appeal to the House of Lords, supporting his application by the same reasons as before but fortifying them by reference to decisions of the Court of Criminal Appeal in cases subsequent to his own. The Attorney-General refused to re-consider the application for a certificate. The applicant now applied for an order of mandamus directed to the Attorney-General.

Held: no order of mandamus could be made since (a) the Attorney-General, having once considered the application and refused to grant a certificate, was under no duty to re-consider the same application; and (b) if the renewed application to the Attorney-General were dealt with as a fresh application then it was outside the time limit imposed by s. 16 (1) of the Act of 1925 and he was likewise under no duty to consider it.

Quaere: whether the application was in a criminal cause or matter, so that the court would have had no jurisdiction to hear the appeal (*Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381).

[**Editorial Note.** It seems that the Attorney-General is not necessarily functus officio when he has determined an application for a certificate under s. 1 (6) of the Criminal Appeal Act, 1907, but that if there were a fresh application to him, based on new reasons and made within the permitted seven days, he might take that into consideration (see p. 337, letter E, post). The court assumed but did not decide, as also the Divisional Court assumed but did not decide, that, if an Attorney-General did not consider an application for a certificate for appeal duly made to him, mandamus would lie (see p. 337, letter C, post).]

As to the Attorney-General's certificate authorising an appeal to the House of Lords, see 10 HALSBURY'S LAWS (3rd Edn.) 545, para. 1002, notes (q), (r); and as to mandamus directed to the Attorney-General, see 7 HALSBURY'S LAWS (3rd Edn.) 385, para. 811, note (f); and for cases on the subject, see 11 DIGEST (Repl.) 579, 133, 134.

For the Criminal Appeal Act, 1907, s. 1 (6), see 5 HALSBURY'S STATUTES (2nd Edn.) 927.

For the Criminal Justice Act, 1925, s. 16 (1), see 14 HALSBURY'S STATUTES (2nd Edn.) 943.]

A Cases referred to:

- (1) *R. v. Blackburn*, (1955), 39 Cr. App. Rep. 84.
- (2) *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; sub nom. *Amand v. Home Secretary & Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; sub nom. *R. v. Secretary of State for Home Affairs & Minister of Defence of the Royal Netherlands Government*, *Ex p. Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp.

B

Appeal.

The applicant, Albert Raymond Blackburn, appealed against an order of the Divisional Court (PILCHER and ASHWORTH, JJ.), dated July 20, 1956, refusing his ex parte application for leave to apply for an order of mandamus. On Jan. 27, 1955, the applicant had been convicted of two offences under the Prevention of Fraud (Investments) Act, 1939, and had been sentenced to imprisonment. An appeal by him against his conviction was dismissed by the Court of Criminal Appeal on Mar. 29, 1955. Within seven days thereafter he applied to the Attorney-General for the grant of a certificate to enable him to appeal to the House of Lords.

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The applicant appeared in person.

SINGLETON, L.J.: Section 1 (6) of the Criminal Appeal Act, 1907, reads:

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"If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court."

It is to be observed that no time limit for the obtaining of a certificate is laid down by the sub-section, but by s. 16 (1) of the Criminal Justice Act, 1925, it is provided:

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"An application to the Attorney-General under s. 1 (6) of the Criminal Appeal Act, 1907, for a certificate authorising an appeal to the House of Lords from the decision of the Court of Criminal Appeal, shall be made within a period of seven days from the date when the decision of the court was given."

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The applicant made his application for a certificate within that time; his reasons were given a little later.

In his affidavit filed in support of his present application the applicant states in para. 4:

H

"I made application for the certificate of the Attorney-General to enable me to appeal to the House of Lords within the time prescribed by the Criminal Justice Act, 1925 . . . The reasons were submitted three weeks later and rejected by the Attorney-General, whose legal secretary wrote me a letter to the effect that the application was refused."

It is clear from the wording of s. 1 (6) of the Criminal Appeal Act, 1907, that before the Attorney-General grants a certificate, he must be of opinion

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"that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought."

No one would doubt that when there is an application, by a person who has been convicted and whose appeal against conviction has been dismissed by the Court of Criminal Appeal, for a certificate from the Attorney-General under that sub-section, it is the duty of the Attorney-General, entrusted to him by Parliament, to consider the application, and to grant or refuse to grant a certificate. That

was done by the Attorney-General. The affidavit sets out that the application was refused. A

The applicant tells the court of further efforts to get the matter re-considered, in part in correspondence with the Secretary of State and also by reference to a letter from the Attorney-General to a Member of Parliament which is not exhibited but part of which is set out in the affidavit of the applicant. It may be unusual that a letter of that kind should be used; but that is no concern of mine. According to the affidavit, the Attorney-General wrote to the Member of Parliament saying: B

"I am writing to you about [the applicant's] petition to the Home Secretary of May 28, in which he asks for permission (in the light of the decision in the *Murtagh* case*) to apply for my certificate to enable him to appeal to the House of Lords. I am afraid that there was a certain amount of misunderstanding in regard to this application and I think it is only right that I should let you know that I am quite satisfied that it is not now open to me to consider this further application by [the applicant] which, as you will know, is not made within the statutory time limit of seven days laid down by s. 16 (1) of the Criminal Justice Act of 1925. In taking this view I may say that I am acting fully in accordance with the precedents." C

That shows clearly that the Attorney-General had considered what I may speak of as the original application, and he regarded the further application as out of time. In para. 6 of the affidavit it is said that the applicant addressed a further petition to the Home Secretary D

"which was answered after three months by the direct statement, on the advice of the Attorney-General, that the Attorney-General was functus officio in the matter and would not entertain any representations with relation to my original application." E

It is said by the applicant that in the case at the Central Criminal Court in which he was convicted the summing-up by the learned judge was defective in some respects, though it was approved, or the conviction was held good, by the Court of Criminal Appeal in a judgment delivered by GORMAN, J. It is said, further, that at some subsequent date there were other cases in the Court of Criminal Appeal which show, or tend to show, that the decision of the Court of Criminal Appeal in the applicant's own case was wrong—that it was bad law, and that the summing-up was defective. F

In this court, we have not seen the summing-up of the learned judge in the applicant's case, though part of it is set out in the report of the case in the Court of Criminal Appeal (*R. v. Blackburn* (1) ((1955), 39 Cr. App. Rep. 84). Without expressing any opinion, I assume, for the purpose of this appeal, that his contention is right in regard to that matter. That does not dispose of the present application. In his submission to this court, he said that there was a duty imposed on the Attorney-General to consider representations by any of the parties mentioned in s. 1 (6), and that the Attorney-General is charged with a judicial discretion whether or not he shall grant a certificate. He submitted further that the duty is not satisfied by his once considering it, but that there is a duty to re-consider it—though he agreed that there was no duty to consider a second application after the time limit imposed by the Act of 1925 had elapsed. His argument was that he had applied within the time specified and that, there having been an application in time, it was the duty of the Attorney-General to consider any renewal of the application. He went further, and said that if, at any distance of time after the Attorney-General had refused to grant his certificate, a like application was made—not another application, but a like application—it was the duty of the Attorney-General to consider it again. That appears to me to involve this, that if there was an application in time, year after year it could be said that a like application could be made, and that every time it G

* *R. v. Murtagh, R. v. Kennedy* ((1955), 39 Cr. App. Rep. 72). H I

A was made it was the duty of the Attorney-General to consider it. I do not think that that is the law. If it was, the whole object of s. 16 (1) of the Criminal Justice Act, 1925, would be defeated. The purpose of that provision clearly was to bring some finality into applications. Section 16 (1) imposed a time limit of

“seven days from the date when the decision of the [Court of Criminal Appeal] was given.”

B If an application once made could be renewed time and time again, it would destroy the effect of s. 16 of the Act of 1925. The applicant agrees that there would be no duty on the Attorney-General to consider an application made out of time. His recent application is either the same application again, or it is a fresh application. If it is a fresh application, it is out of time. If, on the other hand, it is the old application again, I see no reason for reading into s. 1 (6) of the Criminal Appeal Act, 1907, an obligation on the Attorney-General to consider it, which would be doing no more and no less than considering the same thing again. I assume, for this purpose, that there is, or would be in a proper case, a right to an order of mandamus against the Attorney-General if he refused to consider an application properly made under s. 1 (6) of the Act of 1907. I assume it without deciding the matter. I am satisfied, on the other hand, that there is not cast on the Attorney-General the duty of considering the same matter again and again. The Home Secretary, according to an extract from the letter referred to in the affidavit of the applicant, says that the Attorney-General was functus officio in the matter. I am not sure that that is the right way of looking at it. If the Attorney-General had received an application in time and refused it, and if that application were followed by another application setting out new reasons and made within the time limit, I should consider that the Attorney-General would be entitled to look at the application and to consider it on its merits. It has not been suggested to this court that there is any difference in the two applications made. The position may have changed in a sense. There have been one or two other decisions of the Court of Criminal Appeal which, on the argument addressed to us, state the law in a different way from that in which it was stated in the applicant's case. That is as far as the matter goes. The reasons given in his new or more recent application are the same as those in his original application; but they are fortified, he claims, by subsequent decisions.

E It seems to me that the real point of the present case is that the applicant is seeking to re-open his original application, and he is asking the Attorney-General to consider either the old application or a new application in precisely the same terms, or based on the same reasons. I am wholly satisfied that it would not be right for this court to consider directing the Attorney-General to re-consider a matter which he has already considered; we have no right to do it. Even if there is a right to direct him to consider an original application, that is a position which never would arise, for the Attorney-General knows his duty under this sub-section, and he would always consider an application made in due time. It has not been suggested to this court that there is any difference in the two applications made. The position may have changed in a sense. There have been one or two other decisions of the Court of Criminal Appeal which, on the argument addressed to us, state the law in a different way from that in which it was stated in the applicant's case. That is as far as the matter goes. The reasons given in his new or more recent application are the same as those in his original application; but they are fortified, he claims, by subsequent decisions.

H He is not bound to go on re-considering the same application again, or again and again. For those reasons (which are, in effect, the same as those given in the Divisional Court, to which the applicant directed our attention), it seems to me that this application (or appeal, which ever it may be)* should be dismissed. In the circumstances, I do not think it necessary to express any opinion on a further point which has been raised—that is, whether or not this is an application in a

I “criminal cause or matter” and should be refused by reason of the decision of the House of Lords in *Amand v. Secretary of State for Home Affairs* (2) ([1942] 2 All E.R. 381).

MORRIS, L.J.: I entirely agree.

ROMER, L.J.: I also agree.

Appeal dismissed.

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

* See wording of R.S.C., Ord. 58, r. 10.

INLAND REVENUE COMMISSIONERS v. HAMBROOK. A

[COURT OF APPEAL (Denning, Birkett and Parker, L.J.J.), July 23, 24, 30, 1956.]

Master and Servant—Loss of service—Established civil servant injured through negligence of the defendant—Crown's claim to recover damages for loss of services.

While riding a motor cycle off duty, an established civil servant (a tax officer in the Inland Revenue) suffered an injury in a collision with a motor vehicle driven by the defendant, as a result of which he was away from work for over nine months. During that period he received his full pay (less sickness benefit) as a voluntary payment by the Crown. The Crown brought an action for damages for loss of his services against the defendant. Responsibility for the accident was apportioned by agreement as to two-thirds to the defendant and one-third to the civil servant. B

Held: the action, which was an action per quod servitium amisit, did not lie since that cause of action lay only in respect of loss of services of persons (such as a wife, child or servant) who rendered services (whether under contract or not) within the domestic sphere as members of the master's household. C

Taylor v. Neri ((1795), 1 Esp. 386) followed: dictum of VISCOUNT SIMONDS in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* ([1955] 1 All E.R. at p. 858) applied. D

A.-G. v. Valle-Jones ([1935] 2 K.B. 209) and (semble) *Mankin v. Scala Theadrome Co., Ltd.* ([1946] 2 All E.R. 614) overruled as regards the action per quod lying at the suit of the employers. E

Semble: although the payment of sick pay by the Crown was a voluntary act it would have been some evidence of the value of the services of the civil servant if damages had been recoverable (see p. 344, letter E, p. 347, letter I, post).

R. v. Richardson ([1948] S.C.R. 57) cited with approval.

Per DENNING and PARKER, L.J.J.: if the action per quod servitium amisit had lain, the plaintiff would have been entitled to recover in full without any reduction of damages on account of the contributory negligence of the civil servant (see p. 340, letter D, p. 348, letter A, post). F

Decision of LORD GODDARD, C.J. ([1956] 1 All E.R. 807) affirmed on a different ground.

[**Editorial Note.** Many of the old authorities, to which the judgments refer, use the description "menial" servant to describe the category of servants to the loss of whose services the action per quod servitium amisit extends. In the headnote that adjective has been avoided because it has come to bear a connotation such as servile or degrading. In this branch of law, however, the adjective is used in the sense intra moenia, viz., within the walls of a dwelling, and thus as part of the household. G

It may be emphasised that the decision of the Court of Appeal that the action did not lie, is *not* based on the ground that there was no contractual relationship of master and servant or employer and employed between the Crown and the civil servant (cf., e.g., p. 343, letter H, p. 347, letter A, post). H

As to the rights of a master for loss of the services of a servant from personal injury, see 22 HALSBURY'S LAWS (2nd Edn.) 251, para. 437; and for cases on the subject, see 34 DIGEST 180, 181, 1451-1470. I

Cases referred to:

- (1) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 34 Digest 182, 1489.
- (2) *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)*, (1952), 85 C.L.R. 237; *affd.*, P.C., [1955] 1 All E.R. 846; [1955] A.C. 457; 119 J.P. 312; 3rd Digest Supp.

- A (3) *Marys's Case*, (1612), 9 Co. Rep. 111b; 77 E.R. 895; 34 Digest 181, 1468.
 (4) (1410), Y.B. 11 Hen. 4, 2.
 (5) *Taylor v. Neri*, (1795), 1 Esp. 386; 170 E.R. 393; 34 Digest 180, 1453.
 (6) *Bennett v. Alcott*, (1787), 2 Term Rep. 166; 100 E.R. 90; 34 Digest 174, 1331.
 (7) *Hodsoll v. Stallebrass*, (1840), 11 Ad. & El. 301; 9 L.J.Q.B. 132; 113 E.R. 429; 34 Digest 182, 1486.
 B (8) *Martinez v. Gerber*, (1841), 3 Man. & G. 88; 10 L.J.C.P. 314; 133 E.R. 1069; 34 Digest 180, 1456.
 (9) *A.-G. v. Valle-Jones*, [1935] 2 K.B. 209; 104 L.J.K.B. 358; 152 L.T. 513; Digest Supp.
 C (10) *Mankin v. Scala Theadrome Co., Ltd.*, [1946] 2 All E.R. 614; [1947] K.B. 257; [1947] L.J.R. 333; 176 L.T. 184; 2nd Digest Supp.
 (11) *Commonwealth v. Quince*, [1944] A.L.R. 50; 68 C.L.R. 227; 17 A.L.J. 370; 2nd Digest Supp.
 (12) *O'Grady v. Saper (M.), Ltd.*, [1940] 3 All E.R. 527; [1940] 2 K.B. 469; 109 L.J.K.B. 785; 163 L.T. 165; 2nd Digest Supp.
 (13) *R. v. Richardson*, [1948] S.C.R. 57; 2nd Digest Supp.
 D (14) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.

Appeal.

E The plaintiffs, the Commissioners of Inland Revenue, brought an action for damages for negligence against the defendant, Walter Edward Hambrook, in respect of the loss of the services of Raymond Joseph Bryning, a tax officer in the Inland Revenue department, as a result of his being injured in a collision between his motor cycle and a motor vehicle driven by the defendant on July 26, 1952. They gave as particulars by which the amount of the damages would be measured the sums which they had paid to Mr. Bryning for full pay, half pay and half increased pay during successive parts of the period of more than nine months during which he was away from work as a result of his injuries, less an allowance for national insurance sickness benefit, the total sum amounting to £231 13s. 11d. Responsibility for the accident was agreed to be apportioned as to two-thirds to the defendant and as to one-third to Mr. Bryning. On May 14, 1956, LORD GODDARD, C.J., dismissed the action, holding that the relationship of master and servant was necessary to the maintenance of the proceedings and did not exist between the plaintiffs (i.e., the Crown) and Mr. Bryning (an established civil servant) and that the payments to Mr. Bryning, being an act of bounty, did not constitute damage, which was an essential element in the action ([1956] 1 All E.R. 807). The plaintiffs appealed.

G *The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), Sir Frank Soskice, Q.C., Sir Reginald Hills and Rodger Winn* for the plaintiffs.

H *N. R. Fox-Andrews, Q.C., and Humfrey Edmunds* for the defendant.

Cur. adv. vult.

July 30. The following judgments were read.

I DENNING, L.J.: The Inland Revenue Commissioners, the plaintiffs, acting on behalf of the Crown, bring this action for the loss of services of Mr. Bryning. He was a tax officer and on July 26, 1952, when he was off duty he was riding a motor cycle and came into collision with a motor car driven by the defendant Hambrook. He was one-third to blame and the defendant two-thirds to blame. He was injured and off work for nearly ten months. The Crown paid him full pay for six months and half-pay for four months, and now claim that sum (less national insurance benefit) as damages in an action per quod servitium amisit.

An action by a master for loss of service is, as LORD SUMNER said (*Admiralty Comrs. v. S.S. Amerika* (1), [1917] A.C. 38 at p. 60), a survival from the time when

service was a status. It is an anomaly, because it does not fit in with the principles of law as now understood. It treats a servant as a chattel belonging to his master. If a ship or a car is damaged in a collision by the negligence of someone else, the owner of it can recover damages for the loss of use of it whilst it is being repaired. The action per quod servitium amisit enables a master to do the same if his servant is injured. No one else, except a wife, is treated in this way. If a director of a company or a partner in a firm is injured in an accident, he alone can sue for damages. The company or firm cannot sue for loss of his services. If a master himself is injured, his servants may be thrown out of employment, but they cannot sue for their loss. If a solicitor is injured, his clients may be much prejudiced by his absence from his work, but they have no claim for damages on that account. The general principle of law is, as LORD PARKER OF WADDINGTON stated in *Admiralty Comrs. v. S.S. Amerika* (1) (*ibid.*, at p. 45), that

“ . . . the loss of A arising out of an injury whereby B is unable to perform his contract is not actionable.”

Another anomaly is disclosed by the facts of the present case. If the plaintiffs can recover damages for loss of Mr. Bryning's services, they would be entitled to the full amount without any reduction at all, despite the fact that he was one-third to blame. This is, indeed, the logical result of treating Mr. Bryning as a chattel. If the owner of a motor car sends it out with a driver and, whilst he is driving in the course of his employment, the car is damaged in a collision by the faults of both drivers, the owner must take responsibility for his own driver's negligence. He only gets reduced damages. If, however, the driver takes the car out “ on a frolic of his own ”, outside the course of his employment, the owner recovers full damages for the car because he is not then responsible for the driver's negligence. So here, when Mr. Bryning is off duty, the plaintiffs, if their claim is good, can treat him as their chattel and claim full damages for the loss of his services, although it was partly his own fault.

I need hardly say that, in the face of these anomalies, this sort of action should not be extended. This was emphasised by the Privy Council in the recent case of *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) ([1955] 1 All E.R. 846). The question for us is whether the present claim is an extension or not. To answer this, it is necessary to inquire what are the bounds of the action. This can only be done by tracing its development throughout the centuries. In the Middle Ages, servants were regarded as property belonging to the master. If another man took them away, he could be sued in trespass just as if he took cattle. This way of looking at them is best shown by the old writs collected from the Year Books by FITZ-HERBERT, J., who lived early in the sixteenth century. One writ describes how a lord of the manor put his villein in the stocks because he had disobeyed orders. Another man broke up the stocks and let the villein out. It was held that the lord of the manor had an action of trespass against the one who set the villein free. Another writ describes how the abbot of a monastery put a friar in a cell so that he could be chastised because he broke a rule of the order. A friend of the friar got into the monastery and let him out. It was held that the abbot had an action of trespass against the one who set the friar free. So also it was held, quite generally, that

“ a man shall have an action of trespass for taking of his apprentice, or for taking of his servant ”

(see FITZ-HERBERT'S *NATURA BREVIIUM*, p. 91).

In such a state of society it was natural to give a master a cause of action against anyone who beat his servants. A good instance is where a man, by charter from the king, had a right to take a toll on all things sold in a fair in the town. He sent his servants to collect the toll, but they were set on and beaten. It was held that he had a general action of trespass for assault on his servants and

A for the loss of their services. The servant himself had a cause of action as well as the master. The distinction between them was laid down as early as 1441, when it was held that

“the master recovers his damages for the loss of the services and the servant for the damage done to his person”

B (see the YEAR BOOK of 19 Hy. 6, pl. 94).

So much for the general state of the law in those days. The question may be asked “Did the king have such an action?” There is no reason why he should not have it and there are many indications that he did. FITZ-HERBERT gives instances of actions by the king for trespass for taking goods and also for entering on land, cutting the trees and depasturing the herbage. The practice, he says

C (p. 90),

“is to have an information of intrusion for the king in the Exchequer and the defendant there to answer it.”

So far as trespass per quod servitium amisit is concerned, he gives an instance where one W and his men, land and goods, were granted protection by the king: D then another man, B, with force and arms took and carried away the goods of W and his men. It was held that the king had a special action of trespass against B (see FITZ-HERBERT'S NATURA BREVIVM, p. 92).

When we come to the seventeenth century, we find this medieval law continued. In 1612, LORD COKE, in *Marys's Case* (3) ((1612), 9 Co. Rep. 111b at p. 113a), stated it in this way:

E “... if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the services of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a per quod, viz., per quod servitium &c., amisit; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.”

To that statement of the law, there needs only to be added the commentary by SIR MATTHEW HALE, fifty years later:

G “Trespass for beating his servant, per quod servitium amisit, lies although he was not retained, but served only at will”,

citing a case of 1410 (4) (see FITZ-HERBERT'S NATURA BREVIVM at p. 91).

The eighteenth century sees an important development. We find that the action per quod has become confined to menial servants and apprentices, those who lived in the household as part of the family, for the very good reason that H they alone could then be considered as the property of the master. The reason for the law only applied to them and the cause of action should therefore only be given in respect of them. This appears from the observations of SIR WILLIAM BLACKSTONE in vol. I of his COMMENTARIES, pp. 425 et seq. He divides servants into four categories.

I “The first sort of servants, therefore, acknowledged by the laws of England, are menial servants; so called from being intra moenia, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law if there be no custom to the contrary construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not . . . Another species of servants are called apprentices . . . A third species of servants

are labourers who are only hired by the day or the week, and do not live intra moenia, as part of the family . . . There is yet a fourth species of servants, if they may be so called, being rather in a superior, or ministerial capacity; such as stewards, factors, and bailiffs; whom however the law considers as servants pro tempore, with regard to such of their acts, as affect their master's or employer's property."

SIR WILLIAM BLACKSTONE (COMMENTARIES, vol. 1, at p. 429), after discussing a master's action for inducing a servant to leave, said:

"The reason and foundation upon which all this doctrine is built, seems to be the property that every man has in the service of his domestics; acquired by the contract of hiring and purchased by giving them wages."

By "domestics" SIR WILLIAM BLACKSTONE clearly meant the menial servants described by him in his first category. He seems to have considered a master to have a property in his menial servants, but not in others.

That this was the general opinion of the time appears from *Taylor v. Neri* (5) ((1795), 1 Esp. 386). It was sought there to extend the action per quod servitium amisit to the case of a singer hired to sing. EYRE, C.J., a most respected and experienced judge, refused to admit it. He said that he did not think the court had ever gone further than the case of a menial servant. The precedents of that time show that the declaration in seduction cases described the daughter as a "menial servant" (see *Bennett v. Alcott* (6) ((1787), 2 Term Rep. 166).

We may take it, therefore, that at the close of the eighteenth century the action was confined to the members of the household who rendered services to the head of it and who had to be kept by him in sickness and in health—sons, daughters, apprentices, and so forth—for in them alone was there a resemblance of property. It was quite reasonable that the master, who had to keep them whilst sick, should have a cause of action for loss of their services.

In the nineteenth century the action survived mostly to avenge the seduction of a daughter—a special category which stands by itself and on which I do not pause. There are few other cases. In 1840 a watchmaker recovered damages for loss of services of his apprentice (*Hodsoll v. Stallebrass* (7) ((1840), 11 Ad. & El. 301). The apprentice lived in as one of the family, as many did in those days. Perhaps he slept under the counter.

Then in 1841 came the case of *Martinez v. Gerber* (8) ((1841), 3 Man. & G. 88), which looks at first sight as if it was an extension. A master was allowed an action for loss of services for his "servant and traveller". No point was taken that the action did not extend to him. There is nothing to show, in any of the reports of the case, whether he lived in or not. At that time many servants did live in the master's house as members of the household. I think we should assume that was the case, else it would be an illegitimate extension of the law as it was understood by EYRE, C.J.

There is no other case worthy of notice in the nineteenth century, but I would remark that towards the close of the century SIR FREDERICK POLLOCK, who was well versed in the history of the law and in particular of this cause of action, makes it clear that in his view it is confined to members of the household. In the first edition of his book on TORTS, published in 1887, he said (at p. 194):

"It seems natural enough that an action should lie at the suit of the head of a household for enticing away a person who is under his lawful authority, be it wife, child or servant: there may be a difficulty in fixing the boundary where the sphere of domestic relation ends and that of pure contract begins, but that is a difficulty of degree. That the same rule should extend to any wrong done to a wife, child or servant, and followed as a proximate consequence by loss of their society or service is equally to be expected."

A It is to be noted that in that passage and in its setting in the book, SIR FREDERICK POLLOCK confines the action to the head of the household in respect of injuries in family relations. The passage has remained unchanged in every edition from that time to this.

The twentieth century opens with *Admiralty Comrs. v. S.S. Amerika* (1) where naval men were drowned when a submarine was sunk by the negligence of a wrongdoer. The Commissioners of Admiralty sued to recover the pensions payable to their families, but failed because of the principle *actio personalis moritur cum persona*: but LORD PARKER OF WADDINGTON and LORD SUMNER emphasised the anomalous nature of the action *per quod servitium amisit*. Then in 1935 came *A.-G. v. Valle-Jones* (9) ([1935] 2 K.B. 209), where two aircraft-men were injured as a result of a collision with a motor lorry, whereby the Crown lost their services; and in 1946, *Mankin v. Scala Theadrome Co., Ltd.* (10) ([1946] 2 All E.R. 614), where a theatrical performer was injured and his employer sued for loss of services. In those two cases the employer succeeded, but it must be noted that in neither case was it contended that the action did not lie. The only contest was on damages. It seems that the limitations on this action had been forgotten. It was the courts of Australia which brought them to light in a series of important judgments marked by much historical research. In 1944, the High Court of Australia declined to allow an action by the Crown for loss of services of an airman (see *Commonwealth v. Quince* (11) ([1944], 68 C.L.R. 227); and in 1952, the same court declined to admit it for loss of services of a police constable (see *A.-G. for New South Wales v. Perpetual Trustee Co.* (2) ([1952], 85 C.L.R. 237). These decisions have been upheld by the Privy Council (see [1955] 1 All E.R. 846). The case of *A.-G. v. Valle-Jones* (9) must, therefore, be taken to have been wrongly decided. The Crown cannot sue for loss of services of a member of the armed forces. I can see no sensible distinction in this regard between a civil servant and a soldier or sailor or airman.

The opinion of the Board in *A.-G. for New South Wales v. Perpetual Trustee Co.* (2), delivered by VISCOUNT SIMONDS, contains many significant passages of which I would just quote one ([1955] 1 All E.R. at p. 858):

G “The form of action appears, as LORD SUMNER said ([1917] A.C. at p. 60), to be a survival from the time when service was a status. That status lay in the realm of domestic relations. It would not, in their Lordships’ view, be in accord with modern notions, or with the realities of human relationships today, to extend the action . . .”

Now, having traced the history of this action, I think it should be confined today (as it was in the eighteenth century) to the realm of domestic relations where a member of the master’s household is injured: for that is the only realm to which it can in reason be applied. It does not lie, therefore, at the instance of governments, limited companies, or other employers who keep no household.

H Much of the argument before us proceeded on other lines. It was said by counsel for the defendant that the action did not lie for the Crown because there was no contract of service between the Crown and its servants, or because it had power to dismiss them at will. Those particular arguments did not appeal to me. I think that it is quite plain from the old cases that the Crown is not debarred from bringing the action simply because it is the Crown, or because I there is no contract of service between itself and its servants, or because it can dismiss its servants at will. If the action did lie generally, wherever the relationship of master and servant existed, I would agree that there are many cases where the Crown could sue. As SIR OWEN DIXON, C.J. (Australia), has said (*A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) 85 C.L.R. at p. 249):

“There always have been employments under the Crown where the command and direction of the Crown, given mediately or immediately, is the sole measure of duty of the servant. Where the right of control exists in the

Crown and extends to the manner in which the employment is carried out, that is, to the doing of the work, the test of the relation of master and servant is satisfied."

In my opinion, the action does not lie whenever the relationship of master and servant exists. It only lies when the servant can properly be regarded as a member of the master's household, i.e., as part of the family. A servant has long since ceased to be regarded as a slave. It is time he ceased to be looked on as a chattel. He should be looked on as a free human being, and not less so when he is a civil servant.

Such is the broad ground on which I would dismiss this appeal but I would also add that there is a narrower ground on which also I would dismiss it. Mr. Bryning was a tax officer appointed under statute with sufficient discretion to take him out of the category of a servant to whom this cause of action applies. Supposing the action did lie, a question would arise as to damages. We all know that in the many cases where servants employed by private employers are injured the servants themselves claim for loss of earnings. In the ordinary way, when a servant is employed at a weekly wage he is only entitled to wages when he is working and to nothing when he is away sick, except national insurance benefit (see *O'Grady v. M. Saper, Ltd.* (12), [1940] 3 All E.R. 527). So he claims for loss of wages. If the employer should pay his wages whilst sick it would be a voluntary payment and not recoverable by the employer. As LORD PARKER OF WADDINGTON said in *Admiralty Comrs. v. S.S. Amerika* (1) ([1917] A.C. at p. 42):

"No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act . . ."

The payment by the Crown of sick pay is a voluntary act and is not recoverable as such; but I see no reason why it should not be used as some evidence of the value of his services. Indeed, the Supreme Court of Canada so held in *R. v. Richardson* (13) ([1948] S.C.R. 57). I say no more about it because, in the view I take of this case, it does not arise.

I would dismiss the appeal on the broad ground that the action per quod servitium amisit does not lie in relation to a person in the situation of Mr. Bryning.

BIRKETT, L.J.: I agree with the judgment which has just been delivered and for the reasons my Lord has given. The facts on which the plaintiffs relied, in seeking to recover from the defendant the sums of money the Commissioners of Inland Revenue had paid to their established clerk in the circumstances of this case, have been fully set out by my Lord, and it is not necessary to repeat them. The nature of the action was discussed at length in the judgment of the Lord Chief Justice, and has been dealt with by my Lord today. The history of the form of action with which we are now concerned has been described in many cases, most notably in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) ((1952), 85 C.L.R. 237, and [1955] 1 All E.R. 846) and in *Commonwealth v. Quince* (11) (1944), 68 C.L.R. 227; and in the judgment to which we have just listened that history has been further illuminated by the references to the many authorities my Lord has made. All that is left for me to do, therefore, is to state my conclusions as briefly as possible.

We are concerned in this appeal with the position of Mr. Bryning only, but the arguments have necessarily included some larger issues. Evidence was given before the Lord Chief Justice relating to Mr. Bryning, and the Lord Chief Justice came to the conclusion that Mr. Bryning was an established civil servant. He then considered the nature of the employment of an established civil servant in some detail, particularly with regard to the services rendered, and all the terms and conditions relating to and governing the services. He called particular attention to the passage in the judgment of the Judicial Committee of the Privy

A Council in *A.-G. for New South Wales v. Perpetual Trustee Co.* (2) which reads ([1955] 1 All E.R. at p. 858):

"Their Lordships can now express their final opinion on the case. They repeat that, in their view, there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the state which he is said to serve."

B And the Lord Chief Justice then continued ([1956] 1 All E.R. at p. 812):

"As I have said above, it is true that the case was concerned with the service of a police constable whose common law duties relating to independent action distinguish him from other servants of the Crown, but if the master and servant relation on which the action per quod servitium amisit rests is wholly different in kind not only from the relation of the Crown and a constable but from that of the Crown and a serving soldier so also do I think it is different from that of the Crown and an established civil servant whose duties are of a public nature and in part at least laid down by statute."

C That would appear to be the essential part of the decision of the Lord Chief Justice. Counsel for the defendant had submitted that Mr. Bryning was a ministerial officer under the Crown, and quite outside any class of servants in respect of whom the master can maintain an action against a third party for the loss of the servant's services. A further submission he made was that in this case there was a complete absence of any proprietary right arising out of status, and he submitted that the law was that some such right was essential to found and maintain the action.

E In my opinion, as the judgment of the Lord Chief Justice indicates in the passage I have cited, it is the history of this form of action that is fatal to the Crown's case in this appeal. The Solicitor-General argued that, as Mr. Bryning always acted under orders, and possessed no original authority, the services he rendered allowed the Crown to sue in this form of action. I do not think it possible for the Crown to succeed in this action by seeking to put Mr. Bryning into some special category of civil servant, for the reason that, whatever the category may be found to be, there is one essential condition to be fulfilled first of all—he must be within the class to which the authorities have said that the action alone applies. In *A.-G. for New South Wales v. Perpetual Trustee Co.* (2) LORD SIMONDS said ([1955] 1 All E.R. at p. 858):

G "The form of action appears, as LORD SUMNER said ([1917] A.C. at p. 60), to be a survival from the time when service was a status. That status lay in the realm of domestic relations."

H My Lord in his judgment today has referred to the origin of the form of action, and its history through the centuries, and it is quite clear, I think, that the action arose out of status. The feudal lord, for example, had a proprietary interest in his villein, and whoever injured the villein injured the lord. The quotations from SIR WILLIAM BLACKSTONE* support the same general view that the action was in respect of servants who were within the domestic sphere and where the proprietary element was present. In *Best v. Samuel Fox & Co., Ltd.* (14) ([1952] 2 All E.R. 394), where the form of the action was discussed in another connection, it was said to be an anomaly which ought to be restricted rather than extended. To permit the Crown to sue in the case of an officer such as Mr. Bryning in my view would be to extend the scope of the action, and I agree with the Lord Chief Justice that it ought not to be and indeed cannot be done.

I A further argument was submitted by counsel for the defendant on the question of damages. The sums of money paid to Mr. Bryning were in fact payments in respect of sick pay, and they were sums the commissioners were not obliged to pay, but were in truth voluntary payments. They could not therefore be recovered against this defendant.

* See p. 341, letter I, to p. 342, letter A, ante.

The Solicitor-General replied that these payments were to be regarded as a good conventional measure of the damages suffered by the commissioners in the loss of Mr. Bryning's services, and could therefore be recovered as damages. Counsel for the Crown submitted that, although Mr. Bryning was found to be in part responsible for the accident in which he was injured because of his negligence, that was no reason why the Crown should not recover all the damage suffered and there should be no abatement because of the contributory negligence. A

In view of the decision that the action will not lie, no decision on the question of damages is necessary. The Solicitor-General called our attention to the cases of *Admiralty Comrs. v. S.S. Amerika* (1) ([1917] A.C. 38) and *R. v. Richardson* (13) ([1948] S.C.R. 57) and it may very well be that the amounts of money paid out as sick pay may be recoverable on the ground he submitted; and further that the full amount might be recoverable despite the contributory negligence of Mr. Bryning. The Lord Chief Justice, after stating the position with regard to damages said ([1956] 1 All E.R. at p. 813): B

"The Solicitor-General boldly argued that the department was entitled to recover the whole of a man's wages as the measure of compensation although were the latter the plaintiff he could on the admitted facts of this case, make the defendant liable only for two-thirds. I do not propose to decide whether this argument is sound or not for it has become unnecessary but if it is it would, in my opinion, not only be an injustice to the defendant but would add another to the many anomalies which surround this class of action." C

I propose to leave the question of the damages in the same way, and would dismiss this appeal on the ground that this form of action is not open to the Crown in the case of Mr. Bryning. D

PARKER, L.J.: I have come to the same conclusion, and as I agree entirely with the reasons given by both my Lords I have very little that I desire to add. So far as Mr. Bryning is concerned, he was an established civil servant, and I agree entirely with the Lord Chief Justice when he says ([1956] 1 All E.R. at p. 810): E

"An established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty and I can see no ground on which different rules of law in respect of his employment can be applied according to the grade or position he may occupy. They apply to a junior clerical officer as they do to a permanent secretary, just as the Judicial Committee said in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) ([1955] 1 All E.R. at p. 857), the same rules of law in this respect apply in relation to the armed forces to a field marshal as to a private soldier." F

That is enough to dispose of this case, but, having regard to the arguments addressed to this court, I think it is right to consider the matter on a wider basis. Thus the Solicitor-General, while conceding that the more senior civil servants could properly be described as "officers in the civil employment of Her Majesty", contended that the rest were servants in respect of which an action per quod servitium amisit would lie. It was, he said, a question of degree depending on each case on the so-called "servant's" duties and authority, and he contended that Mr. Bryning fell within the latter category. Counsel for the defendant, on the other hand, not only contended that Mr. Bryning's duties and authority were such as to bring him within the former category, but further contended that a per quod action would not lie in respect of *any* servant of the Crown, and this by reason of the fact that there was in general no contract of service or at most a one-sided arrangement bearing no similarity to a master and servant relationship. While, as I have said, I think that Mr. Bryning's position was such that he could properly be described as an officer in the civil employment G

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A of Her Majesty, I also think that even if he fell to be regarded as a mere clerk or typist the action would not lie for the reasons given below.

As regards the contention of counsel for the defendant, I cannot think that the determining factor is the absence of the normal contractual relationship. The action per quod servitium amisit does not depend on the existence of a contract of service, but on the fact of service. The fact of service undoubtedly exists in every case between the Crown and those in its employ, even though that service is rendered under conditions in which either there is no contractual relationship or, if there is, the Crown can dismiss the employee at will. Though such conditions are different from those under which a servant other than a Crown employee renders services, I do not think that on that account alone it can be said the action does not lie. The solution, I think, is to be found by a consideration of the origin and the development of the action—matters which were fully dealt with by LORD SIMONDS in *A.-G. for New South Wales v. Perpetual Trustee Co.* (2) and by my Lord, DENNING, L.J., in the present case. As there pointed out, the cases in which a master can recover damages for the loss of services of an injured servant were, until the end of the eighteenth century, confined to cases of menial servants (see *Taylor v. Neri* (5) (1795), 1 Esp. 386). It is true that by the middle of the nineteenth century it had been applied to apprentices (see *Hodsoll v. Stallebrass* (7) (1840), 11 Ad. & El. 301), and to travellers (see *Martinez v. Gerber* (8) (1841), 3 Man. & G. 88). In neither of these cases was the matter argued, nor from the reports is it possible to ascertain the exact conditions of the service; but for my part I am far from satisfied that these cases involved any extension. I think that, when EYRE, C.J., referred in *Taylor v. Neri* (5) to menial servants, he was referring to menial servants in the strict sense used by BLACKSTONE of servants living intra moenia as part of the household, or the family, and it may well be that the apprentice and the traveller in the later cases lived under the same conditions. If I am right in this, then to make the action applicable in the case of a person in the employment of the Crown would indeed involve a serious extension, not because the master is the Crown, not because of the special conditions of service in such cases, but because such an employee cannot be described as a menial servant in the sense indicated above. I can appreciate an argument in support of such an extension. Since 1947 the Crown is liable for the torts of all its servants as defined in the Crown Proceedings Act, 1947, s. 2 (6), and there would be something to be said, if only on grounds of reciprocity, for extending the action to cases of injury to all such servants. But as LORD SUMNER said in *Admiralty Comrs. v. S.S. Amerika* (1) ([1917] A.C. at p. 60):

“Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.”

H Further it would not be “in accord with modern notions, or with the realities of human relationships today” (to use LORD SIMONDS’ words in *A.-G. for New South Wales v. Perpetual Trustee Co.* (2), [1955] 1 All E.R. at p. 858) to extend the action to the loss of services of a person whose relationship to his master is wholly different in kind from that to which the action was originally applied or to which it has been extended by binding or long-recognised authority.

I This conclusion makes it unnecessary to decide the further question whether the plaintiffs could in any event recover as damages the amount of sick pay paid by the Crown admittedly as a matter of bounty. I am, however, inclined to think that they could claim that amount, not because it represents sick pay, but because it is some criterion by which the loss of services could be measured. If instead of taking on and training a new servant the master reasonably chooses to keep on the injured servant and to pay him, it seems to me that the sums so paid, assuming they are reasonable, are some measure of the value of the services.

Looked at in this way, the case differs from that being considered in *Admiralty Comrs. v. S.S. Amerika* (1) and I am happy to think that this view is in accordance with the decision in regard to damages in *R. v. Richardson* (13) ([1948] S.C.R. 57).

So far as the last point is concerned, namely, whether, assuming the action lay, the plaintiffs would be entitled to recover in full, it seems to me that, if the argument for the plaintiffs is right (and I see no answer to it) it is yet another reason for confirming this class of action within the narrowest possible limits. I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; White & Co.* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ZBYTNIIEWSKI v. BROUGHTON.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Hodson, L.JJ.), June 29, July 2, 19, 20, 1956.]

Housing—Overcrowding—Contemporaneous duration of offence and of removal of restriction on recovery of possession by landlord under Rent Acts—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 59 (3), s. 65 (1).

Rent Restriction—Possession—Overcrowding—Material date for determining whether dwelling-house overcrowded—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 59 (3), s. 65 (1).

In 1950 a room, which constituted a dwelling-house for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, was let to the tenant. Subsequently two children were born to the tenant and his wife, and in consequence the room became overcrowded by virtue of s. 58 of the Housing Act, 1936. The landlord determined the tenancy and in February, 1956, when the dwelling-house was still overcrowded "in such circumstances as to render the occupier guilty of an offence" within s. 65 (1)* of the Housing Act, 1936, instituted proceedings for possession, alleging that the tenant, as occupier, was guilty of the offence of overcrowding and was, therefore, precluded by s. 65 (1) of the Act of 1936 from relying on the protection of the Rent Acts. In March, 1956, the tenant applied to the local authority under s. 59 (3)† of the Act of 1936 for suitable alternative accommodation and by virtue of that sub-section the tenant then ceased to be guilty of the offence of overcrowding.

Held: on the true construction of s. 65 (1) the restriction on recovery of possession imposed by the Rent Acts was removed only while an offence of overcrowding continued; in the present case there was not overcrowding "in such circumstances as to render [the tenant] guilty of an offence" within s. 65 (1) at the date which was the material date, viz., the date of the trial, and accordingly the landlord was not entitled to possession.

Per HODSON, L.J.: a conviction of the tenant for overcrowding would be no evidence in civil proceedings that he was guilty of an offence (see p. 357, letter C, post).

Appeal dismissed.

[For the Housing Act, 1936, s. 58 (2), s. 59 (3), s. 65 (1), and s. 66 (2), see 11 HALSBURY'S STATUTES (2nd Edn.) 503, 504, 508 and 509.]

Cases referred to:

(1) *Bowness v. O'Dwyer*, [1948] 2 All E.R. 181; [1948] 2 K.B. 219; [1948] L.J.R. 1774; 31 Digest (Repl.) 654, 7573.

(2) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 31 Digest (Repl.) 712, 7979.

* The terms of s. 65 (1) are printed at p. 349, letter G, post.

† The terms of s. 59 (3) are printed at p. 354, letter G, post.

- A (3) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B. 107; 174 L.T. 279; 31 Digest (Repl.) 639, 7471.
(4) *Bird v. Hildage*, [1947] 2 All E.R. 7; [1948] 1 K.B. 91; [1948] L.J.R. 196; 177 L.T. 97; 31 Digest (Repl.) 699, 7901.
(5) *Hollington v. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 22 Digest (Repl.) 244, 2412.

B **Appeal.**

This was an appeal by the landlord against an order of His Honour JUDGE DAYNES, Q.C., at West London County Court, dated May 7, 1956.

- C In 1950 a single unfurnished room, together with use of a lavatory, was let to the tenant by the landlord's predecessor in title. The room constituted a dwelling-house for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The tenant occupied the room with his wife. Subsequently two children were born to the tenant and his wife, one in December, 1950, and the other in May, 1952. In January, 1955, the landlord acquired his interest in the property in which the room was situated. In January, 1956, the landlord served on the tenant a notice to quit and on Feb. 23, 1956, the landlord instituted proceedings in the county court for possession alleging, inter alia, in his particulars of claim:

- D "The [tenant] . . . resides and sleeps in the room with his wife and two children aged about six and four and a half years respectively. The said room is in consequence overcrowded and the [tenant] is guilty of an offence under the Housing Act, 1936, s. 59, and his possession of the said room is not protected by the Rent and Mortgage Interest Restrictions Acts."

- E On Mar. 12, 1956, the tenant applied to the local authority under the Act of 1936 for suitable alternative accommodation, and the consequence of this was that he ceased to be guilty of the offence of causing or permitting overcrowding contrary to s. 59 (1) of the Housing Act, 1936; see *ibid.*, s. 59 (3). He and his family were still in occupation of the room at the hearing of the action. His F Honour JUDGE DAYNES, Q.C., held that since the tenant had made his application to the local authority before the trial of the action he was entitled to rely on the protection of the Rent Acts and he dismissed the claim. The landlord appealed.

J. M. Shaw for the landlord.

D. P. F. Wheatley for the tenant.

- G **LORD EVERSHERD, M.R.:** The question which we have to determine is one of the construction of the words of s. 65 (1) of the Housing Act, 1936:

"Where a dwelling-house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, shall prevent the landlord from obtaining possession of the house."

- H [His LORDSHIP stated the facts and continued:] When the case came on for trial, it was no longer true to say that the dwelling-house in question was "overcrowded in such circumstances as to render the occupier thereof guilty of an offence." The tenant, therefore, claimed, in reliance on the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, that no case had been established for making an order against him for possession. The learned judge so held. His I Honour further expressed the view that, in any event, an occupier could not for the purposes of the jurisdiction to order possession be treated as guilty of an offence within the meaning of s. 65 (1) of the Housing Act, 1936, unless he had actually been convicted. We have not heard any argument from counsel for the tenant on that point, and I therefore express no view on it, save to say that I must not be taken to be assenting to the learned judge's expression of opinion that conviction is necessary for present purposes to constitute the guilt indicated by s. 65 (1).

It is unnecessary for me to express a view on that matter, because I am of the same view as the learned judge on the first point, namely, that for the purpose in hand, the disability which s. 65 (1) imposes on the court's powers to give effect to the Rent Acts did not exist at the time of the trial and, therefore, no other cause being shown, the duty of the court was to give effect to those Acts and to refuse an order for possession. In a sentence, the argument for the landlord has been that the matter is concluded one way or the other by the state of the facts as they were when the proceedings began. If at that date it is shown that the occupier was guilty of the offence of overcrowding, then he cannot, so runs the argument, put himself right by later getting the approval of the local authority and thereby giving rise once more to his defences under the Rent Acts. That proposition is founded not so much on the strict wording of this sub-section as by invoking what is undoubtedly a rule of general application in rent restriction cases, namely, that where a landlord proceeds to invoke the jurisdiction of the court and to claim an order for possession, then the court should look at the state of the facts as they are alleged and proved to be at the date when the proceedings are started. A
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That general rule finds expression in many cases which have been cited to us, and I shall not take time by quoting all of them. One of the earlier cases is *Bowness v. O'Dwyer* (1) ([1948] 2 All E.R. 181). There the question arose under s. 3 (2) (b) of the Act of 1939 as amended; that is to say, it raised the question of the extent to which the rent payable was attributable to payments in respect of board, attendance and the use of furniture. The facts and, indeed, the decision are not strictly relevant for present purposes, but in the judgment of the court, which was delivered by myself, the statement is found (*ibid.*, at p. 184): D
E

"It is true that the general rule under the Rent Acts is that the status of any premises, for the purpose of the Acts, should be determined at the date when the landlord seeks to enforce his rights",

that is, when he initiates the proceedings for that purpose. In *Oak Property Co., Ltd. v. Chapman* (2) ([1947] 2 All E.R. 1) the question was whether or not the sub-letting which had occurred was lawful—a familiar topic under the Acts. Again, in the judgment of this court I find the phrase (*ibid.*, at p. 4): F

"From this case [*Norman v. Simpson* (3) ([1946] 1 All E.R. 74)] and others which have since followed it, the principle must now, in our judgment, be taken as established that in a case arising under s. 15 (3) of the Act of 1920 [that is, a sub-letting case] the relevant facts must be determined at the date of the institution of proceedings. G

Not seeking to multiply cases, I confine myself to one other instance where the question concerned arrears of rent, and that is *Bird v. Hildage* (4) ([1947] 2 All E.R. 7), where COHEN, L.J., stated (*ibid.*, at p. 11):

"Section 3 and Sch. 1 lay down the circumstances in which the court may make an order or give a judgment for recovery of possession, and we think that, in reaching a conclusion whether any rent is lawfully due and has not been paid, the court must look at the date of commencement of the proceedings by which the landlord is seeking to recover possession. The rights of the parties crystallised at that date, and nothing happening thereafter could, in our opinion, deprive the court of jurisdiction to make an order for recovery of possession, if the court thought it reasonable to do so." H
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I should add that, in considering whether an order for possession under the Acts is or is not reasonable, it is equally plain that regard must be had to the circumstances as known to the court up to and including the trial of the case. I have cited, however, sufficient of the authorities to show that there is this general conception (to use the word used in one of the earlier cases) that where the status of the premises is the question in issue or where the question is whether the jurisdiction of the court to make an order has arisen, the facts which must *prima facie*

A be determined are those at the date when the landlord proceeds to invoke the court's powers by issuing proceedings. I have made that excursion into the other cases; but it is none the less clear that the so-called rule which I have indicated is by no means one of absolute and universal application to all cases in which any reference to the Rent Acts is necessary.

B In a case such as the present the question for the court is still: What is the true meaning and effect of the sub-section which we now have to consider? The first thing to bear in mind in approaching this matter is that the provisions of this Part [Part 4] of the Housing Act, 1936, are not directed to a consideration or determination of the respective rights of landlord and tenant. They are concerned with quite a different subject-matter, namely, to prevent by appropriate means the social evil of overcrowding. It seems to me that the provisions which we have to construe are designed first and last as a means whereby that end, that is, the prevention of overcrowding, may be secured. Secondly, it is to be borne in mind—and this is perhaps the corollary of what I have just said—that we are not here concerned with the status of the dwelling-house for Rent Act purposes; nor are we concerned with some particular set of facts which under the Rent Acts gives to a landlord a right to invoke the court's jurisdiction to make a possession order in his favour.

D It is not in doubt that the tenant became, on expiry of the valid notice to quit, a statutory tenant, as that formula is understood under the Rent Acts. It is not suggested that he ceased to be a statutory tenant, or that the dwelling-house, by reason of the overcrowding which existed when the proceedings began, was taken altogether out of the ambit of those Acts. Let me just read again the sub-section:

E “Where a dwelling-house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, shall prevent the landlord from obtaining possession of the house.”

F In my judgment, counsel for the tenant is entitled to say, as the foundation of his argument, that this remained a rent controlled house and the tenant was and is a statutory tenant in respect of it, and that the sub-section merely says that in certain circumstances the right of a tenant to say that the landlord cannot evict him unless certain requirements of the Rent Acts are complied with shall not operate. I repeat, the object of the Housing Act, 1936, in so providing is not to confer on the landlord a private right but to put an end to the ill of overcrowding.

G There is one other general observation which I should like to make, which turns on the phrase “guilty of an offence”. I have already said that I find it unnecessary to express a considered view whether conviction is necessary in this or in other cases; but s. 59 (1) of the Housing Act, 1936, provides that “. . . if after the appointed day the occupier . . . of a dwelling-house causes or permits it to be overcrowded . . .,” then he is guilty of an offence and shall be liable on summary conviction to a fine not exceeding a stated figure. In other words, an occupier of an overcrowded dwelling-house is stated, according to the language of s. 59 (1), to be guilty of an offence and to be liable on summary conviction to a penalty. Section 65 (1), therefore, is saying that if the circumstances are such that the occupier is so guilty of an offence and so liable on conviction to a penalty, then certain consequences follow. It appears to me that since criminal liability is thus involved, it would prima facie be contrary to general principle to say that the disability which s. 65 (1) attaches to guilt of the offence should subsist any longer than the guilt itself persists. That is a feature of the present case which is plainly distinct from the characteristics of cases like *Bowness v. O'Dwyer* (1), *Oak Property Co., Ltd. v. Chapman* (2) and *Bird v. Hildage* (4) where private rights only were in issue.

Let me, therefore, turn to the actual matter in hand, namely, the construction of the sub-section. I have said that the purpose of Part 4 of the Act of 1936 is the abatement of overcrowding. That is emphasised by the circumstance that Part 4 of the Act is headed "Abatement of Overcrowding"; and s. 57 imposes on local authorities a duty to inspect, make reports, and so forth. Section 58 (1) defines overcrowding. It is a dual or alternative definition, but for the present purpose it will suffice for me to take the second of the two alternatives:

"A dwelling-house shall be deemed for the purposes of this Act to be overcrowded at any time when the number of persons sleeping in the house . . . (b) is, in relation to the number and floor area of the rooms of which the house consists, in excess of the permitted number of persons as defined in Sch. 5 to this Act."

So far as the present case is concerned it will appear by reference to s. 58 (2) and to Sch. 5 that the permitted number for this dwelling-house was two, and that when the first daughter became a year old on Dec. 12, 1951, the number of occupants was regarded, for the purposes of the Act, as being two and a half, and has since become three.

Section 59 is headed "Offences in relation to overcrowding"; and counsel for the tenant referred to sub-s. (5) which reads:

"The landlord of an overcrowded house shall be deemed to cause or permit it to be overcrowded—(a) if, after notice in writing that it is overcrowded in such circumstances as to render the occupier thereof guilty of an offence has been served upon the landlord or his agent by the local authority, the landlord fails to take such steps as it is reasonably open to him to take for securing the abatement of the overcrowding, including if necessary legal proceedings for possession of the house."

In the present case, it is not in doubt that the landlord has not had such a notice and has not failed to do anything that he ought to have done. There is, therefore, no question of the landlord being in any sort of peril; but the reference to the taking of legal proceedings has a relevance, to which I shall revert later. Section 61 empowers the local authority to authorise the temporary use of a dwelling-house though overcrowded, and that is the section which the tenant in the present case has effectively invoked.

I now come back to s. 65 (1), and it is useful to read into the sub-section the language of the definition. It will be recalled that the sub-section opens:

"Where a dwelling-house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence . . ."

It would, therefore, in the present case be "overcrowded in such circumstances as to render the occupier thereof guilty of an offence", if, and when, the occupier caused or permitted at any time the number of persons sleeping in the house, having regard to the floor area* and the number of rooms, to be in excess of two. Where, therefore, this dwelling is *at any time* so occupied that the number of persons sleeping in the house is in excess of two, then *during that time* nothing in the Rent Acts shall prevent the landlord from obtaining possession of the house. Bearing in mind that definition and particularly the words "in such circumstances as to render", it follows as a matter of construction that this sub-section is saying, in effect: "Where the circumstances are found to be such that the occupier is committing an offence under the Act, then so long as that continues nothing in the Rent Acts is to prevent the landlord from obtaining possession." I do not find it necessary to say whether the word "Where" should be read as "If and so long as", or as "In a case which"; because in the end the result is

* In the case of a dwelling-house consisting of only one room, for the permitted number to be two, the floor area of the room must be at least 110 square feet (Housing Act, 1936, Sch. 5).

A the same, viz., nothing in the Rent Acts is to prevent a landlord from obtaining possession "where" there is overcrowding within the Act.

Bearing in mind the background to which I have referred, I think that the prohibition against the landlord obtaining a possession order is contemporaneous with the circumstances which give rise to the prohibition. It would, it seems to me, be contrary not only to the matters of principle, which I think are involved
B when the purpose of this sub-section and the reference to a criminal offence are borne in mind, but contrary also to the language of the sub-section, to say that once this offence is shown to have been committed at the date when the landlord starts proceedings, then nothing that the tenant can thereafter do will avail him so as to entitle him to rely on the Act which *prima facie* he is entitled as a statutory tenant to invoke. I have said at length what His Honour JUDGE
C DAYNES said, in the course of his judgment:

"Proceedings preliminary to the hearing are of importance; but a judge's aim should be to do justice according to the position when the case comes before him. It is true that a plaintiff must have a cause of action when he sues, though of course a related cause of action can be made subsequently the subject of another action and consolidated with the first action. It has,
D however, long been recognised that a defendant can rely on events which have happened since action brought. This is no new rule introduced by or since the Judicature Acts."

One final matter, which I must deal with because it was much stressed by counsel for the landlord in opening, and also in reply, is that the final words of
E this sub-section,

"... nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, shall prevent the landlord from obtaining possession of the house",

are not expressly confined, or, indeed, related, to obtaining possession by an order of the court. Counsel for the landlord said that if the contractual tenancy
F had been determined, then, apart from the protection given by the Rent Acts, or the shield of the Rent Acts, the landlord could re-enter peaceably, not by virtue of any order of the court, but by going there when the tenant happened to be out and locking the door. So, counsel says, if the view for which he contends is not right, there would be the anomaly that if, on the date when the landlord
G issued his proceedings and when, admittedly, the tenant was occupying the house in such circumstances as to constitute an offence, the landlord had just gone there and, finding the tenant and his family out, had secured the door to prevent their re-entry, no one could have complained; in other words, he would have got possession and that would have put an end, once and for all, to the tenant's rights. I am not, for my part, prepared as at present advised to accept the
H premise of this argument. It may be that if the landlord had done that, then, at the time he did it, he would have done nothing unlawful. I will assume that s. 65 (1) is not intended to relate only to an application to the court for a possession order; though the relevant language of s. 59 (5) which I have already quoted appears to be limited to the case of a landlord obtaining possession by means of a court order. Still it does not follow that, because at that point of time the
I tenant, being guilty of an offence, could not have complained of the landlord's conduct, the tenant could not have thereafter put himself right by obtaining the local authority's permission and then claimed to be allowed to go back; for, as I have already pointed out, s. 65 (1) does not say that the rights of the statutory tenant, as such, cease, or that the dwelling-house is taken altogether out of the Rent Acts, or taken out of them so far as the tenant's tenancy is concerned.

It is not necessary for me to express a final view on that matter, for the landlord did not, in fact, follow that course. He sought, by going to the court, an order for possession, and the question which we have to decide is whether it was

conclusive against the tenant, that at the date the proceedings were started the tenant was guilty of an offence under the Act, so that the landlord could say that nothing in the Rent Acts could thereafter prevent him from getting, by the route he had chosen, an order for possession. For the reasons which I have indicated, I think that the state of affairs as it existed at the date of the institution of proceedings did not conclude the matter against the tenant; that he, the tenant, having ceased before the trial to be guilty of any offence, the circumstances mentioned in s. 65 (1) which gave rise to the prohibition had ceased to exist; and that the tenant was, therefore, left at the date of the trial in the position of a statutory tenant against whom a landlord was seeking an order for possession without establishing any of the necessary conditions precedent under the Rent Acts to invest the court with the jurisdiction to make the order. For those reasons, I think that the learned judge rightly decided this action and I would dismiss the appeal. A B C

JENKINS, L.J.: I agree that this appeal fails. I do not think it necessary to read again in full the provisions of s. 58 of the Housing Act, 1936, which contains the definition of overcrowding. It is not disputed that the tenant and his wife could properly live in the one room, but s. 58 (2) is material as regards the children for it provides: D

“In determining for the purposes of this section the number of persons sleeping in a house, no account shall be taken of a child under one year old, and a child who has attained one year and is under ten years old shall be reckoned as one-half of a unit.” E

So while there was no overcrowding in the first instance, the room became overcrowded under the Act on Dec. 12, 1951, when the eldest child attained the age of one year and thus began to count as half a unit for the purposes of the legislation. Thus by the mere process of his eldest daughter growing up, the tenant committed an offence under the Act.

The present proceedings were begun in February, 1956, the particulars of claim being dated Feb. 23, 1956. After the tenant had been served with the proceedings, he availed himself of the provisions of s. 59 (3) of the Housing Act, 1936. That sub-section provides: F

“Where after the appointed day a dwelling-house which would not otherwise be overcrowded becomes overcrowded by reason of a child attaining one of the ages referred to in the last foregoing section, then, if the occupier applies to the local authority for suitable alternative accommodation or has so applied before the date when the child attains that age, he shall not be guilty of an offence under this section in respect of the overcrowding of the house after the date of his application, so long as all the persons sleeping in the house are persons who were living there on the date when the child attained that age and thereafter continuously live there, or children born after that date of any of those persons . . .” G H

Then the sub-section goes on to deal with certain exceptions from the effect of such an application as preventing an offence under the Act. The position, then, was that until a date after the commencement of the proceedings the tenant was committing an offence under the Act, but that after his application of Mar. 12, 1956, to the local authority he was no longer committing an offence. In those circumstances, the question for the court is whether, notwithstanding the fact that no offence is now being committed and none has been committed since Mar. 12, 1956, the landlord can avail himself of the past offence so as to obtain possession of the house, notwithstanding anything contained in the Rent Acts. I

LORD EVERSHED, M.R., has referred to some of the many authorities which have a general bearing on the question raised, and to which our attention was very

A properly directed. I agree with my Lord that one may say, very broadly, that a general rule is discernible in these cases to the effect that the material date for the purpose of determining whether a landlord's claim for possession is well-founded is the date when the proceedings are commenced. On the other hand, where the question is whether the court has jurisdiction to make an order, and certainly where the question for the court is whether it is reasonable to make an order, it may be said that generally speaking the material date is the date when the matter comes before the court. I do not propose to refer to any of the cases, for I find nothing in them which constrains us to hold that under s. 65 (1) a tenant loses once and for all the protection of the Rent Acts if it can be shown that he has at any time committed an offence under the Housing Act, 1936, even though he may be no longer committing such an offence. Nor, in my view, are we bound by authority to hold that if the tenant is committing an offence at the date of the commencement of the proceedings but ceases to be committing any offence before the case comes before the court, then the landlord is entitled to claim possession notwithstanding anything in the Rent Acts.

In my view, the question must be decided as a matter of construction of the relevant section, s. 65 (1), which provides:

D "Where a dwelling-house is overcrowded in such circumstances as to render the occupier thereof guilty of an offence, nothing in the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, shall prevent the landlord from obtaining possession of the house."

E Now, that sub-section, on the face of it and according to the natural meaning of the language used, seems to me to provide that while certain conditions exist or if certain conditions exist in any given case, then nothing is to prevent the landlord from obtaining possession. The conditions are that the dwelling-house should be overcrowded and further that it should be overcrowded in such circumstances as to render the occupier guilty of an offence. It seems to me that in order to show that the tenant is no longer protected by the Act, the landlord must satisfy the court that both those conditions are fulfilled at the material time, and it seems to me that the material time must be the time when the matter comes before the court. I think that the effect of s. 65 (1) is this: Where a dwelling-house is in the state of being overcrowded and where the relevant circumstances are such as to make that overcrowding an offence, then the fetter on the jurisdiction of the court to make orders for possession on rent restricted premises is for the time being removed, but the removal is coincident, as I see it, in point of time with the continuance of that state of affairs. I see no sufficient reason in the language of the sub-section to make it necessary to hold that the position crystallises once and for all when the proceedings are begun. Like LORD EVERSHED, M.R., I have found some assistance from the process of reading into s. 65 (1) the definition of "overcrowding" in s. 58. I think that that assists the view that the intention of the sub-section is to apply where the house is overcrowded at the date when the court has to decide the question whether the landlord is entitled to possession notwithstanding the provisions of the Acts.

I Little assistance can be derived from other sections of the Act of 1936. My Lord referred to s. 61, under which a local authority can grant licences to permit occupation of premises by a larger number of persons than the number permitted by the Act in the ordinary way. The effect of such a licence is thereafter to prevent any offence of overcrowding being committed by reason of the occupation of the house by the number of persons allowed by the licence. It seems to me that the machinery of that section to some slight extent tends to support the view which I have formed of s. 65 (1). If proceedings were taken for possession of premises which were overcrowded at the commencement of the proceedings and the tenant then applied for and obtained a licence, it seems to me that it would be a curious result if, notwithstanding the licence given by the local

authority to regularise the position, the court were still bound at the suit of the landlord to grant possession, and thus, in effect, override the licence, on the strength of the overcrowding which had taken place before the licence was granted. A

There is one other matter to which, perhaps, I should refer, because counsel for the landlord did to some extent rely on it. Section 66 (2) of the Act, which is the section which makes it "the duty of the local authority to enforce the foregoing provisions of this Part of this Act", provides: B

"The local authority may serve upon the occupier of a dwelling-house which is overcrowded in such circumstances as to render him guilty of an offence notice in writing requiring him to abate the overcrowding before the expiration of fourteen days from the date of the service of the notice, and, if at any time within three months from the expiration of that period the house is in the occupation of the person upon whom the notice was served or of a member of his family and is overcrowded in such circumstances as to render the occupier guilty of an offence, the local authority may make complaint to a court of summary jurisdiction and thereupon the court shall, by its warrant in the form set out in the Schedule to the Small Tenements Recovery Act, 1838, or in a form to the like effect, order vacant possession of the dwelling-house to be given to the landlord within such period, not being less than fourteen nor more than twenty-eight days, as they may determine." C D

The procedure contemplated by that sub-section appears to be: first, a fourteen days' notice requiring the overcrowding to be abated; then a period of three months allowed from the date of the service of the notice with a view to the overcrowding being abated, and failing such abatement, then, if the house is in occupation of the persons on whom the notice was served, or the members of his family, the local authority may make complaint and thereupon the warrant must issue under the mandatory provision. So, in proceedings under that sub-section, it may be said that the position crystallises at the end of the period of three months, and provided that the house is still overcrowded at the date when the complaint is made to the court of summary jurisdiction, then the order for possession must go. I do not think that that sub-section, with the special procedure it lays down, really casts any light on the meaning of s. 65 (1). In framing s. 66 (2) in the way in which it appears in the Act, it may well have been thought that if a person on whom a notice was served failed to take any steps to abate the overcrowding for a period of three months and was still in occupation of the premises at the end of that time, or a member of that person's family was still in such occupation, it was plain that the person guilty of overcrowding was not to be trusted to comply with the provisions of the Act, and ought to be ejected accordingly. E F G

The point is in a small compass, turning, as it does, on the meaning of one relatively short provision contained in s. 65 (1); but paying the best attention which I can to the language of the sub-section, and bearing in mind that its object is manifestly to prevent overcrowding and not to benefit the landlord by giving him an additional opportunity of obtaining possession, I think that, on the true construction of the sub-section, it has the effect given to it by LORD EVERSHED, M.R., and by the learned county court judge, and accordingly, I would dismiss this appeal. H I

HODSON, L.J.: I agree with my Lords and with the learned county court judge that this appeal fails on the ground that on the true construction of s. 65 (1) of the Housing Act, 1936, the material date for consideration is the date when the matter comes before the court. One must concede that, on principle and authority, in cases arising under the Rent Acts, as under other Acts or in any other litigation, the material date for the crystallisation of the rights of the parties is normally the institution of proceedings; but for the reasons which my Lords have given

- A and to which I have nothing to add, it seems to me that, on the true construction of this sub-section, the material date is not the date of the institution of the proceedings, but rather the date when the matter comes before the court. That construction is consonant with the whole purpose of this Part of the Act, which has to do not with the assistance of landlords or with the protection of tenants, but with the prevention of overcrowding. Thus at the material date on the facts
- B of the present case the tenant was not guilty of the offence.

- There is one other thing that I might add. With all respect to the learned county court judge, I cannot agree with him that this unfortunate tenant was not proved ever to have been guilty of overcrowding. When his eldest daughter celebrated her first birthday and he continued to live in the house thereafter, it seems to me that the automatic effect of the Act of 1936 was to make him guilty
- C of an offence for which he might have been fined, although no doubt he knew nothing about that. The learned county court judge appeared to take the view that, in order to bring that matter home in civil proceedings, it would be necessary to do it by means of a conviction. So far from that being the case, it appears to me to be settled law that a conviction would be no evidence of his guilt in civil proceedings. That was decided in *Hollington v. Hewthorn & Co., Ltd.* (5)
- D ([1943] 2 All E.R. 35). In my opinion, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Maude & Tunncliffe* (for the landlord); *How, Davey & Lewis* (for the tenant).

[*Reported by B. L. CHARLES, ESQ., Barrister-at-Law.*]

E

RIDEN v. A. C. BILLINGS & SONS, LTD. AND OTHERS.

- F [COURT OF APPEAL (Denning and Birkett, L.JJ., and Roxburgh, J.), July 2, 3, 11, 12, 26, 1956.]

Building—Constructional work—Negligence—Liability of contractors—Access to building rendered dangerous—Duty of contractors—Plaintiff's knowledge of danger.

Independent Contractor—Work outside office building containing caretaker's flat—No safe means of access—Liability of contractor.

G

Preparatory to restoring a concrete footpath to steps up to a house (No. 25) used as offices, building contractors broke up part of a sloping paved ramp constructed over the original footpath and steps leading up to the door, removed the railings on each side of the remainder of the ramp over the steps and barricaded one side only of that part from the adjoining forecourt and basement area. There was a back entrance to the house which was locked at five o'clock each evening. The contractors gave no warning of any danger, but their foreman advised the wife of the office caretaker living in a flat on the premises to get into the house by walking over the forecourt of the next door house (No. 26) and climbing up the unbarricaded side of the remainder of the ramp, and this advice was passed on to the plaintiff who adopted it when visiting the flat after dark. When leaving the house later the same evening by the same way and being at the moment of the accident on the premises of No. 26, the plaintiff fell into the basement area of No. 26 and was injured. She had taken no precaution, when leaving No. 25, in view of the route which she was using. In an action for damages for negligence brought against the contractors, it was found that it would have been unreasonable to have expected the plaintiff to use the back door and that the accident would not have occurred but for the action of the contractors in destroying the normal means of access to the house. On appeal,

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I

Held (ROXBURGH, J., dissenting): the plaintiff was entitled to recover damages for negligence (reduced by one half on account of her own negligence) since

(i) the contractors, having created a dangerous state of things, owed a duty of care to prevent injury to persons whom they might reasonably expect to be affected by their work (of whom the plaintiff was one) and this duty did not rest on their being occupiers of premises (*Slater v. Clay Cross Co.*, [1956] 2 All E.R. 625, and *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156, followed; *Malone v. Laskey*, [1907] 2 K.B. 141, and *Ball v. London County Council*, [1949] 1 All E.R. 1056, criticised), and

(ii) although the plaintiff had used the route when going to the house, she had not fully appreciated its danger and her knowledge of the danger was not such as to render the accident solely her fault (*Clayards v. Dethick & Davis* (1848), 12 Q.B. 439, followed).

Appeal allowed.

[Editorial Note.] The Law Reform Committee in their third report (November, 1954, Cmd. 9305, para. 78 (vii) (c), (viii) (ix)) recommended that where a visitor has knowledge of a danger his knowledge should be taken into account on the question whether any damage sustained by him was wholly or partly the result of his own fault, and that the provisions of the Law Reform (Contributory Negligence) Act, 1945, should be applicable, but that the defence of *volenti non fit injuria* should be available to the occupier. DENNING, L.J., intimates that in principle contractors should be in no different position from occupiers as regards the effect of the injured person's knowledge of the danger (see p. 364, letter C, post).

As to the duty to give warning where dangerous conditions are created, see 23 HALSBURY'S LAWS (2nd Edn.) 582, para. 834; and for cases on the subject, see 36 DIGEST (Repl.) 24, 25, 102-112.

As to the defence of acceptance of risk where there was not full appreciation of danger, see 23 HALSBURY'S LAWS (2nd Edn.) 718, para. 1007; and as to an employer's freedom from liability for the acts of a building contractor, see 3 HALSBURY'S LAWS (3rd Edn.) 547, para. 1104, and compare 23 HALSBURY'S LAWS (2nd Edn.) 710, para. 1002.]

Cases referred to:

- (1) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- (2) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- (3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- (4) *Clayards v. Dethick & Davis*, (1848), 12 Q.B. 439; 116 E.R. 932; 36 Digest (Repl.) 154, 809.
- (5) *Corby v. Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 140 E.R. 1209; 36 Digest (Repl.) 67, 370.
- (6) *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439; 87 L.J.K.B. 651; 118 L.T. 562; 82 J.P. 125; 36 Digest (Repl.) 24, 105.
- (7) *Mooney v. Lanarkshire County Council*, 1954 S.C. 245.
- (8) *Brown v. Cotterill*, (1934), 51 T.L.R. 21; Digest Supp.
- (9) *Clelland v. Edward Lloyd, Ltd.*, [1937] 2 All E.R. 605; [1938] 1 K.B. 272; 106 L.J.K.B. 626; 157 L.T. 236; Digest Supp.
- (10) *Simmons v. Bovis*, [1956] 1 All E.R. 736.
- (11) *Buckland v. Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.
- (12) *Davis v. St. Mary's Demolition & Excavation Co., Ltd.*, [1954] 1 All E.R. 578; 3rd Digest Supp.
- (13) *Creed v. McGeogh (John) & Sons, Ltd.*, [1955] 3 All E.R. 123; 3rd Digest Supp.

- A (14) *Dunster v. Abbott*, [1953] 2 All E.R. 1572; 3rd Digest Supp.
(15) *Slater v. Clay Cross Co.*, [1956] 2 All E.R. 625.
(16) *Malone v. Laskey*, [1907] 2 K.B. 141; 76 L.J.K.B. 1134; 97 L.T. 324; 36 Digest (Repl.) 14, 56.
(17) *Ball v. London County Council*, [1949] 1 All E.R. 1056; [1949] 2 K.B. 159; 113 J.P. 315; 2nd Digest Supp.
- B (18) *Hawkins v. Coulsdon & Purley Urban District Council*, [1954] 1 All E.R. 97; [1954] 1 Q.B. 319; 118 J.P. 101; 3rd Digest Supp.
(19) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, 812.
(20) *Greene v. Chelsea Borough Council*, [1954] 2 All E.R. 318; [1954] 2 Q.B. 127; 118 J.P. 346; 3rd Digest Supp.
- C (21) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

Appeal.

- The plaintiff had been injured from a fall into a basement area while leaving a house at Cambrai Place, Cheltenham, occupied by the second and third defendants, following the destruction of the normal safe means of access to the house by the first defendants, building contractors, in the process of removing a sloping ramp and restoring a footpath and steps to the house underneath it. She brought an action for damages for negligence against all three defendants, which was dismissed by HALLETT, J., on Feb. 7, 1956, on the ground that there was no concealed danger of which the second and third defendants as occupiers owed a duty to warn the plaintiff, and that the first defendants owed no duty to provide an alternative means of access. The plaintiff appealed but did not prosecute the appeal against the second and third defendants.

G. G. Baker, Q.C., and *M. E. Kempster* for the plaintiff.

N. R. Fox-Andrews, Q.C., and *R. C. Hutton* for the first defendants.

Cur. adv. vult.

- F July 26. The following judgments were read.

- DENNING, L.J.: On Nov. 17, 1953, Mrs. Riden, the plaintiff, then aged seventy-one, fell into a basement area in Cheltenham and was severely injured. She seeks to recover damages. The accident happened at a row of houses known as Cambrai Place, Cheltenham. They are rather old houses with basements. They stand about thirty feet back from the street. Each is approached by a footpath and then four steps up to the front door. Each house has a forecourt and a basement area. The steps to the houses were fenced by iron railings on each side which were sufficient guard to prevent anyone falling from the steps into the basement area.

- This case is concerned with Nos. 25 and 26, Cambrai Place. No. 25 has been occupied for some eighteen years by the Ministry of Works, the second defendants, and used as offices by the Commissioners of Customs and Excise, the third defendants. On the top floor, however, there lived a Mr. and Mrs. Privett who acted as caretakers. When this house was built it was approached from the street in the same way as the others by means of a footpath and steps to the front door; but many years ago an invalid lived there who could only get about in a wheeled chair. So there had been constructed for his benefit a sloping ramp made of paving stones which sloped up from the street in a continuous incline to the top of the steps, but with railings set into the ramp fencing it on each side. In November, 1953, the second defendants determined to remove the sloping ramp, to uncover the steps, and to restore the original approach by making a concrete footpath to the steps. They employed A. C. Billings & Sons, Ltd., the first defendants, as contractors to do the work. The first defendants started work on Monday, Nov. 16. By the evening of Tuesday, Nov. 17, the work had got to this stage: The first defendants had broken up the front half of the ramp which was

near the street and had placed rough rubble on to it and a plank thwartwise across the ramp. They had thrown broken stones and debris on to the forecourt of No. 25. They had removed the railings on each side of the ramp and had put up a barricade of planks on one side (next to the basement area of No. 25) but they had put nothing in place of the railings on the other side next to No. 26. The workmen left the work in that state at 4.30 p.m. on Nov. 17 when it was getting dark.

The result of the first defendants' activities was that there was no longer any safe means of access to the front door. Their men said that they made a plank walk up to the entrance with stakes and ropes alongside so as to guide people along it: but they were disbelieved on this point. The foreman said that they made the place safe for anyone leaving or entering the premises. They did nothing of the kind. The result was that anyone seeking to go in or out of No. 25 by the front door had to clamber up or down as best he could. The judge found that there were four possible ways of doing this. None of them was at all convenient or safe but the least unattractive was the "fourth route". This route meant going on to the forecourt of the next-door house, No. 26, Cambrai Place, where there was an auction mart, and then skirting round some bushes (not far from the basement area of No. 26) and getting up on to the remains of the ramp on that side (where the railings had been removed) and thence into No. 25. Mrs. Privett, the caretaker's wife, went out that way in the afternoon at about 3 p.m. She thought it was the only possible way to take. It was much safer than any other way. She said to the workmen "How are we to get in and out?" They said to her "You can go along on the auction mart side. That is the best way". The judge found that they advised her to use that way. So she told her visitors to go that way. In particular, her brother and his wife went that way but, on leaving, her sister-in-law nearly had a nasty accident because the railings had been taken away on that side. Incidentally, her brother put a plank down to make the way easier. Later on in the evening when it was dark, at about 7.30 p.m., the plaintiff called to see Mr. and Mrs. Privett, and Mrs. Privett told her to go that way. She got into the house safely, but, when she was leaving by that way at about 10 p.m. in the dark, she fell into the basement area of No. 26 and was severely injured. There was a back door to the house opening out into a lane at the back, but this was kept locked up at night, and the judge thought it would have been quite unreasonable to have expected these various people to have used it on this occasion.

The plaintiff brought this action against the contractors, the first defendants, and the occupiers, the Ministry of Works, and the Commissioners of Customs and Excise, the second and third defendants. The judge dismissed her claim against all the defendants. The plaintiff does not appeal against his decision so far as the occupiers (the second and third defendants) are concerned because she realises that they entrusted the work to independent contractors. The occupiers did not know of the danger nor ought they to have known of it, and they ought not to be held liable. The plaintiff's advisers thus recognise, quite rightly, I think, the authority of *Haseldine v. Daw & Son, Ltd.* (1) ([1941] 3 All E.R. 156). I see nothing inconsistent with it in *Thomson v. Cremin* (2) ([1953] 2 All E.R. 1185), which was decided by the House of Lords later that year. But the plaintiff does appeal against the decision in favour of the contractors, the first defendants, on the ground that they created a dangerous state of things and are liable for the consequences.

The judge found that the workmen, when they were knocking off work at 4.30 p.m. on Nov. 17, must have contemplated that there might have been people who would want to leave the house or to go to it, and that good workmen would have provided a substituted means of access. He also found that

"but for the action of the first defendants in destroying the pre-existing

A normal and safe means of access and substituting no other means of access for it, this accident would never have occurred."

He found that:

B "The situation which led to all these people approaching the premises by the fourth route was caused by the first defendants."

Nevertheless, he found that the first defendants owed no duty to the plaintiff in respect of it. The judge felt "a great deal of sympathy with the plaintiff" but nevertheless "with very considerable regret" held that her claim against the contractors was not established.

C The first question for consideration is whether the judge was right in holding that the first defendants were under no duty to the plaintiff. At the outset I desire to stress that we are concerned here, not with the liability of an occupier of land, but with the liability of a contractor who is doing work on land. There are many authorities which show that the contractor's duty is not confined to his duty under the contract to his employer. He is under a general duty imposed by law to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work.

D Let me first consider the cases which show there is such a duty. They do not spring from *M'Alister (or Donoghue) v. Stevenson* (3) ([1932] A.C. 562), but start long before it and continue after it. As far back as 1848 a contractor, in order to make a sewer, dug a trench in a private passage leading to a mews. He negligently failed to fence the opening. Whilst a cab-owner was leading out his horse, it fell into the trench and was killed. The contractor was held liable for negligence; see *Clayards v. Dethick & Davis* (4) ((1848), 12 Q.B. 439). In 1856 a building contractor placed a pile of slates on a private road leading to a lunatic asylum, and left them unlighted at night. A visitor ran into them in the dark. The contractor was held liable for negligence; see *Corby v. Hill* (5) ((1858), 4 C.B.N.S. 556). In 1918 a gas company, when putting gas into a private house, made a hole in the floor and failed to warn a visitor of the danger. They were held liable for the injury which resulted; see *Kimber v. Gas Light & Coke Co.* (6) ([1918] 1 K.B. 439). Those cases were all before *M'Alister (or Donoghue) v. Stevenson* (3). The later cases are reinforced by the authority of that decision. Thus in 1941 a firm of engineers repaired a lift, but they did it so negligently that when a visitor used it next day, the lift fell and injured him. The engineers were held liable: see *Haseldine v. Daw & Son, Ltd.* (1). In 1954 a local authority, when making up the private way to a house, left a protruding piece of metal and a visitor fell over it and was injured. They were held liable; see *Mooney v. Lanarkshire County Council* (7) (1954 S.C. 245).

G All the cases which I have mentioned were decisions of appellate courts. There are many cases at first instance to the same effect. A good illustration is *Brown v. Cotterill* (8) ((1934), 51 T.L.R. 21), where a monumental mason put up a tombstone so negligently that it fell and injured a child. LAWRENCE, J., held the mason liable. The cases show, moreover, that the duty of care is owed to all those whom the contractor may reasonably expect to be affected by his work, whatever the capacity in which they come, whether as invitees or licensees or as other contractors; *Clelland v. Edward Lloyd, Ltd.* (9) ([1937] 2 All E.R. 605, per GODDARD, J.); *Simmons v. Bovis* (10) ([1956] 1 All E.R. 736, per BARRY, J.); or even, in some cases, as children trespassing; see *Buckland v. Guildford Gas Light & Coke Co.* (11) ([1948] 2 All E.R. 1086, per MORRIS, J., at p. 1091); *Davis v. St. Mary's Demolition & Excavation Co., Ltd.* (12) ([1954] 1 All E.R. 578, per ORMEROD, J.); *Creed v. John McGeogh & Sons, Ltd.* (13) ([1955] 3 All E.R. 123, per ASHWORTH, J.).

H The duty of care of which I have spoken is not confined to contractors. It is a duty which rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty

as a contractor. The reason is because the duty arises, not out of the fact of occupation, but out of the fact that he is doing work which he knows or ought to know may bring danger to others; and that gives rise to a duty of care; see *Dunster v. Abbott* (14) ([1953] 2 All E.R. 1572); *Slater v. Clay Cross Co.* (15) ([1956] 2 All E.R. 625).

Now I must come to two cases which cannot be reconciled with this long line of authorities. The first case is *Malone v. Laskey* (16) ([1907] 2 K.B. 141), where the defendants, under contract with a tenant, repaired the lavatory cistern in a house and did it so negligently that a few months later it fell on the wife and injured her. It was held that she had no remedy, because in the words of FLETCHER MOULTON, L.J. (*ibid.*, at p. 154),

"... no rights can be acquired under a contract except by parties to the contract ..."

That is a fallacy which was often invoked in the nineteenth century but was exposed in *M'Alister (or Donoghue) v. Stevenson* (3). Not only is *Malone v. Laskey* (16) founded on a fallacy; it is inconsistent with the later decision of this court in *Haseldine v. Daw & Son, Ltd.* (1) (where the lift engineers were held liable) and cannot stand with it, as junior counsel for the first defendants frankly admitted. Of the two, I have no doubt that *Haseldine v. Daw & Son, Ltd.* (1) should prevail.

The second case is *Ball v. London County Council* (17) ([1949] 1 All E.R. 1056), where landlords negligently installed a boiler in a dwelling-house without fitting a safety valve. Seven years later it exploded and injured the tenants' daughter. She failed in her claim. The decision can be explained perhaps on the ground that the landlords' negligence was not the cause of the injury. TUCKER, L.J., said (*ibid.*, at p. 1063):

"What caused the explosion were two very unusual circumstances—first, the very severe winter, and, secondly, the ill-advised action of [the plaintiff] in lighting this boiler when the pipes were frozen."

The court went further and said that the case was covered by *Malone v. Laskey* (16). No one drew the attention of the court to the fallacy in that case: and no one referred to *Haseldine v. Daw & Son, Ltd.* (1). In the circumstances, the case cannot be considered as of any higher authority than *Malone v. Laskey* (16) itself.

I think, therefore, that those two cases can be put on one side, leaving the principle intact that a contractor doing work on premises is under a duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work. Counsel for the first defendants admitted this principle in some part. He admitted that the contractor was under a duty of care in respect of the premises on which he was working, but he denied that it extended beyond those premises. Hence he admitted that, if the plaintiff had fallen on the rubble on No. 25, whilst going to No. 25, the first defendants might have been liable for the danger they created: but he said that their liability ended when she was not on No. 25 at all. I do not think this limitation is well-founded. It is based on a confusion between the liability of an occupier and the liability of a contractor. If it were sought to make the occupiers of No. 25 liable because they were occupiers and nothing else, their liability would, of course, be confined to No. 25: but that is not this case. The first defendants are liable, not because they are occupiers, but because they created a dangerous state of things and they are under a duty to use reasonable care to prevent damage from it. It is true that they are under no duty to visitors to provide an alternative route for getting to the front door. (They might in some circumstances fulfil their duty of care to visitors by putting up a warning in clear terms "Danger. Keep Out": for that might suffice to prevent damage to them. The occupants of the house might then have grounds of complaint for blocking

A their access, but the visitors would not.) If, however, contractors do provide an alternative route, on or off No. 25, or adopt an alternative route, or point one out, as the first defendants did here, or if it is an obvious deviation for a visitor to take, the contractors are under a duty to use reasonable care to prevent damage to visitors who take that route. A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger.

B On the findings of the judge it seems to me quite clear that the contractors here did not take reasonable care to prevent damage. They knew or ought to have known that people would want to come in and out of No. 25 and should either have made a safe route on No. 25 (as they said they did and were not believed) or they should have made the "fourth route" (which they advised) reasonably safe. They did neither. They did not even give any warning of

C danger. They were, therefore, in breach of their duty.

The next argument of counsel for the first defendants was that the duty on the first contractors was at most a duty to warn the visitors of any danger on the route: and it was superfluous to warn the plaintiff, since she must be taken to have known of the danger. She had got into the premises by the "fourth route" and must have known the state of it. Counsel for the first defendants

D particularly relied on some words I used in *Hawkins v. Coulsdon & Purley Urban District Council* (18) ([1954] 1 All E.R. 97 at p. 105):

"A licensee can never complain of dangers which are obvious or known to him."

I must explain that those words only apply where the visitor has full knowledge

E of the nature and extent of the danger—full appreciation of it—and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured. In those circumstances he cannot complain, for the simple reason that the accident is then solely his own fault; but, short of that, he can complain.

The earliest case where this point was distinctly raised and decided is *Clayards v. Dethick & Davis* (4), which I have already mentioned. The cab-owner knew

F that it was dangerous to try to take his horse out of the mews, past the trench, but he was not free to avoid the danger. It was the only way out. He could not be expected to refrain altogether from coming out of the mews merely because the contractors had made the passage in some degree dangerous. Despite his knowledge of the danger, he was held to be entitled to recover. LORD BRAMWELL criticised the decision in one or two cases and also in an appendix to

G SMITH ON NEGLIGENCE (2nd Edn.) (1884), at p. 275. LORD BRAMWELL wished to hold that knowledge of the danger was a bar to a person complaining of it, for instance that it was a bar to a servant suing his master for an unsafe system of work: and was also a bar to a passenger by train, injured in alighting, from suing the railway company. There are innumerable cases which show that LORD BRAMWELL was wrong. His views were decisively rejected by the House

H of Lords in *Smith v. Baker & Sons* (19) ([1891] A.C. 325), in spite of the fact that he presented them there in person. The decision in *Clayards v. Dethick & Davis* (4) is now unimpeachable. The effect of it was well stated in SMITH ON NEGLIGENCE cited above at p. 235.

"The defendant is not excused merely because the plaintiff, knowing

I of a danger created by the defendant, voluntarily incurs the danger; for the defendant may have so acted as to induce the plaintiff as a reasonable man, to incur the danger."

The authority of *Clayards v. Dethick & Davis* (4) is further enhanced by the approval given to it by SIR FREDERICK POLLOCK. He said that "principle is for it and no accepted authority against it". SIR FREDERICK POLLOCK summarised the decision succinctly in these words:

"Whether the plaintiff had suffered by the defendants' negligence, or

by his own rash action, was a matter of fact and of degree properly left to the jury."

See POLLOCK ON TORTS (15th Edn.), at p. 369.

Such was the position before the Law Reform (Contributory Negligence) Act, 1945. Since the Act the same principle applies, subject to apportionment. I stated it in *Slater v. Clay Cross Co.* (15), in these words, to which I adhere

"... knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault . . . Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing the damages."

This principle has the merit that it is in complete accord with the recommendations* of the Law Reform Committee in regard to occupiers. Contractors should be in no different position.

Applying this principle to the present case, I think it plain that the plaintiff did not fully appreciate the danger of the "fourth route". She said "I thought it was safe". She did not realise how close the basement area was. She said "I could not say how far it would be". Even if she had fully appreciated the danger, I do not think she was entirely free to avoid it. She could not reasonably be expected to stay in the house all night. She could have asked for the back door to have been opened, but, as the judge said, it was hardly negligent of her not to do so. In my opinion, therefore, her knowledge was not such as to be a bar to the action, but is only a ground for reducing the damages. It is to be noticed that at the time the judge decided this case, *Slater v. Clay Cross Co.* (15) had not been decided or reported. If it had been, I feel sure that the judge would have followed it and would not have felt bound regretfully to dismiss the claim.

There remains the question of reducing the damages. The judge found that

"she herself contributed very largely indeed to her accident, because with that danger present to her mind—it should have been present to her mind—she none the less proceeded on her way, taking no precaution at all, except that she stopped for one moment at the top of the ramp to try to recover from the effect of coming out of light into darkness."

In view of this finding, I think she should be found equally to blame and the damages reduced by one half. On reading the medical reports I would assess the general damages at £1,200. The judge found the special damage to be £22 16s. The total is £1,222 16s. of which one half is £611 8s. I would allow the appeal and give judgment for the plaintiff accordingly.

BIRKETT, L.J.: This appeal from a judgment of HALLETT, J., raises questions of some difficulty and great importance. In my judgment, the greatest difficulty in the case is to be resolved by an examination of the exact facts of the case, and, although my Lord has stated them with some fullness in his judgment, it will be necessary for me to refer again to the principal facts to explain the reasons for my own conclusions.

The present appeal is concerned only with A. C. Billings & Sons, Ltd. as defendants. They were a firm of contractors employed by the second defendants to make certain alterations to the premises at No. 25, Cambrai Place, Cheltenham. The house, No. 25, was occupied by the second defendants, and was in fact used as offices by the third defendants. The plaintiff was injured on the premises when the first defendants were doing the work for the second defendants. Having failed to make anybody liable for her injuries and damage before HALLETT, J., she now seeks to make the first defendants solely liable in this appeal.

* See the editorial note at p. 358, ante.

A The work which the first defendants were doing for the second defendants on Nov. 16 and 17, 1953, was to remove the sloping ramp which led from the street to the top of the steps at the front door of No. 25, preparatory to making a concrete footpath to the foot of the steps. On Nov. 17, at about 4.30 in the afternoon, the work had reached the stage when there was no longer any way to the front door that could safely be used on the land of No. 25, in place of the
B old sloping ramp. The ramp had been broken up in part, the broken stones and debris encumbered the forecourt, and the railings which formerly stood on each side of the steps to the front door had been removed. Some planks had been put next to the basement area of No. 25, but nothing had been put next to the basement area of No. 26.

C The first fact that emerges with some clearness, therefore, is that the first defendants had destroyed the formerly existing way to the front door, and had put nothing in its place. It is not without significance to observe that, in the court below, the first defendants sought to prove that, although they had destroyed the existing way to the front door, they had provided a temporary way by the use of planks and stakes and ropes, which could be used with safety by those desirous of entering or leaving the house by the front door. The evidence
D of the witnesses called for the plaintiff convinced the learned judge that no such temporary way had been made at all, and that the first defendants' witnesses were not to be believed on that point; but the attempt to set up a false case would seem to emphasise the fact that the first defendants' workmen realised that they had destroyed the formerly existing way to the front door, and it would seem that they were anxious to show that they had not left the premises in that
E condition, but had in fact provided a safe, temporary way. This can only have been on the footing that the first defendants' workmen realised and accepted that there would be people who would wish to use the front door as a means of access to the house.

The learned judge in his judgment dealt with that matter in this way:

F "As to the first point, the plank walk, the plaintiff's witnesses were all strenuously agreed about it. They denied that there was any such walk, and I am satisfied beyond question that their denials were true. The general foreman employed by the first defendants, who visited the work from time to time, having many other jobs to attend to, said that on the evening of the day in question the plank walk and barriers were not in position; that the
G barriers ought to have been put into position by the workmen before they left; and that the plank walk and barriers were in position the following day. I do not believe him."

Then a little later:

H "The next witness, Mr. Bound, who was actually in charge of the work, when I asked him a question to make sure there was no mistake, made it quite clear there was no plank walk, never had been, and that there were not any barriers. As regards those witnesses of fact then, it seems to me it is quite clear that what the plaintiff and her witnesses said was true."

I But to most houses there are, of course, a front door and a back door, and the question of this back door was discussed in the evidence in the court below, and was made the subject of some argument in this appeal. The caretakers of the premises at No. 25 were a Mr. and Mrs. Privett, and they lived on the top floor of the premises. The back door led into a lane, and from the lane it was possible ultimately to get to the street. From the evidence given before him, HALLETT, J., thought it would have been quite unreasonable to have expected Mr. and Mrs. Privett or their friends, including the plaintiff, to use the back door. Mrs. Privett said the back door was locked at five o'clock, and it seems to be the evidence that nobody thought the back door was to be considered as an alternative entrance to the house.

The plaintiff herself, when asked in cross-examination "Was there anything in fact to prevent you going into the house by the back way?", said: A

"Well, it was always kept locked. The back entrance was always kept locked. I always used the front."

Then HALLETT, J., said later:

"Had you ever known the back door to be used by anyone? A.—It used to be before she went to live up in the top flat. Then I believe she always kept that locked, the bottom." B

So the plaintiff and Mrs. Privett differed in that matter, and the learned judge in his judgment used the language which the plaintiff used in that evidence I have quoted. C

About three o'clock in the afternoon of Nov. 17, Mrs. Privett went out of the house. She went by the front door and took the route to the street which the plaintiff took some hours later when she met with her accident. Nobody seems to have suggested to Mrs. Privett that she should use the back door, and she herself apparently never thought of doing so. The first defendants' workmen advised her to use the way she did use, and none of them suggested the use of the back door. Mrs. Privett advised her relatives to use the same way that she used, and again nobody seems to have considered the back door a reasonable alternative. I regard the question of the back door as settled, so far as this appeal is concerned, by the finding of HALLETT, J. D

What then was the duty of these contractors in those circumstances? It was submitted to HALLETT, J., that the first defendants, having destroyed the existing means of access to the front door of the house, were under a duty to provide a safe alternative way; but the learned judge decided that the first defendants were under no duty at all to the plaintiff in the circumstances of the case. The first question, therefore, is: Was the learned judge right or was he wrong? E

Counsel for the first defendants submitted to us that if there was any duty on the first defendants, the full extent of the duty was to warn the plaintiff of dangers which they knew to exist, or of which they ought to have known. If there had been a breach of that duty by the first defendants, he submitted that the accident to the plaintiff was not occasioned by the breach. He laid great emphasis on the fact that a plank had been placed near to the basement area of No. 26 unknown to the first defendants, and that the plaintiff had slipped on this plank; and of this plank the first defendants had no knowledge. The plaintiff, he said, fell the moment her foot touched the plank and the first defendants had nothing to do with it. He submitted that a contractor could not be liable in respect of an obvious peril which he did not create, on premises on which he was not working, and on land on which he would have no legal right to enter. F

I do not think that the plank which had been placed by a Mr. Brown to save his wife's stockings, as the evidence discloses, when travelling this route added anything to the danger of the route, and the conclusions to which I come may be thus summarised: (1) The first defendants had destroyed the only reasonable and safe entry to the house by the front door. (2) They had provided no alternative of any kind, although they falsely said by their workmen that they had. (3) They knew that an alternative way from No. 26 was being used by people coming to and going from the house, and they must have known that the use of that way was attended by considerable danger. (4) They had themselves recommended the use of that way to Mrs. Privett by their workmen, and it was reasonably to be contemplated that she would pass this advice on to all those who wished to come to or to leave the house on business or pleasure. (5) They took no steps of any kind, either by way of prohibition, or warning, or lighting, or fencing to make known the dangers attending the use of that route by persons going to or coming from the house. G H I

- A A great number of cases were cited to the learned judge and were cited to us relating to the liability of occupiers and contractors. Many of them were cases where the contractor had created a danger and had allowed persons with no knowledge of the danger to be injured, as in *Corby v. Hill* (5) ((1858), 4 C.B.N.S. 556), and *Kimber v. Gas Light & Coke Co.* (6) ([1918] 1 K.B. 439). Counsel for the first defendants both discussed at some length *M'Alister (or Donoghue) v. Stevenson* (3) ([1932] A.C. 562), and the recent case in the Court of Appeal of *Slater v. Clay Cross Co.* (15) ([1956] 2 All E.R. 625), in which the judgment of ASHWORTH, J., was upheld.
- B

With great respect to HALLETT, J., I have come to the conclusion that he was wrong in holding that the first defendants were under no duty to the plaintiff in the circumstances of this case. In my judgment, the first defendants were under

C a duty to use reasonable care to see that in the situation they themselves had created, no harm should come to persons who might reasonably be expected to enter or leave the premises by the front door. Knowing as they did that persons would wish to use the front entrance, and that they had destroyed the only safe way, they did nothing to fulfil the duty which I think rested on them, and are in consequence in breach of their duty to the plaintiff.

- D But the case is far from ending there. I have found the position of the plaintiff to be one of great difficulty, and for my part I think it to be the chief problem in the case. That the first defendants owed a duty to her in the circumstances, I do not doubt, but whether she disabled herself from recovering from the first defendants by her own behaviour is a most difficult question indeed. Counsel for the first defendants naturally relied on *Hawkins v. Coulsdon & Purley Urban District Council* (18) ([1954] 1 All E.R. 97), where the words of DENNING, L.J., were both plain and strong (*ibid.*, at p. 105):
- E

"A licensee can never complain of dangers which are obvious or known to him."

- F Counsel for the first defendants said that the plaintiff was certainly in no better position than a licensee; the dangers of the route to the house which she took were both obvious and known to her, for she had travelled that very route once before that very day she met with her accident, and had seen the place for herself, and had negotiated its dangers and difficulties. He also said that, if the duty of the first defendants was to warn, the breach of that duty was not the cause of the accident, for she knew as much as any form of warning would have told her.

- G On the other hand, there is the important case of *Clayards v. Dethick & Davis* (4) ((1848), 12 Q.B. 439). That case is now a hundred years old and its bearing on the present case is, I think, important and perhaps decisive. The danger in that case was an open trench in a private road, made by a contractor and left unfenced. The private road led to the stables where the plaintiff kept his horses for use in his business as a cab proprietor. It was the only way from the stables to the road. The plaintiff knew of the danger, and the evidence is striking.
- H

- I The facts, very shortly, were these: The plaintiff was a cab proprietor, having stables in Gower Mews, Gower Street. The mews communicated with the street by a passage 13½ feet wide and 56½ feet long, and had no other outlet. In November, 1845, the defendants, acting under directions from the Commissioners of Sewers, were deepening a sewer in Gower Street, and carrying a drain, in communication with it, up the passage leading into Gower Mews. For this purpose they made an open trench about thirteen feet long and 6½ feet wide, but not in the middle of the passage, the unbroken space on one side being about 4½ feet, and on the other side 2½ feet. The opening was not fenced. Before the day on which the accident in question happened, the commissioners had given notice to the occupiers of stables in the mews that the trench would continue open for a day or two longer, and they must put up with it; and had advised them to get other stables. On Nov. 19 the excavators had

thrown the earth and gravel from the trench (unavoidably as was represented on behalf of the defendants) on the wider space between the trench and the wall, to the height of four feet. About five in the afternoon of that day, the plaintiff was bringing one of his horses out of the mews, and was about to put down planks for the purpose of getting him over the narrow space, which was least obstructed. The defendant Davis asked him what he was going to do, and said he would not be answerable for any thing that happened by taking the horse over in that manner. The plaintiff asked how he was to do it; and he said that he must get the horse out. The defendant said: "Take him over on the other side; and I will be answerable". The plaintiff, with assistance, led the horse out, over the gravel. A little before six in the same evening, the plaintiff endeavoured to get another horse out in the same direction (neither defendant being then present); but the rubbish gave way; the horse fell into the trench, and was strangled in an endeavour to drag him out with ropes.

LORD DENMAN, C.J., left it to the jury to say whether the defendants had been guilty of culpable negligence in not fencing the trench. Then he went on to say this (12 Q.B. at p. 442):

"If the defendants' witnesses were to be believed, and the plaintiff on the second occasion had, in defiance of warning, incurred an evidently great danger, this was a rashness on his part which would excuse the defendants: but that it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained. And he left it to the jury to say whether or not the plaintiff had so acted."

The jury found a verdict for the plaintiff with damages.

A rule nisi being granted, COLERIDGE, J., said this (*ibid.*, at p. 447):

"It was necessary for the defendants to show a clear danger and a precise warning. Whether these facts existed or not, was for the consideration of the jury; and, if the jury disbelieved them, the plaintiff was entitled to the verdict."

WIGHTMAN, J., said (*ibid.*):

"If it had appeared that the plaintiff, in defiance of warning, would persevere in the attempt to pass, I cannot suppose that the jury would have found a verdict in his favour. I think, therefore, we must assume that they considered the defendants' contradiction not satisfactory: and I am of opinion that the case was properly left to them as to the defiance of warning";

and LORD DENMAN, C.J., added some words.

In that case, the plaintiff's horse having been injured and killed, it was held that the plaintiff was not debarred from recovering damages from the defendants in all the circumstances of the case. It should be remembered, of course, that that was a jury case, and the question for the jury was whether the plaintiff's loss was due to his own fault, or to the negligence of the defendants. In my view, the difficult question in the present case is to be resolved in the same way. Was the plaintiff the victim of her own rash action? Was her damage due solely to her own fault? Did the knowledge she had bar her from recovering against the first defendants? Or was her conduct a ground for reducing the damages she could recover?

In my judgment, she was not debarred from recovering damages from the first defendants. One of the remarkable features of the case is that, although the plaintiff had travelled this route on which she met with her accident some

A hours before when she entered the house, and must therefore have known how awkward and inconvenient the journey was, yet, when she came to make the return journey in darkness, apart from waiting a moment or two to allow her eyes to become accustomed to the change from the lighted house to the darkness outside, she took no precautionary steps of any kind. The question of going out of the back door was apparently never considered by anybody; she asked for no torch; she sought no companion; she betrayed no nervousness or fear of the journey; and she said in evidence that she thought the route was safe for her to travel. The words that she employed about that were quite clear when she was asked expressly about what she considered of the way, and she thought the way was quite safe.

C Eliminating, therefore, from consideration, as I do, the question of the back door, on the express finding of the learned judge, I think that there was only one way out from the front door that night, and that was the way the plaintiff went. It is true that she was not absolutely forced to go home that night, but the owner of the horse in *Clayards v. Dethick & Davis* (4), was not absolutely forced to bring his horse out of the stable when the trench was in the private road. But if the plaintiff was to go home that night, and it was eminently reasonable that she should want to do so, the only way that she could go was by the route by which she did go, and which had been recommended to her; and I am not prepared to say that, because she did so, she is completely barred from any remedy.

E HALLETT, J., having decided that there was no duty on the first defendants, and that the plaintiff failed in her action, was therefore not concerned with the question of contributory negligence. But it is to be noticed that he expressed the view that the plaintiff contributed very largely indeed to her own accident, because she took no precautions of any kind, when she had some knowledge of the route she was about to travel, which she had gained from travelling the route some hours before. In my judgment, the first defendants owed a duty to the plaintiff, they failed in their duty towards her and she is entitled to recover; but as she herself was guilty of contributory negligence in taking no reasonable care for her own safety, she must bear a proportion of the blame.

F I agree with the view that the plaintiff and the first defendants should be found equally to blame, and I agree with the figures given by my Lord in his judgment. I would therefore be in favour of allowing the appeal to the extent indicated.

G ROXBURGH, J.: Unfortunately, I feel bound to differ. The house in question had two means of entrance and exit—a front and a back door. The back door was apparently in working order, though it was locked at night at five o'clock. This was the evidence of Mrs. Privett, whom the judge accepted as a truthful witness. She, as tenant and housekeeper, would be more likely to know about the back door than the plaintiff, and the judge seems to have been under a H misapprehension when he said:

“Ever since the Privetts had gone to live in the top floor, this had been kept locked up and no use was made of it at all.”

I I should have expected Mrs. Privett to let the aged plaintiff out by the back door rather than let her jump down about three feet in the dark in proximity to an open area.

If the first defendants had put up a sufficiently illuminated notice on the path reading “Front entrance closed, entrance by back door”, they would, in my view, have discharged their whole duty to persons visiting the premises. I mention this to indicate my opinion that they were not bound to supply a safe alternative approach to the front door or to give any warning notice to a visitor who, having once entered, was coming out again. This is, I think, because no warning need be given to a person of full age who has become acquainted with the facts which

constitute the danger. But the first defendants gave no warning. On the contrary, they created a condition of affairs as a result of which (with encouragement from their men) Mrs. Privett and others deviated from the path to follow a route which would have been almost impracticable, but for the fact that they had removed the railings which would have barred it at the front door end. A

Now, I agree that, if the first defendants ought to have foreseen that a lady of seventy-one years of age might attempt this route in the dark (involving as it did a climb of about three feet in some proximity to an unfenced area) and, having successfully negotiated it, might retrace her steps on the return journey instead of asking to be let out by the back door, then the first defendants owed some duty to the plaintiff. It is, therefore, necessary to probe the question whether such a thing was reasonably to be contemplated in advance, and, if it was, the further question what was the extent of the duty owed. It is on these two questions that I have the misfortune to be in a minority. B C

It has been proved that the first defendants' men encouraged Mrs. Privett in the use of this alternative way. But Mrs. Privett, whose age is not in evidence, may have been more agile than the plaintiff and—a more important consideration—the encouragement was given for journeys in daylight. It was not, I think, reasonably to be contemplated that Mrs. Privett would pass on this encouragement to a visitor aged seventy-one arriving in the dark, when there was an alternative approach by the back door. Again, the first defendants, by doing something which they ought not to have done, i.e., leaving the top steps unfenced, made possible the deviation which led to disaster. But I do not think that they could reasonably have expected that this action, which may even have been intended to facilitate deviation by the housekeeper and her husband, would result in a visitor at night being recommended to follow, and following, the same course. Therefore, I am unable to agree that the first defendants ought reasonably to have foreseen that the plaintiff might follow the course which she took in the dark. D E

If I am wrong in this, however, then the question arises: What was the extent of the duty of the first defendants to the plaintiff on her return journey? For a significant fact, if the route was as difficult and dangerous as it appears to have been, is that she had no misgivings about retracing her steps, still without a light. I have a strong feeling that the route was not dangerous to anybody taking reasonable care while in the state in which the first defendants' men left it and that the danger was created when a Mr. Brown, unknown to the first defendants, placed a board which became slippery and on which the plaintiff slipped and was then carried forward by the onward momentum resulting from her jump into the area about eight feet away from the ramp. But I should not feel justified in giving effect to that feeling in view of the findings of the judge, and I proceed on the footing that the way was dangerous when the first defendants' men left and that the danger was not created by Mr. Brown. On that footing the first defendants had a clear duty to warn visitors ignorant of the facts constituting the danger. If the area was dangerous, they should have given warning of that. But they could not give warning of the board because they knew nothing about it. But on the return journey the plaintiff knew more than the first defendants knew. She knew not only of the area, but also of the board. What, then, was their duty to her? In my view, none. F G H

In the case of *Kimber v. Gas Light & Coke Co.* (6) ([1918] 1 K.B. 439) (a decision of this court) the visitor did not know of, and was not warned of, the existence of a hole in the landing opened by some contractors. It was not, therefore, necessary to decide what the position would have been if the plaintiff had known. But in order to decide the case, it was necessary to explore the extent of the duty in a situation otherwise similar. PICKFORD, L.J., said (*ibid.*, at p. 444): I

“... it was negligence any longer to leave the hole unfenced and without warning.”

A BANKES, L.J., said (*ibid.*, at p. 445):

"In my opinion the rule of law . . . is at least as wide as this, namely: If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning."

SCRUTTON, L.J., said (*ibid.*, at p. 447):

"It is A's duty to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B, who is going towards a hidden danger A has created."

Now, I do not suggest that a warning will always be all that is required from a contractor creating a danger; this must always be a question of fact and degree. But if a warning is all that is required in the case of an approaching visitor, nothing could be required in the case of a departing visitor who knew all—indeed, more than all—the contractor knew about the facts constituting the danger. The question, therefore, is whether more than a warning was required in the present case.

A submission by counsel that the duty of a contractor to give warning is necessarily limited to dangers "on the premises" (whatever exactly that may mean) does not appeal to me. But, of course, the place where the danger is situate is very relevant in considering what the contractor ought to do. The area here concerned was on neighbouring land. The contractor had no right to fence it, and I do not think that he had any duty to ask permission to do so. Nor do I think that he had any duty to erect a complete fence along the boundary between the path and the front door or even to stop up the deviation by erecting or replacing a barrier along the line of the steps. In my view, the contractor's duty was only to warn any person who did not know all the facts which he knew, and the plaintiff was not such a person.

It is said that this question of knowledge has been transferred by changes in the law of contributory negligence from the sphere of duty to the sphere of apportionment of blame.

In *Slater v. Clay Cross Co.* (15) ([1956] 2 All E.R. 625), the plaintiff was walking through a narrow tunnel on the defendants' narrow gauge railway. Instructions had been given to drivers that they were to blow the whistle and slow down, but on the occasion of the accident, owing to exceptional circumstances, this was not done. The plaintiff was clearly entitled to succeed, because, though she knew of the danger arising when the train travelled in its usual manner, she did not know the facts which on the particular occasion made her passage more than usually dangerous. She was faced with an unusual danger or trap in ignorance of the facts. If, therefore, there is any difficulty about the case, it arises only from certain passages in the judgment of DENNING, L.J., which seem to me to go beyond what was necessary for its decision.

He said (*ibid.*, at p. 628):

"... it seems to me that, when the plaintiff walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence, but is not a bar to the action . . . Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing the damages."

I respectfully suggest that these passages go too far. I agree that such knowledge as that plaintiff had was no bar to that action, if only because she did not know the facts which constituted the special danger, and I also agree that knowledge is by no means always a bar to an action. But I am unable to believe that knowledge of the facts has ceased to be a bar when the only breach of duty is a failure to give warning of the facts constituting the unusual danger. Surely there can be no duty to tell anybody something he already knows, and if there is no breach of duty, there is no cause of action. A change in the law of contributory negligence cannot, as it seems to me, create a cause of action where none existed before, and this seems to be the conclusion to be drawn from two recent decisions in this court and one in the House of Lords.

In a case in this court as recent as 1953 (*Hawkins v. Coulsdon & Purley Urban District Council* (18), [1954] 1 All E.R. 97) SOMERVELL, L.J., said (at p. 100):

" . . . the duty of a licensor is to warn licensees of any unusual or concealed danger of which he knows and which would not be obvious to a reasonably careful person. Apart from that, the licensee takes the premises as he finds them."

DENNING, L.J., said (*ibid.*, at p. 106):

" In the result, it seems to me that nowadays, in the case of an unusual danger which is not obvious or known to the visitor, it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage."

In an even more recent case before this court (*Greene v. Chelsea Borough Council* (20), [1954] 2 All E.R. 318), SINGLETON, L.J., observed (at p. 324) that there was nothing to show that the plaintiff knew that the ceiling was dangerous, and DENNING, L.J., referring to *London Graving Dock Co., Ltd. v. Horton* (21) ([1951] 2 All E.R. 1) said ([1954] 2 All E.R. at p. 325):

" The majority of their Lordships thought that, if the plaintiff chose to sue the occupiers instead of his employers, he must be regarded, in proceedings against the occupiers, as free to avoid the danger, and he was disentitled, therefore, to sue them."

In the present case the plaintiff was free to act in a number of ways which would have avoided the danger.

In *London Graving Dock Co., Ltd. v. Horton* (21) LORD NORMAND said ([1951] 2 All E.R. at p. 12):

" In any event, there was in the present case an opportunity for inspection, both by the respondent's employers and by the respondent himself, so that the respondent actually knew, as the result of his inspection, the very defects of which he now complains. *M'Alister (or Donoghue) v. Stevenson* (3) cannot, in my opinion, have any application to this case."

It is true that the first two of these cases were fought between licensors and licensees and the third between an invitor and an invitee, but there is no suggestion in any of them that the effect of the alteration in the law of contributory negligence has been to enlarge the cause of action by enlarging the scope of the duty, and there seems to be no logical reason for giving that alteration an effect as between a contractor and a visitor to the premises which it has not as between licensor and licensee. I need scarcely add that I am not considering what the law ought to be, but what it appears to me to be in accordance with previous authority. I would dismiss this appeal.

Appeal dismissed against the second and third defendants. Appeal allowed against the first defendants. Leave to appeal to the House of Lords on terms.

Solicitors: Syrett & Sons, agents for Ivens, Thompson & Green, Cheltenham (for the plaintiff); Gibson & Weldon, agents for H. D. Keith Scott, Gloucester (for the first defendants). [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

RUST v. GOODALE.

[CHANCERY DIVISION (Harman, J.), July 9, 10, 11, 27, 1956.]

B

Mortgage—Power of leasing—Restriction—Underlease without consent—Sale by mortgagee of mortgaged premises to second mortgagee—Sale expressed in contract to be subject to underlease, but underlease not mentioned in conveyance—Rights of purchaser against underlessee—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 89 (1) (a).

C

Landlord and Tenant—Tenancy by estoppel—Feeding the estoppel—Underlease purported to be granted by equitable mortgagor whose statutory power of leasing was excluded—Legal term subsequently acquired by mortgagor—Whether doctrine of feeding the estoppel of any avail against mortgagee.

D

In 1951 a freeholder entered into an agreement with R. for the grant to the latter of a lease of a dwelling-house for a term of eleven years from Christmas, 1951. R. covenanted not to assign the benefit of the agreement and that the house should be used as a private dwelling. In 1953 R. obtained licences to assign the benefit of the agreement to H., and to convert the house into a number of furnished service suites. On July 24, 1953, R. by a document under seal assigned to H. the benefit of the agreement in consideration of £3,000. On the same day, H. by a deed of legal charge (herein called "the first charge") purported to charge to R. by way of legal mortgage all his estate and interest in the house to secure repayment to R. of £2,000. On Nov. 19, 1953, H. purported to grant to the plaintiff a second charge by way

E

of legal mortgage to secure repayment of £4,629: the mortgagor's statutory powers of leasing were excluded. The second charge was registered as a puisne mortgage on Nov. 20, 1953. On Feb. 4, 1954, H. (without any licence from the mortgagees) by an underlease sub-let the first floor of the house to the defendant for a term of eight years from Jan. 22, 1954, in consideration of £2,260 and an annual rent of £5. It was common ground that

F

it would not have been within H.'s powers to grant the underlease (since H. took a fine and did not reserve the best rent*) even if he had possessed the statutory powers of leasing. On Feb. 15, 1954, a lease was granted to H. pursuant to the agreement of 1951, and H. was therefore precluded thereafter, as between himself and the defendant, from denying that the defendant had a legal estate†. In August, 1954, R. gave notice to H. calling in the money

G

secured by the first charge and in September, 1954, R. informed the defendant that he required possession of the floor sub-let to him by H. On Mar. 1, 1955, R. as mortgagee contracted to sell the house to K. for £3,000, the contract containing a condition that the property was sold subject to and with the benefit of "an underlease dated Feb. 4, 1954, granted or purported to have been granted and made" between H. and declaring that the defendant and R. gave "no warranty as to the validity or otherwise of the said underlease". It was further provided that the property was sold subject to

H

"the existing legal charge dated Nov. 19, 1953", made between H. and the plaintiff. The contract was conditional on R. procuring the execution by H. of a supplemental legal charge (in confirmation of the first charge) in a prescribed form prior to completion. The contract was in fact completed

I

on Apr. 7, 1955, in favour of the plaintiff as sub-purchaser, R. having on Apr. 6, 1955, obtained from H. a legal charge, expressed to be supplemental to the charge of July 24, 1953, charging the property by way of legal mortgage to secure the money due under the first charge. The assignment of Apr. 7, 1955, recited the first charge and the confirmatory legal charge of Apr. 6,

* See the Law of Property Act, 1925, s. 99 (6), and p. 376, letter H, post.

† I.e., because the acquisition of the legal estate fed the estoppel; see p. 377, letter B, post.

1955, and R., as mortgagee, assigned to the plaintiff the property for the residue of the term of the lease of Feb. 15, 1954, discharged from the legal charge of Apr. 6, 1955, but expressed to be subject to the plaintiff's second charge of Nov. 19, 1953. The plaintiff thereafter claimed possession against the defendant.

Held: the plaintiff was entitled to possession for the following reasons—

(i) the right to treat as a trespasser a tenant of the mortgagor under a lease which the mortgage precluded the mortgagor from having had power to grant was not destroyed by the mortgagee's selling the mortgaged property.

Doe d. Lord Downe v. Thompson ((1847), 9 Q.B. 1037) applied.

(ii) it was not necessary for R. as mortgagee to have assigned expressly to the plaintiff his rights against the mortgagor and the defendant as the mortgagor's tenant; the reference to the underlease in the contract of March, 1955, meant only that the sale was subject to the underlease so far as it had any validity, and furthermore the assignment, which superseded the contract, was not expressed to be subject to the underlease.

Smith v. Widlake ((1877), 3 C.P.D. 10) considered.

(iii) although the underlease was good by estoppel as between H. and the defendant, it was void as between R. and the defendant, and R. had not waived his rights against the defendant.

Davenport v. Smith ([1921] 2 Ch. 270) distinguished.

(iv) although a legal term of years was granted on Feb. 15, 1954, to H. by the freeholder and R. obtained (as mortgagee) no legal title until the execution of the deed of confirmation of Apr. 6, 1955, no question of priority of legal interests between the plaintiff (as purchaser from R.) and the defendant arose because the underlease granted by H. to the defendant on Feb. 4, 1954, was ineffective against R. and the doctrine of feeding the estoppel did not avail the defendant against R. or the plaintiff.

Dictum of FARWELL, J., in *Iron Trades Employers Insurance Assn. v. Union Land & House Investors, Ltd.* ([1937] Ch. at p. 317) applied.

Per CURLIAM: the reversion of the plaintiff by virtue of the second mortgage to her was destroyed on the assignment to her of the mortgaged premises by R. as first mortgagee on Apr. 7, 1955, notwithstanding that the assignment was expressed to be subject to the plaintiff's charge, since by virtue of s. 89 (1) (a) of the Law of Property Act, 1925, the assignment passed the mortgagor's interest (see p. 382, letters B and C, post).

[**Editorial Note.** Where a lessor purports to demise property to which he has at the time no title to enable him to grant a legal term and subsequently acquires sufficient legal title, the purported demise takes effect in interest, the subsequently acquired legal title being said to feed the estoppel effected by the original purported demise; see 15 HALSBURY'S LAWS (3rd Edn.) 220, para. 418; and for cases on the subject, see 30 DIGEST (Repl.) 382, 253 et seq. In the present case the plaintiff's title was acquired by the assignment of Apr. 7, 1955, wholly from the mortgagee, R., in exercise of his power of sale, and as the mortgagee was not bound by the underlease to the defendant, the fact that the assignment had by statute the effect of passing the mortgagor's interest as well as the mortgagee's was immaterial.

As to the leasing powers of mortgagors, see 23 HALSBURY'S LAWS (2nd Edn.) 330-333, paras. 494-496; and for cases on the subject, see 35 DIGEST 334-337, 768-793.]

Cases referred to:

- (1) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 31 Digest (Repl.) 639, 7472.
- (2) *Corbett v. Plowden*, (1884), 25 Ch.D. 678; 54 L.J.Ch. 109; 50 L.T. 740; 35 Digest 337, 790.

- A (3) *Tarn v. Turner*, (1888), 39 Ch.D. 456; 57 L.J.Ch. 1085; 59 L.T. 742; 35 Digest 684, 4257.
- (4) *Doe d. Downe (Lord) v. Thompson, Downe (Lord) v. Thompson*, (1847), 9 Q.B. 1037; 8 L.T.O.S. 408; 115 E.R. 1572; 35 Digest 337, 793.
- (5) *Smith v. Phillips*, (1837), 1 Keen, 694; 6 L.J.Ch. 253; 48 E.R. 474; 35 Digest 337, 792.
- B (6) *Shaw v. Bunny*, (1865), 2 De G.J. & Sm. 468; 34 L.J.Ch. 257; 11 L.T. 645; 46 E.R. 456; 35 Digest 501, 2319.
- (7) *Kirkwood v. Thompson*, (1865), 2 De G.J. & Sm. 613; 34 L.J.Ch. 501; 12 L.T. 811; 46 E.R. 513; 35 Digest 501, 2322.
- (8) *Smith v. Widlake*, (1877), 3 C.P.D. 10; 47 L.J.Q.B. 282; 30 Digest (Repl.) 493, 1370.
- C (9) *Prettyman's Case, cited in Walters v. Stamford*, (1692), 2 Vern. 279.
- (10) *Keith v. Gancia (R.) & Co., Ltd.*, [1904] 1 Ch. 774; 73 L.J.Ch. 411; 90 L.T. 395; 35 Digest 49, 453.
- (11) *Davenport v. Smith*, [1921] 2 Ch. 270; 91 L.J.Ch. 225; 126 L.T. 184; 31 Digest (Repl.) 539, 6631.
- (12) *Iron Trades Employers Insurance Assocn., Ltd. v. Union Land & House Investors, Ltd.*, [1937] 1 All E.R. 481; [1937] Ch. 313; 106 L.J.Ch. 206; 156 L.T. 322; Digest Supp.
- D (13) *Trevivan v. Lawrance*, (1704), 1 Salk. 276; Holt K.B. 282; 2 Ld. Raym. 1048; 6 Mod. Rep. 256; 91 E.R. 241; 30 Digest (Repl.) 382, 256.
- (14) *Right d. Jefferys v. Bucknell*, (1831), 2 B. & Ad. 278; 9 L.J.O.S.K.B. 304; 109 E.R. 1146; 21 Digest 282, 985.

E Action.

The plaintiff, Christine Agnes Rust, claimed (i) an order for possession of a suite of rooms on the first floor of No. 32, Gloucester Place, Portman Square, London, purported to be demised by an underlease dated Feb. 4, 1954, and (ii) mesne profits.

F The defendant contended that the underlease dated Feb. 4, 1954, was binding on the plaintiff and by a counterclaim sought to enforce covenants contained in the underlease.

The facts appear in the judgment.

P. Ingress Bell, Q.C., and *W. T. Elverston* for the plaintiff.

J. G. Strangman, Q.C., and *H. Hillaby* for the defendant.

G

Cur. adv. vult.

July 27. **HARMAN, J.**, read the following judgment: The plaintiff is the leaseholder of 32, Gloucester Place, London, under a Portman Estate lease creating a term of eleven years from Christmas, 1951. In this action she seeks to eject the defendant from the first floor flat of the premises, of which he is in possession, and claims to be entitled so to remain by virtue of an underlease made between him and Robert Barry Wynne-Hughes (hereafter referred to as "the underlessor") for the residue of a term of eight years from Jan. 22, 1954, at an annual rent of £5 and subject to certain onerous covenants said to be binding on the plaintiff as lessor, in respect of which a counterclaim is set up.

I The history of the matter is a little complicated and I must state it in some detail. In January, 1951, a certain Captain Cunningham-Reid, being then in possession of the property under a lease which would expire at Christmas, 1951, entered into an agreement with Viscount Portman for the grant to Captain Cunningham-Reid of a further lease on the terms on which the plaintiff now holds. The consideration was £3,000 and an annual rent of £120 payable quarterly on the usual quarter days. The agreement provided that the lease should be in the form usual for the Portman estate, and Captain Cunningham-Reid covenanted not to assign or set over the benefit of the agreement to any person whomsoever;

further that he should do certain work on the house and keep it as a private house. A

In 1953 Captain Cunningham-Reid obtained two written licences, the first to divide the property into a number of furnished service suites or bed-sitting rooms, and the second to assign the benefit of the agreement to the underlessor, which he did by a document under seal made on July 24, 1953, for a consideration of £3,000. On the same day the underlessor, having apparently paid £1,000 of the consideration, mortgaged all his estate and interest in the property to Captain Cunningham-Reid (hereafter called "the first mortgagee") to secure the balance of £2,000 made repayable by five equal yearly instalments. This document* (which I will refer to as "the first charge") was expressed to be a charge by way of legal mortgage, but, in my opinion, could not convey or create any legal estate which the mortgagor had not. It operated therefore as an equitable charge. C
The very terms of s. 87 of the Law of Property Act, 1925, which first gave legislative effect to charges by way of legal mortgage, make the section applicable only to legal mortgages of land. The section therefore has no application to cases where the mortgagor (as here) has only an equitable estate. Possibly the document operates as a covenant to create a legal mortgage, if and when the mortgagor acquires a legal estate, and so may be said to have some effect. This instrument excluded the mortgagor's statutory power of leasing in the following terms: D

"The borrower shall not be entitled to exercise any powers of leasing or accepting surrenders of leases given by any statute in that behalf except with the consent in writing of the lender provided that such consent shall not be required for the letting of furnished suites of rooms or single rooms." E

In 1953 the plaintiff, under her then name of O'Callaghan, appears to have lent considerable sums to the underlessor in connection with the repairs to, and conversion of, the property as shown by a document of Mar. 7, 1953, styled "an investment contract" between the parties; and by a further charge of Nov. 19, 1953, the underlessor charged the property to the plaintiff to secure £4,629 and interest subject to the first charge before recited. This instrument was also expressed to be by way of legal mortgage, but, of course, operated only in equity. It contained a provision for repayment by annual instalments of £1,000 and excluded the statutory powers of the borrower of leasing in the same terms as the first charge. This instrument was registered at the Land Registry as a puisne mortgage on Nov. 20, 1953. F G

It appears that the underlessor, even with the financial support of the plaintiff, was in need of money, for he, by the underlease of Feb. 4, 1954, mentioned at the beginning of this judgment, sub-let the first floor of the premises to the defendant for a term of eight years from Jan. 22, 1954. The consideration was the sum of £2,260 paid on the execution of the document and an annual rent of £5. Certain furniture was expressed to be included in the letting and the underlessor covenanted to pay rates including water rates, to do certain repairs, and to maintain a constant supply of hot water. It is quite clear, and was admitted at the Bar, that this underlease when made was not within a mortgagor's statutory powers, even if the underlessor had them, because it took a fine and did not reserve the best rent: see s. 99 (6) of the Law of Property Act, 1925. This relieves me of H I

* The first charge was a legal charge dated July 24, 1953, and made between the underlessor of the one part and the first mortgagee of the other part whereby the underlessor charged by way of legal mortgage all his estate and interest in the property comprised in the assignment of July 24, 1953, with the payment to the first mortgagee with interest thereon. By cl. 6 it was agreed that the first charge should constitute a charge by way of legal mortgage on any lease granted to the underlessor in pursuance of the agreement of January, 1951. Clause 8 excluded the underlessor's power of leasing, except with the first mortgagee's written consent, in the terms stated above.

A considering whether this was a furnished suite of rooms within the proviso in that behalf in the two charges.

On Feb. 15, 1954, a lease was granted to the underlessor in pursuance of the agreement of Jan. 9, 1951, and in consideration of the repairs done by the lessee and the £3,000 paid by his predecessor the first mortgagee. The rent as I have said was £120 and the term eleven years from Christmas, 1951. The underlessor having thus obtained the legal estate in a term of years sufficient to enable him to grant the underlease of Feb. 4, 1954, was precluded from that date onwards as between himself and the defendant from denying that the defendant had a legal estate accordingly*. This, however, clearly did not affect either of the mortgagees, both of whom were entitled at this stage to treat the underlessor as a trespasser and evict him. I cite again (as did SIR RAYMOND EVERSHED, M.R., in *Dudley & District Benefit Building Society v. Emerson* (1) ([1949] 2 All E.R. 252 at p. 255) the EARL OF SELBORNE, L.C.'s speech in *Corbett v. Plowden* (2) ((1884), 25 Ch.D. 678 at p. 681):

D “ ‘ If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them ’ ”.

E It was said at the hearing that the defendant took his underlease without knowledge of the two mortgages. That would I think in any event be immaterial, but in law it is not correct, for, as the second charge was registered, he had notice of that and thus of the first charge also.

On Aug. 28, 1954, the first mortgagee gave notice to the underlessor calling in the money under the first charge, and on Sept. 22, 1954, the first mortgagee's solicitors wrote to the defendant's solicitors alleging that the underlease was voidable against their client and asking for possession in order to avoid proceedings. At the same time they offered the defendant the opportunity to redeem the mortgage, as indeed he was entitled to do, as an alternative to going out of possession. As to this see *Tarn v. Turner* (3) ((1888), 39 Ch.D. 456). At the same time an offer was made to the plaintiff as second mortgagee to redeem the first charge, and, though this latter proposal was for a time entertained by the plaintiff's advisers, neither of these offers was accepted. The first mortgagee was thus in a position to exercise his power of sale.

C On Nov. 12, 1954, the first suggestion was made on the plaintiff's behalf that she should buy the property from the first mortgagee instead of redeeming, and a draft contract for sale was negotiated between the parties in the latter part of that year. In February, 1955, a Mme. Koumantarakis comes rather mysteriously on the scene, and she on Mar. 1, 1955, entered into a written contract to purchase from the first mortgagee for £3,000. This document contained the following special conditions:

I “ G. The property is sold subject to and with the benefit of an underlease dated Feb. 4, 1954, granted or purported to have been granted and made between [the underlessor] of the one part and [the defendant] of the other part and [the purchaser] or her solicitors having been supplied with a copy of the said underlease shall be deemed to purchase with full knowledge thereof and shall raise no objection or requisition with regard thereto and [the first mortgagee] gives no warranty as to the validity or otherwise of the said underlease. The counterpart of the said underlease is not and never has been in the possession custody or power of [the first mortgagee] who shall

* References for authority on this are given in the editorial note at p. 374, ante.

not be required to hand the document over on completion . . . K. The property is also sold subject to the existing legal charge dated Nov. 19, 1953, made between [the underlessor] of the one part and [the plaintiff] of the other part. L. This contract is conditional upon the vendor procuring the execution by [the underlessor] of a supplemental legal charge in the form annexed hereto prior to completion.” A

In the meanwhile the defendant's solicitors were not unnaturally anxious as to their position and it appears that, for reasons which are obscure, the first mortgagee's solicitors informed them on the telephone on Mar. 29, 1955, of the existence of condition G which I have read. B

The contract was completed on Apr. 7, 1955, in favour of the plaintiff as sub-purchaser, and the completion statement shows that the sum due on the first charge was then about £2,200. On the previous day* the vendor, in compliance with his obligations under the contract, obtained from the underlessor a legal charge, expressed to be supplemental to the first charge, charging the property by way of legal mortgage to secure the money due under the first charge. This gave the first mortgagee the equivalent of a legal estate in the term of years under the lease which he on the next day assigned to the plaintiff. This instrument, an assignment dated Apr. 7, 1955, recited the first charge and the legal charge of Apr. 6, 1955, and the first mortgagee, conveying as mortgagee, assigned to the plaintiff the property for the residue of the term of the lease of Feb. 15, 1954, discharged from the legal charge of Apr. 6, 1955, but expressed to be subject, nevertheless, to the plaintiff's second charge, i.e., her charge dated Nov. 19, 1953. C D

On Apr. 13, 1955, the first mortgagee's solicitors wrote the following letter to the defendant's solicitors: E

“Dear Sir . . . The sub-sale to Mrs. Rust (formerly Mrs. O'Callaghan) was completed on the 7th instant. Both the purchaser and the sub-purchaser are, of course, fully aware of the circumstances under which your client occupies part of the property and this was referred to in the contract of sale in the terms you mention. It was not, however, actually referred to in the assignment.” F

The word “actually” is perhaps a nice piece of irony.

On Apr. 19, 1955, the defendant's solicitors demanded of the plaintiff payment of the water rates under the underlease and also to re-connect the hot water supply and provide hot water. The retort to this was a claim for possession, to which the defendant's solicitors replied that the underlease was valid, and the present action was accordingly launched by writ dated June 14, 1955. So much for the facts. G

It is the defendant's case that the underlease, which was admittedly either void or voidable when first granted, has become binding on the plaintiff on the following grounds: (1) A mortgagee's right to treat as a trespasser a tenant of the mortgagor under a lease not authorised by the mortgage is a right only incident to the mortgage and intended to support the mortgagee's powers. So soon, therefore, as the mortgagee either sells under or forecloses his mortgage this right is gone. (2) Even if the mortgagee could have passed his right against the defendant as the mortgagor's tenant to the plaintiff as purchaser, he did not do so, H I

*By a legal charge dated Apr. 6, 1955, and made between the underlessor of the one part and the first mortgagee of the other part supplemental to the first charge the underlessor by way of confirmation of the first charge of July 24, 1953, charged by way of legal mortgage all his estate and interest under the lease of Feb. 15, 1954, with the payment to the first mortgagee of the principal moneys and interest secured by the first charge to the intent that he should possess all rights remedies and powers in relation to the mortgaged property in every respect as if the first charge had constituted a charge by way of legal mortgage of the lease from the day of the grant of the lease.

- A for there is no express assignment of that right in the instrument of Apr. 7, 1955. Moreover the contract of Mar. 1, 1955, though not the assignment, is made expressly subject to the underlease. (3) Even if the mortgagee could and did pass whatever rights he had against the defendant to his purchaser, he had lost his right to object to the underlease before the assignment and the plaintiff taking under him is in no better position than he. (4) The plaintiff's legal title rests only on the confirmatory legal charge of Apr. 6, 1955. Up to that date the first mortgagee, her vendor, had no legal estate. The defendant on the other hand acquired a legal estate as against the underlessor, the mortgagor, directly the lease of Feb. 15, 1954, was executed in favour of the underlessor, this estate being created under the doctrine of feeding the estoppel*. Therefore, the defendant, it is said, has the prior legal right and is ahead. (5) Notwithstanding the words in the assignment to her of Apr. 7, 1955, the plaintiff's rights as second mortgagee disappeared as a result of that conveyance and no estate or interest under that instrument remains in her which would entitle her to object as second mortgagee to the underlease.

I will deal with these points in the order in which I have stated them.

- (1) No authority for this proposition was produced and I am aware of none. D There is, however, a case which appears to show that the contrary is right, namely, *Doe d. Lord Downe v. Thompson* (4) ((1847), 9 Q.B. 1037). In that case the mortgagor granted a lease to the defendant unauthorised by the mortgage. The plaintiff purchased the legal estate from the mortgagee (the mortgage being by conveyance of the fee) and also the equitable estate from persons deriving title under the mortgagor. He then received rent for two years from the tenant E and subsequently sought ejectment against him, and was held entitled to possession on the ground that the estate of the lessee was never well created by the mortgagor, and that the plaintiff, having acquired the fee simple, could exercise the mortgagee's rights of treating the lessee as a yearly tenant only although the mortgage had disappeared two years before. It is indeed true that if the mortgagor redeems he will be bound by the lease which he himself F has created (see *Smith v. Phillips* (5) (1837), 1 Keen, 694), but that doctrine has no application, in my judgment, to a sale or foreclosure by the mortgagee.

- (2) I cannot see any necessity for an express assignment by the first mortgagee of his rights against the underlessor to the plaintiff as purchaser. It was not doubted that a second mortgagee may properly purchase from the first mortgagee and will obtain an irredeemable estate on so doing. Authority for this proposition is to be found in two cases, namely, *Shaw v. Bunny* (6) ((1865), 2 De G. J. & Sm. 468), and *Kirkwood v. Thompson* (7) ((1865), 2 De G. J. & Sm. 613). If then the second mortgagee gets the same irredeemable estate as a stranger would get he obtains all the rights of the mortgagee who conveys to him. True it is that in this case the contract of Mar. 1, 1955, was expressed to be subject to the underlease. In my opinion, the expression only meant subject to the underlease H so far as it had any validity, and may have been put there by way of precaution by the vendor. However that may be, the assignment is not expressed to be so subject, and it supersedes the contract, which indeed cannot be looked at for this purpose. A parallel is to be found in *Smith v. Widlake* (8) ((1877), 3 C.P.D. 10), where the conveyance to the purchaser (the plaintiff) was itself expressed to be subject to the term of a void tenancy. Nevertheless, it was held that the I vendor passed to the purchaser everything which he had including his right to override the term. See the judgment of BRAMWELL, L.J., where he says (*ibid.*, at p. 15):

"It was also argued that, as the grant to the plaintiff was made expressly subject to the void lease, he is not entitled to possession until the expiration of the term intended to be created by the indenture dated Sept. 29, 1834;

* For references for authority on this doctrine, see editorial note at p. 374, ante.

but he, as grantee under the indenture dated Apr. 2, 1874, takes all that his grantors could convey, and as the supposed term did not exist, he became seised in fee of the cottages and garden free from incumbrances, and with the right to immediate possession."

COTTON, L.J., says (*ibid.*, at p. 16):

"It has been argued that the plaintiff cannot recover possession of the cottages and garden until the expiration of sixty years from Sept. 29, 1834, because the conveyance to the plaintiff in the recitals, in the habendum, and in the covenant against incumbrances, recognises as valid the indenture of lease dated as of that day; and that the deed must therefore be construed as confirming the void lease or creating a new lease for the remainder of the term of sixty years. In support of this argument, reliance has been placed upon *Prettyman's Case* (9) . . . in my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose of excepting it from the covenant against incumbrances."

(3) The law on this subject is in my opinion correctly stated in 23 HALSBURY'S LAWS (2nd Edn.), p. 332, para. 495:

"A lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between mortgagor and lessee, but void as between mortgagee and lessee."

To the same effect is the observation of JOYCE, J., in *Keith v. R. Gancia & Co., Ltd.* (10) ([1904] 1 Ch. 774). There has been here no acceptance of rent from the defendant by the plaintiff, nor, so far as I know, by the first mortgagee, but, even if there had been, it would not set up the underlease but would at the most create only a tenancy from year to year between the mortgagee and the tenant and that not on the terms of the underlease. It is said that the first mortgagee had in some way waived his rights to object to the underlease. Now the facts as I have stated them show first that by the letter of Sept. 22, 1954, he repudiated the underlease and gave the defendant a proper offer to redeem. Secondly, the defendant did not accept this offer and the first mortgagee proceeded to negotiate for a sale. It is true that he contracted to sell subject to the underlease, but, so far as I know, he did not communicate this fact to the defendant until after the execution of the contract of Mar. 1, 1955. The first assurance to the defendant seems to have been by telephone on Mar. 29, 1955, and there was some confirmation in a letter of Apr. 13, 1955. In my judgment, the first mortgagee could not, after contracting with the plaintiff, deprive her of the subject-matter of the contract by making representations without her knowledge to a third party. But, apart from this, I am of opinion that the first mortgagee himself never waived his right to object to this underlease. All he said was that if he succeeded in selling for enough money to cover himself he for his part would take no steps to evict the underlessee. *Davenport v. Smith* (11) ([1921] 2 Ch. 270), cited for the defendant, is to my mind clearly distinguishable. There the lease subject to which the plaintiff bought was a validly created lease and he was held precluded from relying on prior breaches because he had notice of them before he bought and in spite of this recognised that the lease was valid. Accordingly, this point in my view fails.

(4) This is a highly technical point. It is said that the defendant acquired a legal estate in 1954 and the plaintiff no legal title until 1955, but in my judgment, as between the mortgagee and the tenant under an unauthorised lease, no legal estate is created at all. The mortgagor must be taken to have been exercising his right to make a lease good only as between himself and the tenant, as pointed out by FARWELL, J., in *Iron Trades Employers Insurance Assn., Ltd. v. Union*

- A *Land & House Investors, Ltd.* (12) ([1937] Ch. 313). He deals with the old law ([1937] Ch. at p. 317; [1937] 1 All E.R. at p. 484):

B “Under the law as it was before the Act of 1881 the position was this, that in the case of a legal mortgage the mortgagor, although in possession, had no power at all to grant a lease which was binding on the mortgagee. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor, who had granted the lease, was concerned, it was binding upon him as against the lessee, and he was estopped from disputing it and as against the mortgagor or against any one other than a person having a title paramount to the mortgagor, e.g., the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him, except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property which had been leased to him by the mortgagor, but beyond that right to redeem he had no rights as against the mortgagee nor had he any estate or interest as against the mortgagee in the land at all; he had by virtue of equity a right to redeem if he was in danger of being evicted by the mortgagee who had, as I have said, a paramount title, but except to that extent a lease granted by the mortgagor prior to the Act of 1881 was ineffective as against the mortgagee.”

- E He then discussed whether the law had been altered except to the extent to which statutory powers of lease had been granted by the Conveyancing Act, 1881, and indeed the Law of Property Act, 1925, against mortgagors, and came to the conclusion that the position was otherwise the same. The mortgagor therefore was not dealing with the legal term of years vested in him under the Law of Property Act, 1925, but only his equity of redemption. In this I agree with the observations in *WOODFALL, LAW OF LANDLORD AND TENANT* (24th Edn.), pp. 80, 81. I am, therefore, of opinion that no question of priority of legal estates arises.

- G A further technical point was taken that a sale by a mortgagee under the Act of 1925 conveys to the purchaser not only the mortgagee's term of years but the mortgagor's expectancy thereon and therefore the purchaser acquiring the mortgagor's as well as the mortgagee's estate is bound by the mortgagor's disabilities. In support of this proposition there was cited *Doe d. Lord Downe v. Thompson* (4), where LORD DENMAN, C.J., said (9 Q.B. at p. 1043):

- H “The lease was good against Thomas Burton by estoppel only: he had not the legal estate when he granted it; nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption; and they could pass nothing else to Lord Downe. The legal interest has passed to Lord Downe wholly and entirely from Messrs. Swann, who were not privies to, nor in any way estopped by, the lease; neither can Lord Downe be estopped in respect of the interest which he took from them. Doubtless, if Lord Downe had taken the legal interest from Burton, he would have been estopped in the same manner that Burton would, as was held in *Trevivan v. Lawrance* (13) ((1704), 1 Salk. 276) and other cases; and particularly see the case of *Right d. Jefferys v. Bucknell* (14) ((1831), 2 B. & Ad. 278), in which the doctrine of estoppel was fully considered. But, as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them. And, as those from whom he did take the land were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. Swann alone conveyed.”

In my opinion, there is nothing in this point. Nothing passed to the purchaser from the underlessor; all passed from the first mortgagee under his statutory power of sale. Moreover, this being a charge by way of legal mortgage, in fact no term was vested in the first mortgagee; he merely had the same powers as if it had been so vested, and therefore the point cannot in my judgment arise (see s. 87 of the Law of Property Act, 1925). A

(5) On this point it seems to me the defendant is right. The assignment by the first mortgagee by virtue of his power has the effect, under s. 89 of the Law of Property Act, 1925, not only of conveying to the purchaser the mortgage term, but also, as appears in s. 89 (1) (a), as follows: B

“the conveyance . . . shall operate to convey to the purchaser not only the mortgage term, if any, but also (unless expressly excepted with the leave of the court) the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority . . . [to that].” C

Therefore the plaintiff's reversion as second mortgagee was destroyed. If then the plaintiff had no rights as successor to the first mortgagee, she could not in my judgment succeed in this action under rights as second mortgagee, notwithstanding the fact that the assignment was expressed to operate subject to the second mortgage. As, however, in my judgment, the plaintiff succeeds as successor to the first mortgagee, this point does not avail the defendant. D

Lastly, by re-amendment, the defendant alleged an estoppel precluding the plaintiff from relying on her rights. This arose, it was argued, first from the form of the contract, secondly, from the letter from the first mortgagee already mentioned, thirdly, from the fact that both the first mortgagee and the plaintiff knew of the underlease before the contract and took no steps to avoid it, and, lastly, because the defendant in these circumstances had taken no steps to redeem and had thus lost his right of redemption. There was no allegation that he refrained from redeeming in reliance on any representation. Even if there were, there seem to be two answers; first, that the defendant was given ample opportunity to redeem as I have already described, and secondly, any comforting assurances by the first mortgagee were made without the knowledge of the plaintiff and after contract in her favour and cannot bind her. E

It follows in my judgment that the plaintiff is entitled to the order for possession which she seeks. The counterclaim must be dismissed. F

Solicitors: *Cooper, Bake, Fettes, Roche & Wade* (for the plaintiff); *Cecil Jobson* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A ROLAND-LINIE SCHIFFAHT G.m.b.H. v. SPILLERS, LTD.
AND OTHERS.

[QUEEN'S BENCH DIVISION (Sellers, J.), July 5, 6, 9, 27, 1956.]

B *Shipping—Demurrage—Time lost waiting for berth—Ship kept waiting because discharging place not immediately available—Liability of holders of bills of lading.*

C By a charterparty dated Sept. 10, 1954, the s.s. Werrastein was chartered to carry a cargo of wheat in bulk from Australia. The bills of lading relating to the cargo expressly incorporated all the terms and conditions of the charterparty, and named Hull as the port of destination. Clause 2 of the charterparty provided that the vessel was to proceed to one safe port on the east coast of Great Britain "... or so near thereunto as the vessel can safely get ... and there deliver the cargo in accordance with the custom of port for steamships ... at any customary dock, wharf or pier as ordered by the charterers or their agents ... Provided always that if such discharging place is not immediately available, demurrage in respect of all time waiting thereafter shall be paid ... " at a specified rate. In the circumstances prevailing at the material time the discharging place was the King George Dock at Hull, the charterers having no option to appoint another dock. The Werrastein reached the Humber on Jan. 9, 1955, but, owing to congestion in the King George Dock, no discharging place was available to her and she was instructed by the port authorities to anchor at a point twenty-two miles away from the dock. This was a customary anchorage for the port, but was outside the limits of the port. The Werrastein had to wait at this anchorage for some seven days before a berth was available for her at the King George Dock. On a claim by the shipowners against the defendants, who were holders of the bills of lading and consignees of the cargo, for demurrage under cl. 2 in respect of the seven days' delay,

D

E

F

Held: (i) the essence of the right to claim demurrage under cl. 2 of the charterparty was that the vessel was kept waiting because a discharging place was not immediately available, and the shipowners were entitled to the demurrage which they claimed.

G *North River Freighters, Ltd. v. President of India* ([1956] 1 All E.R. 50) applied.

(ii) the defendants as holders of the bills of lading and consignees of the cargo were liable to pay the demurrage under cl. 2 of the charterparty.

[**Editorial Note.** Compensation for the loss of time during which the ship was kept waiting outside the port, although at a customary anchorage for the port, is a right distinct from demurrage after lay days have begun to run. A ship which is not an "arrived ship" in the sense that she could give notice of readiness to discharge may yet be an "arrived ship" for the purposes of a clause entitling her owners to compensation for time lost in waiting for a berth.

H

As to when a ship becomes an arrived ship, see 30 HALSBURY'S LAWS (2nd Edn.) 522, para. 674; and for the position of a consignee or bona fide holder for value of a bill of lading, see *ibid.*, p. 410, para. 578.

I

For cases concerning the effect of incorporation of a charterparty in a bill of lading, see 41 DIGEST 588, 4121-4126.]

Cases referred to:

(1) *North River Freighters, Ltd. v. President of India*, [1956] 1 All E.R. 50; [1956] 1 Q.B. 333.

(2) *Leonis S.S. Co., Ltd. v. Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 41 Digest 569, 3937.

Action.

The shipowners, Roland-Linie Schiffahrt G.m.b.H., were the owners of the steamship Werrastein of 6,737 tons gross register. On Sept. 10, 1954, the Norddeutscher Lloyd of Bremen as disponent owners of the Werrastein, had chartered the vessel to the Australian Wheat Board to carry a cargo of wheat in bulk from Sydney, New South Wales, to one safe port on the east coast of Great Britain. By three bills of lading dated Nov. 19, 1954, the shipowners acknowledged shipment on board the Werrastein of the parcels of wheat in bulk therein mentioned for carriage to Hull. Each of the bills of lading expressly incorporated all the terms, conditions, clauses and exceptions of the charterparty dated Sept. 10, 1954. The three defendants, Spillers, Ltd., Joseph Rank, Ltd. and Micks Lambert & Co. became holders and indorsees of one each of the bills of lading and were at all material times the owners and consignees of the respective parcels of wheat. By cl. 2 of the charterparty it was provided that:

"Being so loaded, the vessel shall proceed with all reasonable speed . . . to discharge at one safe port on the east coast of Great Britain . . . or so near thereunto as the vessel can safely get, always afloat, and there deliver the cargo in accordance with the custom of port for steamships as provided for by cl. 22, at any customary dock, wharf or pier as ordered by the charterers or their agents, where the vessel can safely lie, always afloat, on being paid freight at the rate hereinafter mentioned. Provided always that if such discharging place is not immediately available, demurrage in respect of all time waiting thereafter shall be paid at the rate mentioned in cl. 17."

Clause 17 provided that:

"Should the vessel not be discharged at the rate herein stipulated demurrage shall be paid at the rate of 8d. British sterling per gross register ton per running day and pro rata for any part of a day. Such demurrage shall be paid day by day, when and where incurred."

Clause 22 provided:

"The time for discharging at destination shall be in accordance with the custom of the port for steamships at the port of discharge."

In the events which occurred, which are described in the judgment, the Werrastein was delayed for seven days, seven hours and three minutes at a customary anchorage for vessels of her size outside the port of Hull before she could discharge her cargo at Hull and the shipowners claimed the sum of £1,740 7s. 10d. from the defendants under cl. 2 of the charterparty and, in the alternative, as damages for breach of contract.

Eustace Roskill, Q.C., and *J. F. Donaldson* for the shipowners.

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the defendants.

Cur. adv. vult.

July 27. **SELLERS, J.**, read the following judgment in which, after referring to the charterparty and to the bills of lading, he continued: The present claim against the defendants arises out of the circumstances which existed and developed when the Werrastein reached the Humber. She was delayed just over a week before she could discharge and deliver her cargo to the defendants. The shipowners claim that the charterparty required the defendants to pay proportionately for this waiting period at the rate of 8d. per gross register ton per running day or pro rata for any part of a day or, alternatively, that a like sum is recoverable as damages for breach of contract. The defendants deny that any liability attaches to them under the terms of carriage and deny any breach of contract.

The vessel was undoubtedly delayed because a discharging place was not available until a week after she reached the Humber. In 1925 *SCRUTTON, L.J.*, said that as long as he could remember there had been controversy between

A shipowner and charterer as to who is to bear the risk of waiting at a port for a berth. This case sustains the controversy.

It is necessary to review the particular circumstances at Hull. Until August, 1954, two docks were in customary use for the discharging of grain, King George Dock and Alexandra Dock. The former only had grain elevators, including portable equipment. In the Alexandra Dock discharge of grain customarily took place by bagging the bulk grain on board and then either discharging the loaded bags or emptying the bags over the side into lighters. Apparently new labour brought into Hull for dock work regarded the discharge by bagging as antiquated and refused to carry it out. Instead of continuing until such time as more modern methods and machinery could be adopted the dock labourers refused to work the hand discharge and, in order to terminate a strike, the method was abandoned. Before the charterparty was entered into the only place where discharge of grain was taking place at Hull was the King George Dock by means of the elevator machinery available there. This reduction in grain discharging facilities and the hold-up of the strike led to congestion, and when the Werrastein reached the Humber all the berths and mechanical discharging equipment in the King George Dock were occupied and not available for her.

In fair weather a pilot cutter normally lies off the Spurn lightship in the entrance to the Humber and incoming vessels report to the cutter and take on a pilot in that vicinity. The Werrastein so reported and was informed, as was the fact, that no berth was available and that she was to proceed to an anchorage to await a berth. The responsibility for allocating berths rests with the dock authorities, the British Transport Commission, and it was on their decision that the order was given. The order in which ships are called into dock for berthing is determined by and follows the order in which they have reported to the pilot cutter. Had there been no congestion, and if the dock authorities had so allowed and ordered, a vessel of the Werrastein's size could have waited in the King George Dock adjacent to the south-east corner of that dock. The position was apparently not available, and she was not allowed to enter.

There are at Hull three customary anchorages for large vessels to lie, one of which is in an area off Spurn Head. The vessel came to anchor in that area at 2 p.m. on Sunday, Jan. 9, 1955, and remained there until 9.3 p.m. on Sunday, Jan. 16, 1955, an agreed period of seven days, seven hours and three minutes. This anchorage was about twenty-two miles from the King George Dock, but I am satisfied that if the Werrastein had, on her arrival in the Humber, gone up to the King George Dock, she would have been refused entrance and would have had to return to one of the three anchorages which all lie near the entrance to the Humber. A vessel of her size could not safely anchor and would not be allowed to lie in the Humber in the vicinity of the docks.

[HIS LORDSHIP then reviewed the evidence concerning the extent of and limits of the port of Hull and found that the three customary anchorages were not within the geographical, legal or fiscal limits of the port of Hull but were adjuncts to the port and were the customary places for large vessels to anchor while awaiting entry to the docks and continued:]

It is in these circumstances and on these facts generally stated that the shipowners base their claim under cl. 2 of the charterparty.

[HIS LORDSHIP then referred to the material parts of cl. 2 which are quoted at p. 384, letter C, ante, and continued:]

As Hull was the destination in the bills of lading, the discharge was to be at Hull at any customary dock, wharf or pier, which in the circumstances meant the King George Dock, or at any wharf or pier within it. The charterers or their agents had in the circumstances no option as to the dock, but could have ordered her to a particular berth there, as eventually they did.

The case for the defendants was that the vessel was not an arrived ship and that the time had not come for the defendants or any one of them to order her to any dock, wharf or pier, and that no order had been given; that until she was so ordered the proviso [to cl. 2] did not come into operation as "demurrage in respect of all waiting time thereafter" meant after the order to the discharging place (which proved, in the event, not to be immediately available); and that in any case, the vessel never reached the port of Hull until Jan. 17, 1955, and that the waiting time could not run until she reached the port. A

For the shipowners it was contended that under the bills of lading the vessel was impliedly ordered to the King George Dock, as it was the only customary dock for discharge of a grain cargo at Hull; alternatively, that if an order was necessary the defendants were in breach of contract in not giving one, and that they could not, by withholding an order in the circumstances in which the vessel was at the anchorage, avoid their liability for waiting time and place it on the shipowners. B C

It seems to be clear that "demurrage", as it is called in the proviso, cannot be payable unless the vessel is kept waiting because her discharging place is not immediately available for her to take up. The discharging place must therefore of necessity be known before it can be ascertained whether it is available or not. D
In many cases it will not be known until it is ordered by the charterers or their agents on the vessel's arrival at the appropriate place for the order to be given. Here the vessel had to discharge in the King George Dock. The precise berth had not been ordered, but the dock included all the berths therein. It was at all material times clear that no discharging place within the dock was available and that is why the vessel was ordered to the anchorage and the only reason why she waited there. E
An incoming vessel might go to one of the anchorages for various reasons. She might go to await the tide or a tug or because of damage or breakdown or illness of the crew. In any such case it could not be said that she had completed her voyage to Hull when she was still twenty-two miles away. But in the present circumstances I am prepared to find (if it be necessary) that the Werrastein was to be treated as having arrived at the port of Hull for the purpose of cl. 2. F
It would have been an idle and wasteful formality to have travelled a fruitless twenty-two miles and back merely to establish her rights, and I am not prepared to find that the terms of the charterparty necessitated it. The essence of the right to claim under the proviso is that the vessel is kept waiting because the discharging place is not immediately available, and that is the essential question of fact which gives a right to compensation at the rate of demurrage mentioned in cl. 17, which is quite independent of and distinct from any right to demurrage after lay days have commenced to run. G

It is clear, also, that the three anchorages were the customary waiting places for large vessels trading in and out of Hull, and were recognised facilities of the port, and no less so than if they had, by the favours of nature, been within the confines of the port of Hull itself. H

The Werrastein had reached the appropriate waiting place for the port. She was ready to discharge. She had to wait there because no berth was available. She had, therefore, in the course of her voyage to Hull, reached the place where she had to stop until a berth was available. The considerations which apply to a vessel which has to wait are obviously different from those which apply to a vessel which has to load or discharge, or may often be so. I
A vessel cannot load or discharge until she is in the position properly designated for the purpose. It depends on the contract and the circumstances whether a vessel has reached the place where she is available for discharge and when the time commences from which the period for discharge will run. Clause 2* provides that the vessel shall deliver the cargo in accordance with the custom of the port for steamships

* The terms of the clause are at p. 384, letter C, ante.

A as provided by cl. 22*. The time for discharging would not commence to run whilst a vessel was at the anchorage. She would not be an arrived ship.

In my view, the proviso to cl. 2 deals with waiting time (due to the discharging place being unavailable) before lay days commence to run, and provides for just such an occasion as has arisen here. The loss due to waiting for discharge has to fall on one of the parties to the adventure and depends on the terms of their bargain; but, provided that the vessel has reached the recognised waiting place for the port, she can do no more than be ready and available to discharge. The defendants have the selection (within the terms of the contract) of the place of discharge. It does not seem wholly inappropriate that if loss by waiting for a berth is incurred it should fall on them. The ship has to face the hazards of the voyage whereby she may be delayed by storm, fog, tides and many other events.

C But for cl. 2 the waiting at the anchorage would likewise have fallen on the ship, for it would seem that the earliest time that she could have become an arrived ship, so that time for discharge would have run against the charterers or their agents, would have been when she entered the King George Dock and she could not have done that earlier than she did.

The argument for the defendants relied on the many authorities relating to the questions when a vessel was an arrived ship so that she could give notice of readiness to load or to discharge, and from when time would run for discharge if no notice was required. I do not refer to these authorities because, in my opinion, they have no relevance to the present claim and I would accept the contention that if the shipowners had to establish under cl. 2 that their vessel was an "arrived ship" [so as to be able to discharge her cargo] the claim would fail.

Support for the views which I have expressed is, in my opinion, to be found in the recent case in the Court of Appeal of *North River Freighters, Ltd. v. President of India* (1) ([1956] 1 All E.R. 50). There cl. 5 provided: "Time lost in waiting for berth to count as loading time". The vessel had come to anchor in the quarantine anchorage for Dairen. She had been chartered to proceed to "one safe berth Dairen (Manchuria) to load". The quarantine anchorage was found to be within the commercial area of the port of Dairen. It was held that the provision relied on† was wholly independent of the commencement of loading time. As the case came before the court on a Special Case it does not reveal the evidence on which it was found that the quarantine anchorage was within the commercial area of the port. If commercial area was used in the sense in the judgment of KENNEDY, L.J., in *Leonis S.S. Co., Ltd. v. Rank, Ltd.* (2) ([1908] 1 K.B. 499 at p. 518) it would appear to have been a limited area within the legal limits of the port and relevant with regard to the commencement of loading time (if a port charterparty). All the learned lords justices upheld the shipowners' claim on the ground that the clause gave an additional right and that the ship had not first to bring herself within cl. 17, which provided:

H "Lay days to commence twenty-four hours after vessel is dunnaged, matted and all hatches ready for cargo, and captain having given written notice . . . to that effect to charterers or their agents."

SINGLETON, L.J., said ([1956] 1 All E.R. at p. 54):

I "The clause as to time lost is independent of cl. 17. It is inserted to avoid questions which have arisen in many cases which have been before the courts. The risk of time lost in waiting for a berth is put on the charterers whose agents are, or ought to be, familiar with local conditions . . . In my opinion, the provision as to notice in cl. 17 does not affect the question arising under line 67 of the charterparty, and the lack of a notice under [cl. 17] does not avoid the owners' rights in regard to time lost through

* The terms of the clause are at p. 384, letter F, ante.

† The provision relied on was cl. 17, for which see letter H, supra.

waiting for a berth. The notice is something which has to be given for the purpose of calculating lay days. That calculation is independent of the provision in line 67, although the one has to be added to the other to reach the true position under the contract. There was certainly no obligation on the master to give a notice under cl. 17 when the vessel reached the port of Dairen. The charterers knew of her arrival and the next step was for them to nominate the berth to which they wished her to go. If they failed to do so within a reasonable time, and without any adequate explanation, time was lost by the ship in waiting for a berth. It was to meet such a case that the words in line 67 were inserted in the charterparty."

JENKINS, L.J. said (*ibid.*, at p. 56):

"The matter must, therefore, as it seems to me, be dealt with on the footing that the Radnor, having arrived in the commercial area of the port of Dairen, was in fact ready to load and ready and able to proceed to any berth the charterer might designate by 9.30 a.m. on June 3, but was kept waiting for a berth until 4.30 p.m. on June 10, owing to the charterer's failure to nominate the berth to which she was to proceed. In these circumstances, it seems to me to be clear that the period from 9.30 a.m. on June 3 to 4.30 p.m. on June 10 was 'time lost in waiting for berth' according to the natural and ordinary meaning of those few simple words, with the result that, unless some qualification of their natural and ordinary meaning is to be read into them, the period in question must count as loading time by the express terms of cl. 5 of the charterparty."

Then there is a short passage from the judgment of PARKER, L.J. (*ibid.*, at p. 59):

"No doubt 'time' cannot be said to be 'lost' until it has begun to run, but it surely begins to run when the vessel has reached the point where she has to stop until a berth is available. It seems to me that that is the natural meaning of the words, and that the expression is wholly independent of the time when loading time commences."

On the view I have taken of this case the alternative claim for breach of contract and the issues which would arise out of it do not call for consideration. It was submitted for the defendants that if there were such liability as I have found, liability did not fall on the defendants as holders of bills of lading and as consignees of the goods, but would fall on the charterers. It was, however, an express term of each bill of lading that all the terms, conditions, clauses and exceptions of the charterparty should be incorporated, and I find nothing inconsistent or insensible in the relevant clauses so as to make them inapplicable to the bills of lading and unenforceable against the defendants.

In my opinion, the claim succeeds and judgment will be entered for the shipowners against the three defendants.

Judgment for the shipowners.

Solicitors: *William A. Crump & Son* (for the shipowners); *Theodore Goddard & Co.*, agents for *Andrew M. Jackson & Co.*, Hull (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

A

DAVIES v. BRITISH GEON, LTD.

[COURT OF APPEAL (Denning and Birkett, L.J.J., and Harman, J.), June 21, 22, July 25, 1956.]

B

Practice—Appearance—Writ issued in district registry against company—Company's head office and registered office in London, and factory in district of district registry—Appearance in London—R.S.C., Ord. 12, r. 4, r. 5.

C

The defendant company, which manufactured certain products, had its head office and registered office in London, but its only factory was at Barry, near Cardiff, where some four hundred people were employed. All board meetings were held in London, the control of the company was in London, and its policy was decided there, prices were fixed there, contracts were entered into there and the sale of the company's products was solely in the hands of the sales director whose office was there. The plaintiff, a workman employed by the company at its factory at Barry, commenced an action against the company by issuing a writ in the Cardiff District Registry. Service of the writ was accepted by the company's Cardiff solicitors, but appearance was entered in London by the London agents of the company's Cardiff solicitors. On an application by the plaintiff to set aside the appearance on the ground that the defendant company carried on business within the district of the Cardiff District Registry within the meaning of R.S.C., Ord. 12, r. 4 and r. 5*, by the former of which a defendant who resided or carried on business within the district of the district registry would be bound to enter appearance in the district registry,

D

E

Held (HARMAN, J., dissenting): for the purposes of R.S.C., Ord. 12, r. 4 and r. 5, a company, like an individual or a firm, could carry on business in more places than one; on the facts the defendant company resided and carried on business in London and also carried on business at Barry and, therefore, should have entered its appearance in the Cardiff District Registry.

F

Taylor v. Crowland Gas & Coke Co. ((1855), 11 Exch. 1) and *Aberystwith Promenade Pier Co., Ltd. v. Cooper* ((1865), 35 L.J.Q.B. 44) distinguished; *Keynsham Blue Lias Lime Co., Ltd. v. Baker* ((1863), 2 H. & C. 729) considered.

Decision of PEARSON, J. ([1956] 2 All E.R. 404) reversed.

G

[**Editorial Note.** The words "in which the defendant . . . resides or carries on business", which are comparable with those of R.S.C., Ord. 12, r. 4, appear in C.C.R., Ord. 2, r. 1 (1) (a), which governs the place where actions may be begun in county courts. It seems that, having regard to the view expressed by DENNING, L.J., in relation to the practice in county courts, the practice there should accord with the present decision (see p. 397, letter G, post). HARMAN, J., in his dissenting judgment, expresses the view that the words in C.C.R., Ord. 2, r. 1 (1) (a) should bear the same meaning as in R.S.C., Ord. 12, r. 4 (see p. 398, letter F, post).

H

As to the place for entering an appearance, see 26 HALSBURY'S LAWS (2nd Edn.) 37, para. 54.

For R.S.C., Ord. 12, r. 4, r. 5, see ANNUAL PRACTICE, 1956, 134, 135.]

I

Cases referred to:

- (1) *Taylor v. Crowland Gas & Coke Co.*, (1855), 11 Exch. 1; 24 L.J.Ex. 233; 25 L.T.O.S. 55; 19 J.P. 295; 156 E.R. 720; 13 Digest 459, 99.
- (2) *Keynsham Blue Lias Lime Co., Ltd. v. Baker*, (1863), 2 H. & C. 729; 33 L.J.Ex. 41; 9 L.T. 418; 159 E.R. 302; 13 Digest 460, 106.
- (3) *Adams v. Great Western Ry. Co.*, (1861), 6 H. & N. 404; 30 L.J.Ex. 124; 3 L.T. 631; 158 E.R. 166; 13 Digest 459, 98.

* The relevant terms of the rules appear at p. 391, letters C and D, post.

- (4) *Shiels v. Great Northern Ry. Co.*, (1861), 30 L.J.Q.B. 331; 4 L.T. 479; 13 Digest 460, 100.
- (5) *Brown v. London & North Western Ry. Co.*, (1863), 4 B. & S. 326; 32 L.J.Q.B. 318; 8 L.T. 695; 27 J.P. 711; 122 E.R. 481; 13 Digest 459, 87.
- (6) *Mitchell v. Hender*, (1854), 1 Saund. & M. 22; 23 L.J.Q.B. 273; 23 L.T.O.S. 83; 18 J.P. 728; 13 Digest 459, 90.
- (7) *Weatherley v. Calder & Co.*, (1889), 61 L.T. 508; 13 Digest 459, 96.
- (8) *Dunlop Pneumatic Tyre Co. v. Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 13 Digest 430, 1532.
- (9) *Swedish Central Ry. Co., Ltd. v. Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, 144.
- (10) *De Beers Consolidated Mines, Ltd. v. Howe*, [1905] 2 K.B. 612; *affd.* H.L., [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; 13 Digest 429, 1529.
- (11) *Union Corp., Ltd. v. Inland Revenue Comrs., Johannesburg Consolidated Investment Co., Ltd. v. Inland Revenue Comrs., Trinidad Leaseholds, Ltd. v. Inland Revenue Comrs.*, [1952] 1 All E.R. 646; *affd.* H.L., [1953] 1 All E.R. 729; [1953] A.C. 482; 34 Tax Cas. 207, 279; 3rd Digest Supp.
- (12) *Le Tailleur v. South Eastern Ry. Co.*, (1877), 3 C.P.D. 18; 34 Digest 529, 30.
- (13) *Ex p. Breull, Re Bowie*, (1880), 16 Ch.D. 484; 50 L.J.Ch. 384; 43 L.T. 580; 4 Digest 38, 322.
- (14) *Aberystwith Promenade Pier Co., Ltd. v. Cooper*, (1865), 35 L.J.Q.B. 44; 13 L.T. 273; 30 J.P. 791; 13 Digest 460, 107.
- (15) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; Digest Supp.
- (16) *Compagnie Générale Trans-Atlantique v. Law (Thomas) & Co., La Bourgogne*, [1899] A.C. 431; 68 L.J.P. 104; 80 L.T. 845; 13 Digest 431, 1540.
- (17) *Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills Co. v. Nicholson*, (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 1 Tax Cas. 83, 88; 28 Digest 25, 136.
- (18) *Sulley v. A.-G.*, (1860), 5 H. & N. 711; 29 L.J.Ex. 464; 2 L.T. 439; 24 J.P. 676; 2 Tax Cas. 149, n.; 157 E.R. 1364; 28 Digest 25, 132.
- (19) *Kilkenny & Great Southern & Western Ry. Co. v. Feilden*, (1851), 6 Exch. 81; 20 L.J.Ex. 141; 16 L.T.O.S. 418; 155 E.R. 462; 13 Digest 433, 1558.
- (20) *A.-G. v. Alexander*, (1874), L.R. 10 Exch. 20; 44 L.J.Ex. 3; 31 L.T. 694; 28 Digest 30, 159.

Interlocutory Appeal.

The plaintiff, David William Davies, appealed from an order of PEARSON, J., dated May 7, 1956, and reported [1956] 2 All E.R. 404.

The plaintiff brought an action against the defendant company, British Geon, Ltd., in which he alleged that he had contracted dermatitis while employed at the company's factory at Barry. He issued a writ on Feb. 2, 1956, in the Cardiff District Registry and service was accepted by the defendant company's solicitors in Cardiff. On Feb. 9, 1956, appearance was entered in London by the London agents for the company's Cardiff solicitors. The memorandum of appearance complied with R.S.C., Ord. 12, r. 5 (2) and stated that the defendant company neither resided nor carried on business within the district of the Cardiff Registry. The plaintiff applied to set aside the appearance on the ground that the company did carry on business within the Cardiff District Registry.

A The application was refused by Master LAWRENCE and an appeal from his decision was dismissed by PEARSON, J., on the ground that, for the purposes of R.S.C., Ord. 12, r. 4 and r. 5, a corporation was deemed to have only one place of business, which, in the circumstances of the case, was the place where its head office was, and that, therefore, on the facts the defendant company carried on its business in London.

B *H. V. Lloyd-Jones, Q.C., and H. W. J. Ap Robert* for the plaintiff.
L. F. Read for the defendant company.

Cur. adv. vult.

July 25. The following judgments were read.

C **BIRKETT, L.J.:** This is an appeal from a judgment of PEARSON, J., given on May 7, 1956. It concerns the meaning to be given to the words in R.S.C., Ord. 12, r. 4 and r. 5. Rule 4 states:

"If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry."

Rule 5 (1) reads:

D "If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or at the Central Office."

In the present case the writ was issued in the Cardiff District Registry, and the defendant company has its factory within the district, and, if it should be held that the company carries on business within the district, the company ought to appear in the district registry in conformity with r. 4; but, if it should be held that the company does not carry on business within the district, then the appearance can be either in the Cardiff District Registry or at the Central Office. It is not contended that the defendant company "resides" in the Cardiff district, in view of the decided cases, but merely that it carries on business there.

F The words "resides or carries on business" first appear in the Rules of 1875* and are repeated in the Rules of the Supreme Court, 1883. Some of the cases which are relevant to this appeal are decisions on the words appearing in the County Courts Act, 1846† (9 & 10 Vict. c. 95), s. 128 and s. 129. Such a case was the important case of *Taylor v. Crowland Gas & Coke Co.* (1) ((1855), 11 Exch. 1). Section 128 of the Act of 1846 provided that

G "all actions and proceedings which before the passing of this Act might have been brought in any of Her Majesty's superior courts of record . . . where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business . . . may be brought and determined in any such superior court, at the election of the party suing or proceeding . . ."

H Section 129 dealt with the question of costs when any party had acted in disregard of the provisions of s. 128.

The precise point raised in this appeal does not appear to have been raised in this form during the lifetime of the order and rules in question; and from the practical point of view it does not appear to matter much, at first sight, whether the appeal is allowed or dismissed, for any inconvenience which may arise from

I any construction of the rules can be quickly remedied by an application under R.S.C., Ord. 35, r. 16. It has, however, been thought right to raise the question of the meaning of the words in the order and rules because of the special facts of this case. PEARSON, J., gave the matter the fullest consideration and delivered a most helpful and painstaking judgment, in which he reviewed the authorities at some length, and stated his conclusions most clearly and firmly.

* In Ord. 12, r. 2, in Sch. 1 to the Supreme Court of Judicature Act, 1875.

† This Act is repealed.

The evidence before the learned judge showed that the defendant company manufactured certain products, including a powder used for making plastic goods. This manufacture was carried on at Barry in the County of Glamorgan within the district of the Cardiff Registry of the High Court of Justice. About four hundred or five hundred people were employed at the factory, and it was the only factory of the defendant company. The registered office of the company is in Piccadilly, London. The board meetings of the company are held and the policy of the company is decided at St. James's Square, London. The secretary of the company in his affidavit said that the control of the company was in London, contracts were entered into there, prices fixed there, and the sale of the company's products was solely in the hands of the sales director whose office was in London. Mr. Davies, the plaintiff in the action, was employed by the defendant company at the factory in Glamorgan, and he sued his employer for damages on account of injuries which he had suffered through contracting dermatitis at his work for which, he contended, the defendant company was liable. The writ was issued in the Cardiff District Registry, and it was contended for the plaintiff that, as the defendant company "carried on business" within the Cardiff District Registry at the factory at Barry some seven miles from Cardiff, it ought to have entered an appearance in the Cardiff District Registry, in accordance with R.S.C., Ord. 12, r. 4. The appearance was, in fact, entered in London and it follows that, as matters now stand and if nothing more is done, all the interlocutory work will be done in London. The plaintiff's solicitors, who reside and carry on business in Wales, have not invoked the aid of R.S.C., Ord. 35, r. 17, but have chosen to make the matter a point of principle by moving to strike out the appearance of the defendant company, as they are enjoined in the ANNUAL PRACTICE, 1956, at p. 135, to do if the appearance is erroneous, and to compel it to enter appearance in Cardiff. The defendant company entered the appearance in London because it was contended that it did not reside or carry on business in Glamorgan within the meaning of the order and rules with which we are now concerned, but resided and carried on business in London only, and was within the protection of R.S.C., Ord. 12, r. 5 (1). Giving the ordinary meaning to ordinary English words, nobody could doubt, I think, that the defendant company carried on business at the factory in Glamorgan, and also at the head offices in London; but unfortunately the question is not so simple as that because of the decided cases of the last hundred years.

PEARSON, J., made it quite plain that, had he been free to do so, he would have given the words this plain ordinary meaning. In his judgment as delivered in court, he said ([1956] 2 All E.R. at p. 405):

"If one merely looks at the wording of those rules without guidance from any previous authority one would be strongly inclined to say that different meanings should be given to the word 'resides' and the words 'carries on business', which appear in both of the rules . . . Secondly, it might be said that, as a defendant might be a natural person or a corporation, *prima facie* the word 'resides' and the words 'carries on business' must have their separate meanings in relation to a corporation as well as in relation to a natural person. Thirdly, it might be said that a corporation, as well as a natural person, could be carrying on business in a number of different places and that carrying on business could be constituted by manufacturing in a large factory."

If I may respectfully say so, that passage is filled with excellent common sense, and it is necessary to look at the authorities to see whether they do, indeed, compel the learned judge to decide the case as he did, contrary to his desire and the common sense of his interpretation. There were three passages in the learned

A judge's judgment which seem to me to contain the essence of the matter. He said ([1956] 2 All E.R. at p. 414):

"Therefore, I think it must be taken that for many purposes it is possible for a corporation to be carrying on business in more places than one, and even to be residing in more places than one; but here we have these rules, enacted initially in 1875 and repeated in 1883, which have remained in force ever since, and in addition great weight should be given to the view taken in CHITTY'S ARCHBOLD in 1885. It is reasonable also to suppose that the draftsman of the 1875 rules must have had in mind the previous decisions, and the matters are sufficiently in *pari materia*. Therefore I hold that notwithstanding the recent authorities, it is right to say that for the purposes of these rules a corporation is deemed to have only one place of business."

The second passage (*ibid.*) is:

"Therefore, I think that I am bound to hold, in spite of what would naturally have been thought on merely reading the words, that there is no distinction between 'residing' and 'carrying on business' when dealing with a corporation, and that a corporation has only one place of business, and that is its principal place of business."

The third passage (*ibid.*, at p. 416) reads:

"As I have said, if there had been no previous authority I should have arrived at a different conclusion here. I should have thought that the right general principle is that you give the ordinary meaning to the words 'carries on business', and if in an ordinary reasonable sense you find a company is established and is carrying on one of its principal activities at that establishment within the area of the district registry, it should have been said at any rate that its business was carried on partly within that district registry. If that created hardship on the defendant in some case, as it might, then an application could be made under R.S.C., Ord. 35, r. 16, to have it transferred to the Central Office. In spite of those feelings, however, I feel overborne by the authority of the decided cases, and that old and high authority, namely, CHITTY'S ARCHBOLD, which is referred to in the ANNUAL PRACTICE. For that reason this appeal fails."

The question in this court, therefore, would seem to be whether it is possible to give that reasonable and convenient effect to the order and the rules in question which PEARSON, J., desired and stated, or whether the decided cases preclude us from doing so, as PEARSON, J., felt that they precluded him. To say that the defendant company does not carry on business at Barry in Glamorganshire is to defy common sense; to say that a company cannot carry on business both at Glamorgan and London is equally repugnant to common sense; the simple question is: do the authorities compel this court to come to the same conclusion as that to which PEARSON, J., came?

It is quite clear that PEARSON, J., was greatly influenced by the statement in CHITTY'S ARCHBOLD'S PRACTICE OF THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE (14th Edn.) (1885), vol. 1, p. 253:

"A corporation can only 'carry on business' in one place, and that place is, the place where its principal business is transacted."

After citing the facts of the present case, PEARSON, J., also said ([1956] 2 All E.R. at p. 415):

"... having regard to the railway company cases and the case of *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2) ((1863), 2 H. & C. 729), I think

the right finding is that the company carries on business at its head office, which is in Piccadilly, London . . .”

In *Adams v. Great Western Ry. Co.* (3) ((1861), 6 H. & N. 404), which was a decision on the words of the County Courts Act, 1846, it was held that the railway company “dwelt” at Paddington only because the general control and management was centred there. This decision was followed in many other cases such as *Shiels v. Great Northern Ry. Co.* (4) ((1861), 30 L.J.Q.B. 331), and *Brown v. London & North Western Ry. Co.* (5) ((1863), 4 B. & S. 326). These decisions, it would appear, were governed by considerations of convenience, for nobody could doubt that, in the ordinary use of language, the Great Western Railway, for example, carried on business at Birmingham as well as at Paddington. The railway cases have always been recognised as exceptional cases, and in *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2), where the head office of the company had always been in London, although its factory was within the Bristol area, when the liquidator sued for a small debt in London, it was held that he should have brought the action in the Bristol or Somerset County Court. POLLOCK, C.B., said (2 H. & C. at p. 733):

“But in my judgment that furnishes no rule whatever for the plain case of a company having a place of business where they manufacture an article and there sell and deliver it to persons residing in the neighbourhood, as this company did. It is said that a person who has bought of them a few shillings worth of goods may be sued in the courts of Westminster Hall because the company have an office in London where the directors meet for the purpose of conducting the affairs of the company. It seems to me that affords no ground whatever for holding that there is a concurrent jurisdiction, when the goods are manufactured and sold at Keynsham to a tradesman residing at Bristol.”

BRAMWELL, B., said (*ibid.*) that he was of the same opinion:

“The plaintiffs are a corporation, and the case of *Taylor v. Crowland Gas & Coke Co.* (1) is an authority that a corporation dwells at the place where its business is carried on.”

CHANNELL, B., said (*ibid.*, at p. 734):

“I think that the decisions as to railway companies are not applicable, for the reason given by the Lord Chief Baron.”

PICOTT, B., said that he was of the same opinion and added (*ibid.*):

“But this company carried on their business, in every sense, at Keynsham, and not at their office in London.”

The directors, however, controlled the business, and that case seems to support in some measure at least, the contention of the plaintiff in the present case.

It would appear further that the statement in CHITTY'S ARCHBOLD, which so influenced the learned judge, was based on the decisions in the railway cases, and it can be said with equal force in this case, as in *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2), that the decisions are inapplicable. In *Taylor v. Crowland Gas & Coke Co.* (1) the court was considering the words of s. 128 of the County Courts Act, 1846, and decided on the facts of that case that the company dwelt at the place where it carried on its business. I say “decided on the facts” for the reason that the court was then considering, not the case of a company with an office in one place and a factory in another, but a case where the company had its offices and works in the same place and all the business was done in the one place. This early case has greatly influenced the decision in subsequent cases, but its special facts ought to be remembered. *Mitchell v. Hender* (6)

- A ((1854), 1 Saund. & M. 22) decides that an individual can carry on business in more than one place, again a decision under s. 128 of the Act of 1846; *Weatherley v. Calder & Co.* (7) ((1889), 61 L.T. 508) decides that a firm in Scotland carrying on business there can at the same time carry on business in England at a branch establishment. For certain purposes a corporation may reside in different countries, as in *Dunlop Pneumatic Tyre Co. v. Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (8) ([1902] 1 K.B. 342), and in the cases relating to income tax it is clearly possible for a corporation to have two places of business: see *Swedish Central Ry. Co., Ltd. v. Thompson* (9) ([1925] A.C. 495). From all this it would appear that a corporation for many purposes can carry on business in more places than one, and can reside in more places than one.

- B The questions in the present appeal would appear to be: (i) Is the view of PEARSON, J., right that for the purposes of R.S.C., Ord. 12, r. 4 and r. 5, a corporation is deemed to have only one place of business? (ii) Is the view of PEARSON, J., right that the one place of business is the principal place of business "where the central management and control actually abides"? (iii) Is the view of PEARSON, J., right that for the purposes of R.S.C., Ord. 12, r. 4 and r. 5, the defendant company does not carry on business at its factory in the Cardiff district?

In *De Beers Consolidated Mines, Ltd. v. Howe* (10) ([1906] A.C. 455) LORD LOREBURN, L.C., said (*ibid.*, at p. 458):

- E "Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied."

The artificial test applied in that case, as it had been applied in many income tax cases where the question was whether the company was resident in the United Kingdom, was to determine where the real business was carried on, and that was "where the central management and control actually abides."

- F This test was followed in *Union Corpn., Ltd. v. Inland Revenue Comrs.* (11) ([1952] 1 All E.R. 646 at p. 654), where SIR RAYMOND EVERSHERD, M.R., giving the judgment of the court, said, in reviewing the authorities so far as the law relating to income tax was concerned:

"Where, on these facts, is Union Corporation, Ltd. 'ordinarily resident'?"

- G Or, since it is conceded on both sides that in the present case the adverb is without significance, where is it 'resident'?"

- H In the full judgment he reviewed that question of residence and I need make no further citations from the case. These, however, were cases dealing with income tax and the question of residence for that purpose, but must it be said that, if the defendant company resided in London, because of the authority of this and other cases, it could not also carry on business at Barry in Glamorgan-shire so that it could be sued in the Cardiff District Registry, and ought to enter an appearance there?

- I I do not think that the question which arises in the present case has ever been before the courts in this form. For the purposes of the present order and rules, I am of the opinion that the defendant company resided and carried on business in London within the meaning of the authorities, but that circumstance did not preclude it from carrying on business also at Barry in the County of Glamorgan; and I know of no authority which compels the court to say that it does not carry on business, for the purpose of R.S.C., Ord. 12, r. 4 and r. 5, in the Cardiff District Registry. So far from this decision upsetting established practice, I believe that, as PEARSON, J., said, reason and convenience combine to make the decision in conformity with modern conditions and practice and would result in economies in procedure. I would, therefore, allow the appeal.

DENNING, L.J.: I agree with the judgment which BIRKETT, L.J., has just delivered. Reason and convenience favour our decision. The solicitors on each side are in Cardiff and counsel on both sides belong to the local Bar. It is obviously cheaper for the interlocutory proceedings to be conducted in Cardiff rather than in London. Although PEARSON, J., expressed his personal view in favour of the plaintiff, nevertheless he felt compelled by the authorities to decide that, for the purposes of R.S.C., Ord. 12, r. 4 and r. 5, a corporation carries on business at only one place, that is, at its principal place of business, and that the defendant company therefore carried on business only in London. I can quite understand that the judge felt it right, sitting at first instance, to bow to the authorities: but I do not think that we should. I will go through the authorities to show how they appear to me.

The judge quotes ([1956] 2 All E.R. at p. 407) the case of *Taylor v. Crowland Gas & Coke Co.* (1) ((1855), 11 Exch. 1) for the proposition (although he says that it is artificial), that in relation to a corporation, the expression "dwells" and the expression "carries on business" have the same meaning and not two separate meanings. The facts in that case were that the Crowland Gas Co. had its gas works in Crowland, and its offices there, and its directors met there. It was argued that it did not "dwell" there but "dwelt" at the place or places where the shareholders lived. The court retorted, quite naturally, that the company dwelt "at the place where it carries on its business". That statement was very appropriate to that case, where every part of the business was carried on in Crowland. It is quite inappropriate to a case where the company carries on business in two places, as, for instance, where the factory is in one place and the offices are in another. The court had no such case in mind and their observations cannot be taken to extend to it.

Now we come to the railway cases, *Adams v. Great Western Ry. Co.* (3) ((1861), 6 H. & N. 404), *Shiels v. Great Northern Ry. Co.* (4) ((1861), 30 L.J.Q.B. 331), *Brown v. London & North Western Ry. Co.* (5) ((1863), 4 B. & S. 326), and *Le Tailleur v. South Eastern Ry. Co.* (12) ((1877), 3 C.P.D. 18). It was there held that a railway company "dwells" and "carries on his business" only at the principal station where the general superintendence of the whole concern is centred, and not at any station, however large, where the local management is conducted. In each of those cases the decision was put by the judges on the ground of convenience. They recognised that, according to the ordinary use of language, a railway company carries on business at every station on the line, however small; but, inasmuch as that would have meant that it could be sued in every county court throughout its system, the judges went to the other extreme and held that a railway carried on its business at the principal station only. Those cases have frequently been said to be *sui generis*: for instance, by POLLOCK, C.B., in *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2) ((1863), 2 H. & C. 729) and by LUSH, L.J., in *Ex p. Breull, Re Bowie* (13) ((1880), 16 Ch.D. 484 at p. 488). They cannot, therefore, be taken to apply to ordinary manufacturing companies which have a factory in one place and an office in another. Indeed, the courts have refused to apply the railway cases to a manufacturing company. A case in point is *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2) in 1863. The company had its offices in London where the directors met and controlled the company's affairs; but it had its factory at Keynsham in Somersetshire where it manufactured and sold and delivered its products. It supplied a small quantity of goods to a trader down there and the court held that the company "dwelt" at Keynsham and not in London.

There is, however, one case which appears at first sight to extend the railway cases to other companies. It is *Aberystwith Promenade Pier Co., Ltd. v. Cooper* (14) ((1865), 35 L.J.Q.B. 44). The company had a pier and toll-keeper at Aberystwith, but its only office was at Westminster where the substantial

- A business of the company and all negotiations were done. It had no office at Aberystwith. The court held that the company "dwelt" at Westminster and not at Aberystwith. That decision may well be a correct decision on the word "dwells" but it is no authority at all on the meaning of "carries on business". The income tax cases, too, such as *Swedish Central Ry. Co., Ltd. v. Thompson* (9) ([1925] A.C. 495) and *Union Corpn., Ltd. v. Inland Revenue Comrs.* (11) ([1952] 1 All E.R. 646) are authorities on the words "ordinarily resident" and not at all on the words "carries on business".

- When we come to the words "carries on business", we find many cases to show that a firm or company may "dwell" or "reside" in one place and "carry on business" in another. A good instance is *Weatherley v. Calder & Co.* (7) ((1889), 61 L.T. 508), where a Scottish firm had its head office in Glasgow and a branch office in Middlesbrough. It was held that it "carried on business" in Middlesbrough so as to be sued there. So also in *Dunlop Pneumatic Tyre Co. v. Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (8) ([1902] 1 K.B. 342), a foreign corporation hired a stand at the cycle show at the Crystal Palace for nine days to exhibit its articles. It was held that during the show the foreign corporation was "carrying on business" in England so as to be sued here.
- D Such authorities amply warrant the dictum of ATKIN, L.J., in *New York Life Insurance Co. v. Public Trustee* (15) ([1924] 2 Ch. 101 at p. 120, where he said:

"... the true view is that the corporation resides for the purposes of suit in as many places as it carries on business . . ."

- In the present case PEARSON, J., felt overborne by the statement in CHITTY'S ARCHBOLD'S PRACTICE OF THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE (14th Edn.) (1885) at p. 253:

"A corporation can only 'carry on business' in one place, and that place is, the place where its principal business is transacted."

- That statement is based on the railway cases. None of them is binding on this court. I think that those cases turn on special grounds of convenience in regard to county court proceedings and the rules as to costs then in force. I doubt whether those grounds exist today. In any case the reasoning in them cannot properly be extended to other cases. It seems to me plain that a company, like an individual or a firm, can carry on business in several places.

- It was said that the county court practice is still based on the old railway cases. I do not accept that view. I can remember many cases in the days when I went to the county courts in which a railway company was sued in the county court in the country and not in the London court. The action is normally brought where the cause of action arose, and the question where the company "carries on business" does not arise. I do not suppose that the question has arisen for the last eighty years. At any rate, there is no decided case about it. If the present case, for instance, were brought in the county court, it would certainly be in the county court at Cardiff where the cause of action arose, and not in London, and all the interlocutory proceedings would be in Cardiff. I do not think that the view held by BIRKETT, L.J., and myself will interfere in the slightest with the existing county court practice.

- On the facts of this case I think that the defendant company resided in London but carried on business both in London and at Barry near Cardiff in the County of Glamorgan. The defendant company ought, therefore, to have entered its appearance in the district registry. I would be in favour of allowing the appeal accordingly.

HARMAN, J.: This is a storm in a teacup, and, to my mind, having regard to the fact that the plaintiff is in receipt of legal aid, a great waste of public money. The plaintiff, whilst in the defendant company's employment at the company's factory at Barry, suffered an injury to his health for which he conceived that the defendant company was responsible. Accordingly, having

obtained a civil aid certificate, he issued, as he was well entitled to do, out of the district registry at Cardiff, a writ claiming damages in the Queen's Bench Division of the High Court and on the same date delivered his statement of claim. It appears that both the plaintiff and the defendant company employ solicitors having their offices in Wales and one would have thought that as a matter of convenience, the defendant company would enter its appearance in the district registry as it had an option to do under R.S.C., Ord. 12, r. 5. The company did not take this course, but entered appearance in London. Even so, if both solicitors had wished to get on with the action and it had been more convenient to carry it on in the district registry, there would have been no difficulty by agreement in having the proceedings transferred thither. The plaintiff's solicitors, however, did not take this course but, apparently, after delivery of the defence, instead of letting the action take its course, in which event it would by now have been ripe for trial, chose to move to set aside the entry of appearance on the ground that the defendant company resides or carries on business within the area of the district registry and was bound to appear there under R.S.C., Ord. 12, r. 4. The plaintiff is personally not concerned with this; his interest is to get his action tried, and it could be tried just as well, and a great deal more cheaply, by issuing a summons for directions in London instead of employing leading counsel before the Court of Appeal on what is a mere technicality on which, if the plaintiff succeeds, the only difference will be that the summons for directions will issue in the Cardiff District Registry and the trial will be delayed perhaps six months. No question of venue arises: it is purely a question where the summons for directions shall be heard.

The point, although trivial, is not easy of solution, but, for my part, I cannot doubt that the learned judge was right in holding himself bound to the conclusion that the defendant company does not reside nor carry on business within the area of the district registry. Moreover, as will appear, I think that this court is no less bound; but even if it were not, this seems to me eminently an instance to which the principle of *stare decisis* ought to be applied, for if we allow this appeal we shall be upsetting a long settled line of authorities and, moreover, affecting the jurisdiction of the county courts. In Ord. 2, r. 1 (1) (a) of the County Court Rules, 1936, regulating the place "where proceedings may be commenced", are found these words "in the court for the district in which the defendant . . . resides or carries on business". Thus the same words are used as appear in R.S.C., Ord. 12, r. 4, and to my mind the same meaning ought to be given to them. It seems clear on the line of authorities cited by the judge below that in the county courts it is settled that for the purposes of this rule a company carries on business where its control abides. It would be lamentable if in the High Court under R.S.C., Ord. 12, the same words should bear a different meaning.

I agree that if this matter were *res integra* we might conclude that a company carries on business wherever it has an office or can be found trading. Indeed, for purposes of service in this country of processes on foreign corporations some such rule does prevail; for instance, see *Compagnie Générale Trans-Atlantique v. Thomas Law & Co., La Bourgogne* (16) ([1899] A.C. 431). That, however, is an entirely different question from the question where a company resides or carries on business for other purposes. See, in regard to this point, *De Beers Consolidated Mines, Ltd. v. Howe* (10) ([1905] 2 K.B. 612 at p. 637), in the Court of Appeal, the argument in the same case in the House of Lords ([1906] A.C. at p. 456), and a passage from the speech of LORD LOREBURN, L.C. (*ibid.*, at pp. 459, 460). Accordingly, if the defendant company were a foreign corporation having a factory at Barry, as it has, it may well be that a writ could be served on the company there. The defendant company, however, is not a foreign corporation; it is a company limited under the Companies Acts and can be served only at its registered office (Companies Act, 1948, s. 437). Service,

- A therefore, on this company at Barry would be bad. The defendant company has its registered office in London and must be served there unless its solicitors are willing to accept service. It is said, nevertheless, that, having been served in London, appearance must be entered at Barry because the company carries on business there. In my judgment this is wrong. So long ago as 1876 HUDDLESTON, B., in his judgment in *Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills Co. v. Nicholson* (17) ((1876), 1 Ex.D. 428), laid down the law which has ever since been followed. The Cesena Sulphur Co. had its factory in Italy where the entirety of its manufacture was carried on. HUDDLESTON, B., said (*ibid.*, at p. 451):
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C "I own that I had every inclination to yield to the able arguments which were employed by the counsel for the appellants in each case, and it is with the greatest reluctance that I have come to a contrary conclusion. The whole question turns on the interpretation of 'residence' as applicable to a company. The tax is only imposed upon a 'person residing within the United Kingdom', and a corporation for the purpose of paying income tax is a 'person'. The use of the word 'residence' is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons. There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives. I adopt Mr. Matthews' suggestion, that 16 & 17 Vict. c. 34, when it speaks of 'residing' does not mean an artificial residence. It means an actual residence. Mr. Matthews argues, therefore, that when you deal with a trading corporation it means the place not where the form or shadow of business, but where the real trade and business is carried on, and that definition seems to be almost conceded by all the counsel. There is a German expression applicable to it which is well known to foreign jurists—*der Mittelpunkt der Geschäfte*; and the French term is '*le centre de l'entreprise*', the central point of the business.

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"All the cases cited support that view. In *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2) ((1863), 2 H. & C. 729), the court held that Keynsham was the place of business, because the substantial business was carried on there, though the registered office was in London. In *Taylor v. Crowland Gas & Coke Co.* (1) ((1855), 11 Exch. 1), the learned judges thought that a company dwells where it carries on its business. In *Adams v. Great Western Ry. Co.* (3) ((1861), 6 H. & N. 404) it was held that the place where that company carried on its business was Paddington. So in *Brown v. London & North Western Ry. Co.* (5) ((1863), 4 B. & S. 326), it was held that the place where that company carried on its business was at Euston, and not at Chester as had been contended. The same rule had been applied in *Shiels v. Great Northern Ry. Co.* (4) ((1861), 30 L.J.Q.B. 331). Then there is a very strong case, *Aberystwith Promenade Pier Co., Ltd. v. Cooper* (14) ((1865), 35 L.J.Q.B. 44), where it was held that the place of business was in London, although the pier was built in Wales and the tolls were taken there. The decision in *Sulley v. A.-G.* (18) ((1860), 5 H. & N. 711) was to the same effect. The case of *Kilkenny & Great Southern & Western Ry. Co. v. Feilden* (19) ((1851), 6 Exch. 81), which was cited for the appellants, is, I am satisfied, distinguishable. In the last case in this court, *A.-G. v. Alexander* (20) ((1874), L.R. 10 Exch. 20), there was no charter of incorporation in England, and two at least of the learned judges—the Lord Chief Baron and my Brother AMPHLETT—held that Constantinople, where the corporation was incorporated, was the seat of business, the place where the business was carried on."

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This decision has been followed ever since and was expressly confirmed in the House of Lords by LORD LOREBURN, L.C., in *De Beers Consolidated Mines, Ltd. v. Howe* (10), in which he said ([1906] A.C. at p. 458):

"The decision of KELLY, C.B., and HUDDLESTON, B., in . . . *Cesena Sulphur Co. v. Nicholson* (17), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

In my judgment this principle cannot be confined to income tax cases; indeed, it is largely based on the old cases under the County Court Acts, as the learned judge below showed. It is a principle too old now to be shaken. It seems to me to be obvious that a company can reside only where it carries on business, and I think that the converse must be true. In other words, the two expressions "resides" and "carries on business", although they are alternatives in the case of an individual, are synonyms in the case of a corporation which can have no residence in the proper sense. It is also true that a company can have more than one residence or place of business, as *New York Life Insurance Co. v. Public Trustee* (15) ([1924] 2 Ch. 101), cited by the learned judge, shows, but, in order that a company may carry on business at a place so as to make that place its residence, at least some degree of control must be exercised there. This is pointed out by the Court of Appeal in the latest decision on this subject, namely, *Union Corpn., Ltd. v. Inland Revenue Comrs.* (11) ([1952] 1 All E.R. 646): see the headnote to the report and the judgment of the court delivered by SIR RAYMOND EVERSHED, M.R. (*ibid.*, at p. 657). It was suggested that *Keynsham Blue Lias Lime Co., Ltd. v. Baker* (2) showed that the Court of Appeal took the view that a company resided where its manufacturing business was carried on, and so it was decided, but this was to the exclusion of the place of its registered office and the ratio decidendi of that case was the now discarded theory that a company can have only one place of business or residence. The question where the company is controlled is purely one of fact and on the facts here there can be only one answer, and it is London. Nothing is decided at Barry beyond the engagement or dismissal of workmen, although, no doubt, the whole of the manufacturing of the company's products is carried out there. If the plaintiff were right, the company must also carry on business at its branch office at Manchester and, if it had a hundred branch offices, would carry on business within the meaning of R.S.C., Ord. 12, r. 4, at each one of them. It seems to me that in these days of multiple stores the rule may be a convenient one just as it has been held to be in the case of railway companies. Otherwise there must be doubt what degree of business is sufficient for the purposes of the rule. If appearance can always be entered at the head office where the control abides, simplicity is reached. If real inconvenience results, there are ample means of removing the proceedings to the appropriate district. I would dismiss the appeal.

Appeal allowed; appearance set aside.

Solicitors: *Manser, Phillips & Co.*, agents for *Myer Cohen & Co.*, Barry (for the plaintiff); *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the defendant company).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LONDON COUNTY COUNCIL v. FARREN.

[COURT OF APPEAL (Singleton, Morris and Romer, L.J.J.), July 23, 24, 25, 1956.]

Case Stated—Remission of Case Stated—Point not argued before magistrate—

No evidence tendered on which point could be decided in favour of appellants

—Application for remission for hearing of evidence first made to Court of

Appeal—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25—

London Government Act, 1939 (2 & 3 Geo. 6 c. 40), s. 184 (1), (2)—Summary

Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6.

Landlord and Tenant—Notice to quit—Validity—Signature—On behalf of London County Council.

Premises were let to the tenant by a memorandum of agreement dated Sept. 4, 1953, made between the London County Council by W. their director of housing and valuer and agent of the one part and the tenant of the other part. The tenancy so created commenced on Aug. 1, 1953, and was to continue until determined by one month's notice to expire at any time. If determined by the council it was to be "by a written notice signed by the director of housing and valuer to the council". By a notice dated Feb. 2, 1955, served on the tenant and expressed to be given under the Landlord and Tenant Act, 1954, s. 25, the council purported to terminate the tenancy on Aug. 5, 1955. The notice was given by and signed by T., valuer and agent to the council. On a date between that of the grant of the tenancy and the date of the notice the department of the director of housing and valuer to the council was split into two departments, that of the director of housing and that of the valuer to the council. On the council's application to a magistrate under the Small Tenements Recovery Act, 1838, to recover possession of the premises, the tenant contended that the notice to quit was bad since, in the events which had happened, it ought to be signed by two persons, the director of housing and the valuer (who were different persons), and further that there was no evidence that T. had authority to sign the notice on behalf of the director of housing. The magistrate upheld the tenant's contention and dismissed the application. The only arguments submitted to the magistrate related to the question whether the notice was in accordance with the requirements of the contract between the parties. On appeal to the Divisional Court, the council based its case solely on the Landlord and Tenant Act, 1954, contending that the notice was a valid notice under s. 25 of that Act, and that T. had authority to sign the notice by virtue of the London Government Act, 1939, s. 184. The notice did not contain a statement (such as would have constituted evidence of T.'s authority by virtue of s. 184 (2)) that T. was authorised by the council to sign the notice. No evidence had been given or was tendered that T. was authorised to sign the notice. No application was made to remit the case for the consideration of the magistrate. On appeal to the Court of Appeal the council's case was put on the same grounds as to the Divisional Court and in addition the court was asked to remit the case to the magistrate for the hearing of evidence whether or not T. was authorised to give the notice to quit.

Held: (i) since the notice to quit did not state that T. was authorised to sign it and thus was not brought within s. 184 (2) of the London Government Act, 1939, and since no evidence had been tendered to show that T. was authorised to sign, it had not been established that the notice was a valid notice within s. 25 (1) of the Landlord and Tenant Act, 1954; and

(ii) the case would not be remitted to the magistrate for evidence to be given to show that T. was authorised to give the notice to quit because (a) the question of the validity of the notice under the Landlord and Tenant Act, 1954, had not been taken before the magistrate, (b) it was doubtful whether

it was question of law "arising on" the Case Stated by the magistrate within s. 6 of the Summary Jurisdiction Act, 1857, and (c), even if there was power to remit the case, the application to remit it, being an application for the admission of evidence made for the first time to the Court of Appeal, ought not to be granted.

Kates v. Jeffery ([1914] 3 K.B. 160) applied.

Appeal dismissed.

[As to the power to remit a Case Stated, see 21 HALSBURY'S LAWS (2nd Edn.) 729, para. 1260.

For the Landlord and Tenant Act, 1954, s. 25, see 34 HALSBURY'S STATUTES (2nd Edn.) 410.

For the London Government Act, 1939, s. 184, see 15 HALSBURY'S STATUTES (2nd Edn.) 1159.

For the Summary Jurisdiction Act, 1857, s. 6, see 14 HALSBURY'S STATUTES (2nd Edn.) 820.]

Cases referred to:

(1) *Kates v. Jeffery*, [1914] 3 K.B. 160; 83 L.J.K.B. 1760; 111 L.T. 459; 78 J.P. 310; 33 Digest 420, 1308.

(2) *Knight v. Halliwell*, (1874), L.R. 9 Q.B. 412; 43 L.J.M.C. 113; 30 L.T. 359; 38 J.P. 470; 33 Digest 420, 1305.

(3) *Purkis v. Huxtable*, (1859), 1 E. & E. 780; 28 L.J.M.C. 221; 33 L.T.O.S. 106; 120 E.R. 1102; 33 Digest 419, 1303.

(4) *Giebler v. Manning*, [1906] 1 K.B. 709; 75 L.J.K.B. 463; 94 L.T. 580; 70 J.P. 181; 14 Digest 170, 1476.

Appeal.

This was an appeal by the London County Council against an order of the Divisional Court of the Queen's Bench Division dated Apr. 25, 1956, dismissing an appeal by Case Stated from a decision of a metropolitan magistrate sitting at Old Street Magistrates' Court on Nov. 11 and 18, 1955. The Case Stated is fully set out in the judgment of SINGLETON, L.J.

R. E. Megarry, Q.C., and *C. F. Fletcher-Cooke* for the London County Council.
M. Littman for the tenant.

SINGLETON, L.J.: This case arises out of an application by the London County Council for the possession of premises in Gosset Street and Turin Street, Bethnal Green, of which premises the London County Council are owners and are the landlords for the purposes of the Landlord and Tenant Act, 1954. They applied to the magistrate, Mr. Leslie Marks, for an order for possession. The application failed. They asked for a Case to be stated by the learned magistrate. A Case was stated. The Divisional Court upheld the determination of the magistrate; and the London County Council appeal to this court against the judgment of the Divisional Court.

The Case Stated is very short. It is desirable that I should read it so that it may be seen precisely what the question before the magistrate was. In para. 1 of the Case it is stated that on Nov. 11, 1955, application was made, pursuant to the Small Tenements Recovery Act, 1838, by Mary Winifred Westgate acting for the London County Council for a warrant to recover possession of the premises which I have mentioned already. In para. 2 the magistrate said:

"I heard the said complaint on Nov. 11, 1955, and found the following facts: (a) The above-named tenement was let to the respondent by a memorandum of agreement dated Sept. 4, 1953, and made between the London County Council by Cyril Herbert Walker their director of housing and valuer and agent of the one part and the respondent of the other part at a rent of £36 per month payable monthly in advance."

A Thus the rent of the premises, which were used for storage purposes, was something over £400 a year. Paragraph 2 continues:

B “(b) The tenancy so created commenced on Aug. 1, 1953, and was to continue until determined as provided by the said memorandum. Clause 6 of the said memorandum is as follows: ‘The tenancy may be determined by one month’s notice to expire at any time. If determined by the council it shall be by a written notice signed by the director of housing and valuer to the council and served on the tenant or left for the tenant upon the premises or if the same are unoccupied affixed to the premises one month at least prior to the day of determination. If determined by the tenant it shall be by a notice in writing signed by the tenant and served upon the director of housing and valuer or one of his assistants at the offices of the council one month at least prior to the day of determination. The notice in either case may instead of being served be sent through the post by registered letter addressed to the tenant at his last known address or to the director of housing and valuer at the offices of the council as the case may be’. (c) By a notice dated Feb. 2, 1955, and served upon the respondent and expressed to be given under the provisions of s. 25 of the Landlord and Tenant Act, 1954, the London County Council purported to terminate the said tenancy on Aug. 5, 1955. The said notice was given by and signed by Joseph Edward James Toole, valuer and agent to the London County Council. (d) In spite of the said notice, the respondent remained and remains in possession of the above-named tenement. (e) The London County Council require possession of the above-named tenement for redevelopment of a housing estate, pursuant to Part 5 of the Housing Act, 1936. (f) At the time of the grant of the said tenancy, the housing and the valuer’s departments of the London County Council were combined in one department under the director of housing and valuer to the council. Some time between the date of the said grant and the service of the said notice the London County Council resolved to split the combined department into two departments, that of the director of housing and that of the valuer to the council. (g) At the time of the giving of the said notice Joseph Edward James Toole was valuer to the London County Council. The director of housing was a Mr. Allerton.”

The Case Stated continues:

G “3. It was submitted by the respondent at the close of the case for the appellant that there was no case for the respondent to answer, and that the application should fail, upon the preliminary ground that the said notice was not signed as required by the memorandum of agreement. 4. It was contended by the appellant that the valuer was on Feb. 2, 1955, the right and proper person to give and sign the said notice on behalf of the London H County Council according to the standing orders of the London County Council then in force. 5. It was contended by the respondent that by the terms of the said memorandum of agreement the said notice had to be signed by the director of housing and valuer to the council and that since the functions of the director of housing and those of the valuer were now exercised by two different persons, the notice ought to be signed by both such persons. The I respondent further contended that in any event there was no evidence that the said J. E. Toole had authority to sign the said notice on behalf of the director of housing. The respondent further contended that the standing orders of the council could not affect the contractual position between the council and the respondent and that in any event no such orders had been proved in evidence. 6. I was referred to no cases. 7. I was of opinion that the said notice was bad because it was not given and signed both by the director of housing and by the valuer to the London County Council and that in any event the said notice was not signed by the director of housing or by

anyone on his behalf, and I accordingly refused the application for a warrant. 8. The question for the opinion of the High Court is whether or not the said notice was good notwithstanding that it was given and signed only by the valuer to the London County Council."

I have read the Case stated by the magistrate in full in order to make clear beyond doubt what the position was when the application came before him. It is clear that the only question which was raised was whether the notice given by the London County Council or by someone who is said to be acting on their behalf was a good notice, for by cl. (6) of the tenancy agreement it was provided that notice to determine should be "by a written notice signed by the director of housing and valuer to the council". The contention put forward on behalf of the tenant was that the notice which had been given was not a document signed by the director of housing and valuer to the council. The position had changed. The London County Council had determined to divide the department, which they had in 1953, into two departments, and the contention put forward on behalf of the tenant was that, as that had happened, then in order to determine the tenancy there must be a notice signed by the director of housing and signed also by the valuer to the council. Some might think it unnecessary in one sense, having regard to the change in the constitution of the office of the London County Council. Further down cl. (6) of the tenancy agreement one finds the words "or one of his assistants at the offices of the council", from which it appears that at the time that document came into existence it was contemplated there should be only one signature. It is unnecessary to go further into this point for reasons which I shall give in a moment.

The learned magistrate was asked to determine the case on that submission and on nothing else, as he himself set out in the Case which he has stated. He reached the conclusion that the notice was not in accordance with the contractual requirements, and he dismissed the application of the London County Council.

The case came before the Divisional Court on Apr. 25, 1956. Counsel for the London County Council told us that the case took a very short time in the Divisional Court. Certainly he cannot say that of the hearing in this court which has lasted quite a long time, as I ventured to point out to him. When the case was before the Divisional Court junior counsel for the London County Council took a new point. He raised a question which had not been mentioned to the learned magistrate. The notice which had been given to determine the tenancy was signed by Mr. J. E. J. Toole, as I have said already; it was headed "London County Council", and on the next line in still larger print is "Landlord and Tenant Act, 1954". It is a landlord's notice to terminate a business tenancy. It states at the head of it that the notice is given by Mr. Toole, valuer and agent to the London County Council, and it is a notice "terminating your tenancy on Aug. 5, 1955". In accordance with the requirements of the Landlord and Tenant Act, 1954, cl. 2 of the notice states:

"You are required within two months after receiving this notice to notify me in writing whether or not you will be willing to give up possession of the premises on that date."

In cl. 3 it is stated:

"I would oppose an application to the court under Part 2 of the Act for the grant of a new tenancy on the ground that on the termination of the current tenancy, the landlord intends to demolish or reconstruct the whole or a substantial part of the premises or to carry out substantial work of construction on the whole or part of them and that he could not reasonably do so without obtaining possession of the premises."

In cl. 4 it is stated:

"This notice is given under the provisions of s. 25 of the Landlord and Tenant Act, 1954. Your attention is called to the notes overleaf."

A The notes are notes reproduced from form 7, which is the prescribed form* for giving notice under s. 25 of the Landlord and Tenant Act, 1954. The notice is signed by Mr. Toole as valuer and agent to the London County Council.

When junior counsel for the London County Council appeared before the Divisional Court he pointed out that he was not arguing the contractual question which had been dealt with by the magistrate. The case he submitted was based
B entirely on the Landlord and Tenant Act, 1954. It is a matter for regret that that was not mentioned before the learned magistrate. I know that those who have to attend to these cases have many other things to think about, and I realise, as we have been told by counsel, that these cases often go through without any question being raised, and that many orders are made by lay magistrates, or by metropolitan or stipendiary magistrates, but at the same time I would
C point out that the notice is headed in large type "Landlord and Tenant Act, 1954", and, though I do not want to be critical of anyone, I am inclined to think that the first thing anyone going to a court to obtain a warrant for possession on a notice of this kind would do would be to look at the Landlord and Tenant Act, 1954. If reference had been made to Part 2 of the Landlord and Tenant Act, 1954, the position would have been mentioned to the magistrate.

D I should like to make it clear that nothing I say in this case is intended to deal with anything other than a tenancy under Part 2 of the Act of 1954. Part 2 of the Act of 1954 is headed: "Security of tenure for business, professional and other tenants". Section 23 states the tenancies to which Part 2 of the Act applies. The marginal note to s. 24 of the Act is "Continuation of tenancies to which Part 2 applies and grant of new tenancies"; and sub-s. (1) provides:

E "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

The most important section is s. 25. Sub-section (1) provides:

F "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination')."

The prescribed form is form 7 which appears in the Appendix to the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107). Section 25 deals with what is to happen when a notice is given, and by sub-s. (3) (a) it provides, in
G effect, that if a notice is given under the section the date of termination specified in the notice shall not be earlier than the earliest date at which the tenancy could have been terminated under the contract. Rights of contract between parties are preserved to that extent at least.

Junior counsel for the London County Council pointed out in the Divisional Court that he relied on s. 25 which gave the landlord a right to terminate the
H tenancy by a notice given to the tenant in the prescribed form. He referred the Divisional Court to the prescribed form, and to the notice which the council had given which, it was claimed, was in the prescribed form. He was asked by a member of the court what authority had Mr. Toole to give the notice. Counsel thereupon referred the Divisional Court to the London Government Act, 1939, s. 184. That section is intended to simplify as far as possible the task of those
I who have to give notices on behalf of a local authority within the area of the London Government Act, 1939. Sub-section (1) of s. 184 provides:

"Any notice, order or other document which a local authority is authorised or required by or under any enactment (including any enactment in this Act) to give, make or issue may be signed on behalf of the authority by the clerk of the authority or by any other officer of the authority authorised by

* See the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107), reg. 4 (vii), Appendix, Form 7.

the authority in writing to sign documents of the particular kind or the particular document, as the case may be." A

A local authority need not put its seal on every notice. Their clerk may sign a notice on their behalf, or a notice may be signed by any other officer of the authority authorised by the authority in writing to sign documents of the particular kind, or the particular document. Sub-section (2) provides: B

"Any document purporting to bear the signature of the clerk of the authority or of any officer stated therein to be duly authorised by the authority to sign such a document or the particular document, as the case may be, shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the local authority." C

The notice had at the foot of it the name of Mr. Toole, valuer and agent to the London County Council.

The provisions of s. 184 had been overlooked, or it was not thought necessary to follow them. Mr. Toole was an officer of the London County Council, but he was not stated in or on the document to be duly authorised by the authority to sign such a document. Therefore, on the face of the document, the document does not prove itself, as it would have done if the words which I have read had appeared on it. Thus, when counsel cited s. 184 to the Divisional Court, he was armed with a document which might be described as a notice, but it was not a document which proved itself in the sense that there was nothing on the document which would enable it to be said under s. 184 (2) that Mr. Toole was authorised to sign that document or documents of that class. D

Counsel for the London County Council in argument before this court said that, in general, if a document was signed by an agent for a landlord, signed as agent, the document was a good notice. In one sense no doubt that is right, but in regard to a document of this kind the statute prescribed what form of document should be treated as a notice given, made or issued by the authority of the local authority, and a document, in accordance with s. 184 (2), is to be deemed to have been so given until the contrary is proved. This document is not such a document so that there was no proof of authority on the face of the document; and, moreover, no evidence was called before the magistrate to show that Mr. Toole was authorised to sign this document or documents of this character. E

Thus a fresh point was taken on behalf of the London County Council before the Divisional Court. It is said by counsel that a new point as to authority was sprung on the London County Council in the Divisional Court. I do not think that is the right way to describe the position. The point that this was a good notice under the Landlord and Tenant Act, 1954, was taken by and on behalf of the London County Council. Then, quite naturally, someone asked what authority had Mr. Toole to sign it. The Divisional Court dismissed the appeal by way of Case Stated from the decision of the magistrate, and dealt with it both on the ground of the notice required under the contract of tenancy and also on the terms of the Landlord and Tenant Act, 1954, s. 25. F G

Counsel for the London County Council told us that he did not now seek to say that the decision of the magistrate was wrong in regard to the requirement of two signatures. He has not argued that point in this court. He has asked us to consider the case solely under the provisions of the Landlord and Tenant Act, 1954. It is for that reason that I do not think it necessary to express any final view on the only question raised before the magistrate. H

I should say that there is a definition of "landlord" in s. 44 of the Act which shows that a landlord for the purposes of the Act of 1954 may be someone other than the person who entered into the contract of tenancy. The landlord within the definition may terminate the tenancy by a notice given in accordance with the provisions of s. 25 (1). Unless those provisions are complied with, the tenancy to which the Act applies does not come to an end. If the landlord is a I

A local authority within the area of the London Government Act, 1939, all that is necessary is to comply with the terms of s. 184 of that Act.

LORD GODDARD, C.J., having dealt with the position under the contractual notice, referred to the Act of 1954 which had been brought to the attention of the court, and he said:

B "That Act, in s. 24, provides: 'A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act'. That is as clear as anything. These premises are premises to which Part 2 of the Landlord and Tenant Act applies—that seems to be conceded—and therefore s. 24 provides that no matter what the contract of tenancy says it can only be determined in the manner provided by the Act. Then you find that s. 25 provides 'The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as "the date of termination")'. The notice that was served on the tenant is almost in banner headlines; it says: 'Landlord and Tenant Act, 1954 . . . ' . . . No doubt if this document had contained a statement that Mr. Toole was authorised to sign, then perhaps this document would have been a good document because it would have been signed by the landlord because the section* enables the county council to sign by an officer. Either evidence must be given that that officer was authorised to sign or the document must contain a statement that the officer is authorised to sign. Then he is deemed to be authorised unless the contrary is proved."

E Thus on this part of the case the Divisional Court reached the view that, there being no evidence given or tendered that Mr. Toole was authorised to sign a document of this nature and the document not being in accordance with s. 184 (2) of the London Government Act, 1939, there was no evidence of authority. I am of the same opinion.

F There was no application made to remit the case for the consideration of the magistrate. I am not sure that one would have succeeded. We are asked in this court to remit the case to the magistrate so that he may come to a decision on hearing new evidence whether or not Mr. Toole was authorised by the London County Council to give notices of this character, or to give this particular notice.

G The power is said to arise under s. 6, or possibly under s. 7, of the Summary Jurisdiction Act, 1857. Section 6 [as amended by the Magistrates' Courts Act, 1952, s. 131 and Sch. 5] provides:

H "The court to which a case is transmitted under the Magistrates' Courts Act, 1952, shall hear and determine the question or questions of law *arising thereon*, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the court may seem fit; and all such orders shall be final and conclusive on all parties . . ."

I emphasise the words "*arising thereon*".

I The Case stated by the magistrate is confined to the question whether or not the notice is a good notice, having regard to the fact that it was signed by the valuer only and not by two persons, as the tenant contended it ought to have been. The magistrate determined that case on the facts before him. It is now said on behalf of the London County Council that another case ought to be put before him, a case arising under s. 24 and s. 25 of the Landlord and Tenant Act, 1954. That is not the case which was raised before the magistrate. He has stated a Case. The point raised in the Divisional Court under the Landlord and

* See s. 184 of the London Government Act, 1939, pp. 405, 406, ante.

Tenant Act, 1954, is not something "arising thereon", so it appears to me. That is what makes me doubt whether or not the case could properly be sent back, even if a wide interpretation ought to be given to the power under s. 6 of the Act of 1857. What is sought in this court is that this court shall remit the case to the magistrate for him to determine a question which was never before the magistrate and never considered by him. I very much doubt that such an order could be made.

Counsel for the London County Council drew our attention to certain authorities which go to show that the Divisional Court in such a case may determine a question of law which is not raised by either party and which does not appear on the Case itself, if no further evidence is necessary. The last authority is *Kates v. Jeffery* (1) ([1914] 3 K.B. 160). The headnote is:

"Upon the argument of an appeal from justices by way of Case Stated a point cannot be taken before the Divisional Court upon the facts stated which was not taken before the justices, except upon a question of law which no evidence could alter."

I do not think it necessary to read the facts. It is sufficient to read the judgment of DARLING, J., with which AVORY, J., and ROWLATT, J., agreed. DARLING, J., said (*ibid.*, at p. 163):

"I am of opinion that this appeal must be dismissed. With regard to the first point, i.e., whether there was sufficient evidence of the appointment of the respondent as sanitary inspector, that was the only point which was taken in the court below, and Mr. Barrington-Ward on behalf of the appellant does not now rely upon it. There is no ground for suggesting that there was not sufficient evidence that the respondent was a sanitary inspector. But Mr. Barrington-Ward raises the point that no evidence was given before the justices that the sanitary inspector obtained the authority from the local authority which was necessary to enable him to take these proceedings against the appellant. That point was not taken before the justices. If the point had been taken, the justices would in all probability have adjourned the case if necessary for the evidence to have been produced, and if it had been forthcoming would have then again proceeded with the hearing. In *Knight v. Halliwell* (2) ((1874), L.R. 9 Q.B. 412) BLACKBURN, J., said, after referring to *Purkis v. Huxtable* (3) ((1859), 1 E. & E. 780) and observing that if the point which was attempted to be raised before the Court of Queen's Bench in that case had been taken before the justices evidence with regard to it could have been supplied, 'here a question of law, which no evidence could alter, arises on the statement of facts'. I think that if LORD ALVERSTONE, C.J., used the words attributed to him in the report in the LAW JOURNAL in *Giebler v. Manning* (4) ((1906), 75 L.J.K.B. 463)—'We have invariably taken the view in cases of this class, that where the particular point arises on the facts as found, even although it was not raised in the court below, we are entitled to give our judgment upon it'—and which have been quoted by Mr. Barrington-Ward, he must have been speaking in the same sense as BLACKBURN, J., did in *Knight v. Halliwell* (2), and that his language is equivalent to what BLACKBURN, J., laid down, namely, that a question of law arising on the facts stated by justices, but which was not taken before them, can only be taken before this court if it is one which no evidence could alter. In my judgment, if this court sees that a question of law arises upon the face of a Case stated by justices which no evidence could alter, this court is entitled to take the point and to deal with the question of law although the point was not taken before the justices. And this court cannot refuse to raise such a point merely because one of the parties has not taken it in the court below. For example, if a Case stated by the justices alleged that a lease for five years was an estate in fee simple, this court would not only be

A entitled but bound to take the point of law. But no such point of law arises upon the facts stated in the present case. The question whether the respondent was duly authorised to take proceedings against the appellant was a pure question of fact, and if the point of law had been taken that, without evidence of that fact, the prosecution would not lie, the justices might and probably would have adjourned the hearing in order to enable the authority of the sanitary inspector to be produced. In my judgment, therefore, the point is not now open to the appellant, and this appeal must be dismissed."

In the present case no such point was taken before the magistrate. There was no request for an adjournment before him. The point as to authority could not and cannot be decided without evidence. There is nothing on the document to show that the agent, Mr. Toole, had authority to sign documents of this character. **C** There was no evidence to show that he was authorised in fact. Counsel for the London County Council submitted that the word "agent" on the document was sufficient to show that he had authority, that it was equivalent to that. I do not agree. The fact that the word "agent" appears on the document does not mean that he was the agent to sign notices or that he was authorised to sign notices. Consequently, I am satisfied that the point raised could not be decided without evidence. **D**

It would be unusual, to say the least, that a case which had been dealt with by the magistrate solely on one point should be sent back to him, and that he should be asked to deal with it on quite a different point which would require further evidence. Over and above that, I think that it would not be right for the Court of Appeal to send the case back when no such request had been made to the Divisional Court. It may be that, if there had been such a request and if the Divisional Court had been told that the authority could be proved, they would have considered an application to remit, though I doubt whether they could properly have done so. The ordinary practice in matters of this kind should be followed. **E**

The position of the tenant has to be considered. So far the tenant has succeeded. It is only when the case reaches the Court of Appeal that there is any suggestion that the case should be remitted to the magistrate for consideration on a point not previously raised. That would be a little hard on the tenant, in one sense. He wishes to keep the premises so that he can carry on his business. We are told he has been there for some long time. That is not a matter for us, unless the question becomes one of discretion. **F**

In my opinion the appeal should be dismissed. **G**

MORRIS, L.J.: I have reached the same conclusion. It is clear that in the magistrate's court the tenant took the point that the notice was not as required by the memorandum of agreement. When that point was taken the answer which should have been given was that the whole matter was governed by the Landlord and Tenant Act, 1954. I do not say that in any critical spirit because I realise how easy it is for matters to be overlooked; but an oversight in fact occurred and brought about the subsequent history. It is plain that thereafter, during the hearing before the learned magistrate, the case proceeded entirely on a consideration of the contractual position, and of the contractual position as affected by the complication that there had been a separation of the functions of the director of housing and of the functions of the valuer. The magistrate gave his decision on the points raised, and the Case was stated on the points discussed before him and decided by him and raised in the Case. **H**

As my Lord has said, when the matter came before the Divisional Court, an entirely new point was raised, i.e., the point that Part 2 of the Landlord and Tenant Act, 1954, was applicable. I propose to proceed on the assumption that, so far as this case is concerned and so far as the notice to be given by the landlord is concerned, the provisions of that Act do apply. **I**

The Divisional Court were not expressly asked to send the case back. I cannot accede to the submission of counsel for the London County Council that the notice which was served is a notice that satisfies the language of s. 184 (2) of the London Government Act, 1939. I cannot think that it bears the signature of an officer "stated therein to be duly authorised by the authority to sign such a document". So the question arises whether we should accede to counsel's invitation to us to send the case back so that the magistrate should be invited to exercise his discretion whether or not he will hear evidence to prove authority. Counsel says that he would like to have the opportunity to prove authority under s. 184 (1) of the Act of 1939 or possibly under s. 40 of the London County Council (General Powers) Act, 1953, or possibly in a more general way, apart from statutory provisions, to prove that Mr. Toole was an agent.

I do not feel that it would be right for us to send this case back. I do not wish to say anything that would seem in any way to limit the powers which are given to remit a case, but I very much doubt whether the situation arising here is of the kind which was contemplated by the Summary Jurisdiction Act, 1857, s. 6.

The case as it is now being argued involves a complete departure. If we send it back it would mean sending back when the Divisional Court were not asked to send it back, and it would mean sending the case back in circumstances which would make the point now raised quite unrecognisable as compared with the point previously before the magistrate. I do not think that this is within the spirit of s. 6, even if there be a power to remit. This as it seems to me is a new point never raised before the magistrate, to which his mind was never directed, which he has not decided, to which the evidence was not directed, and for the decision in regard to which new evidence or further evidence may have to be given. To do what we are asked to do would involve, not remitting the matter raised by the case, but remitting a different matter. The court is not being asked to consider the question of law arising on the Case Stated but a different question which was never even thought of when the learned magistrate was asked to state a Case and for the determination of which new evidence may be necessary. It seems to me that this is like seeking to put new wine into an old bottle. I do not think that it would be right for us to accede to the application made.

ROMER, L.J.: I agree, and I have only a very few words to add. The question whether in point of form the notice determining the respondent's tenancy was governed by the terms of the tenancy agreement or whether it was governed, and governed exclusively, by the provisions of s. 24 and s. 25 of the Landlord and Tenant Act, 1954, is undoubtedly a pure question of law, if taken by itself. Accordingly, within such decisions as *Kates v. Jeffery* (1) ([1914] 3 K.B. 160) and *Knight v. Halliwell* (2) ((1874), L.R. 9 Q.B. 412) to which we were referred, it was open, although the matter had not been touched on before the magistrate or in the Case Stated, for that point of law to be brought up for discussion before the Divisional Court. That was done, and the point of law, as such, was decided by the Divisional Court in favour of the London County Council. That I think appears quite plainly from certain passages in the judgment of LORD GODDARD, C.J., and also from the very fact that the court proceeded to discuss the case on the footing that the Act of 1954 did apply; but the decision on that point of law in itself was not sufficient to enable the London County Council to succeed because then the question arose under the London Government Act, 1939, s. 184, with regard to the presumed authority of Mr. Toole to sign the notice. The Divisional Court accordingly proceeded to consider that aspect of the case. No objection, as far as I know, was raised to their doing so, and they decided that in a sense adversely to the London County Council.

They were not asked to remit the case so that evidence to prove Mr. Toole's actual authority could be adduced before the magistrate. For myself I think

A there is considerable doubt whether, having regard to the Summary Jurisdiction Act, 1857, s. 6, the Divisional Court could have remitted the matter in that way, even if they had been asked, but they were not asked. The first request for such a remission has been made to this court, and it appears to me quite clear that, even assuming the jurisdiction, we ought not to entertain this application which for the first time has been made before this court.

B Counsel for the tenant said, and I think rightly, that if, having closed his case, a party then asks the Divisional Court, when the matter comes to them on Case Stated, for a remission so that he may re-open his case and produce further evidence, it is only in the rarest possible cases, if at all, that that should be acceded to. I am quite certain that that observation applies a fortiori where the application is made to this court.

C I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor, London County Council; Franks, Charlesly & Leighton* (for the tenant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

D

R. v. INDUSTRIAL DISPUTES TRIBUNAL, *Ex parte* COURAGE & CO., LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Donovan, JJ.), July 12, 1956.]

E

Master and Servant—Trade dispute—“Section of trade or industry”—Dispute concerning one brewery—Union representing substantial proportion of workers in brewery industry—Whether referable to Industrial Disputes Tribunal—Industrial Disputes Order, 1951 (S.I. 1951 No. 1376), art. 1 (b).

F The company employed at a particular brewery three hundred and fifty workers of whom fifty or sixty were members of a particular trade union. The union represented a substantial proportion of workers in the brewing industry throughout the country. The union sought an increase of pay for their members employed by the company and on the company's refusal to make the suggested increase the union reported the matter as a dispute to the Minister of Labour and National Service under art. 1 of the Industrial Disputes Order, 1951. The Minister referred the dispute to the Industrial Disputes Tribunal under art. 8 (1) for settlement. The company applied for an order of prohibition against the tribunal on the ground, amongst others, that the union could not report the matter to the Minister since it did not represent a substantial proportion of the workers in the “section of trade or industry”, namely, this particular brewery, as required by art. 1 (b).

H

I **Held:** the order for prohibition would be refused since the word “section” in art. 1 (b) referred to a division by functions within the trade or industry as a whole and not to a division by the geographical locality of a particular brewery or breweries; accordingly, the union, which represented a substantial proportion of workers in the industry throughout the country, was entitled to report the dispute to the Minister, who was under a duty to refer it to the Industrial Disputes Tribunal.

[For the Industrial Disputes Order, 1951, art. 1 (b), see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 164.]

Motion for prohibition.

The applicant company, Courage & Co., Ltd., applied for an order of prohibition prohibiting the Industrial Disputes Tribunal and the Transport and General Workers' Union from further proceeding with a reference of a dispute

alleged to exist between the company and certain members of the union in the applicants' employment. A

The company owned a brewery at Alton and managed it as a single unit and as a separate and independent undertaking. The company employed some three hundred and fifty workers at the brewery. Fifty or sixty of these workers were members of the Transport and General Workers' Union. By letter dated Mar. 28, 1955, to the company the union requested an opportunity to meet the company in order to discuss the question of wage rates. The company declined to discuss this question with the union and the union reported the dispute to the Minister of Labour and National Service. On May 30, 1955, the company increased the basic rate of pay for their workers at Alton. The union thereupon withdrew their reference of a dispute, and on June 8, 1955, the union group secretary wrote to the company: B C

"I have to refer to my letter of May 19, 1955, in which I advised you of my reference of our dispute to the Ministry of Labour under [S.I. 1951 No. 1376], and to say I have since received information from our membership to the effect not only were the wage rates of your transport drivers increased by 8s. per week as from May 23 but that you have now decided to increase the wages of your work people in other departments of the brewery by 8s. establishing a rate of pay for adult male brewery workers of 140s. per week of forty-four hours. I have to say, therefore, in view of the circumstances and that you have to some extent made the wage adjustments which we desired we see no reason at this stage for a continued reference to the Industrial Disputes Tribunal and we have, therefore, requested the withdrawal of our reference to the Ministry. I would take this opportunity of suggesting, however, that we should much prefer that these matters be dealt with directly rather than indirectly and should there be a necessity in the future we should address ourselves to you on such matters as come to hand." D E

By letter dated Dec. 12, 1955, the union wrote to the company that they were of the opinion that there was a need for a substantial increase in the minimum rates of pay and suggested an increase of 12s. per week; but by letter dated Jan. 10, 1956, this figure was reduced to 10s. per week with a view to reaching a settlement. The company declined to discuss the matter with the union but increased the minimum rate of pay by 6s. per week as from Dec. 29, 1955. On Jan. 27, 1956, the group secretary of the union wrote to the Ministry of Labour and National Service: F G

"I am instructed by my executive to report that a dispute has arisen between the union and the company in relation to an application submitted by the union for an increase of 12s. per week on the basic minimum rates for adult male general brewery workers dated Dec. 12, 1955, and as modified by the union in a communication dated Jan. 10, 1956, wherein the union requested an increase of 10s. per week on the basic rates of adult male general brewery workers . . . I should be glad, therefore, if in accordance with the provisions of [S.I. 1951 No. 1376] you would refer this dispute to the Industrial Disputes Tribunal on the basis that the union's claim for a further increase of 4s. per week on the basic minimum rates of adult male general brewery workers and proportionate adjustments for women and juveniles be upheld with effect from Dec. 29, 1955 . . ." H I

On Feb. 11, 1956, the following letter was written to the company by the Ministry:

"I am directed by the Minister of Labour and National Service to inform you that he thinks it desirable in the case of the under-mentioned dispute reported under the Industrial Disputes Order, 1951, [S.I. 1951 No. 1376] to extend the period of fourteen days specified in art. 8 (1) of the order. He

- A** has accordingly postponed reference of the dispute to the Industrial Disputes Tribunal . . .
1. Parties to the dispute: (a) Employers—Courage & Co., Ltd.
(b) Workers—Members of the Transport and General Workers Union in the employment of the said employers.
 2. Reported by: the Union.
- B**
3. Date of report: Jan. 28, 1956.
 4. Particulars of dispute: The dispute arises out of an application by the said workers for a further wage increase of 4s. per week for adult male general brewery workers on the basic minimum rates as from Dec. 29, 1955, and for a proportionate increase in the wages of women and juveniles."
- C** On Mar. 29, 1956, the Minister referred the dispute to the Industrial Disputes Tribunal in the following terms:
- "The Minister of Labour and National Service in exercise of the power conferred on him by art. 8 of the Industrial Disputes Order, 1951, hereby refers to the Industrial Disputes Tribunal for settlement the dispute particulars whereof are specified in the schedule hereto . . .
- D**

SCHEDULE

Particulars of the Dispute

A. The Parties.

Employers—[The company].

- E** Workers—Members of the Transport and General Workers' Union, in the employment of [the company].

B. Description of the Dispute.

The dispute arises out of an application by the said workers for a further wage increase of 4s. per week on the basic minimum rates for adult male general brewery workers and for proportionate increases in the wages of women and juveniles with effect from Dec. 29, 1955.

- F** C. Nature of the Report.

The dispute was reported to the Minister on Jan. 28, 1956, by the Transport and General Workers' Union . . . on behalf of the workers."

- The matter was due to be heard by the tribunal on May 16, 1956, but the company took objection to the tribunal's jurisdiction and the hearing was adjourned to enable the company to apply for an order of prohibition. The grounds on which they sought the order included the following grounds: (i) that there was no dispute, (ii) that the union was not acting on behalf of any workers who were parties to any dispute with the company, (iii) that the Minister had referred the dispute to the tribunal on the basis that the union represented a substantial proportion of workers in the whole of the brewery industry but that the whole of the brewery industry was not concerned in the dispute, (iv) that the union did not represent a substantial proportion of workers in the section of the trade or industry or in the undertaking concerned in the dispute, namely, in the brewery of the company, and that accordingly the Minister had no power to refer the matter to the tribunal. In an affidavit dated June 22, 1956, the group secretary of the union stated:
- G**
- H**
- I**

"(a) A number of persons employed by the company are members of the . . . union (b) The union represents a substantial proportion of workers in the brewing industry throughout the country (c) In the month of March, 1955, I was approached by several members of the union, being employees of the company . . . and I was asked by them to make representations on their behalf for an increase in the wages paid to them by the company . . . (d) In all that I did I acted on behalf of the members of the union who were employed by the company as aforesaid and at their request, and as

an officer of the union in conformity with instructions from the executive thereof."

J. G. S. Hobson for the company.

N. R. Fox-Andrews, Q.C., and *Michael Lee* for the union.

S. B. R. Cooke for the Minister of Labour and National Service.

LORD GODDARD, C.J.: Article 1 of the Industrial Disputes Order, 1951, provides:

"Where a dispute exists in a trade or industry or section of trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this order by—(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute; and it appears to the Minister . . . (b) that there is no . . . machinery . . . [for voluntary settlement of terms and conditions of employment] and that, where the report is made by an organisation of employers or a trade union, that organisation or trade union represents a substantial proportion of employers or workers, as the case may be, in the trade or industry or section of trade or industry concerned; that dispute shall be dealt with in accordance with the subsequent provisions of this order."

Two matters of construction have been argued. It will be observed that the dispute may exist "in a trade or industry or section of trade or industry or in an undertaking". There is no difficulty in giving a meaning to the word "undertaking"; it means a unit, such as a factory or a brewery. The dispute may, therefore, arise not in the trade generally, not even in a section of the trade generally, but in one particular undertaking. If it does arise in one particular organisation, the Minister of Labour and National Service may refer the dispute to the Industrial Disputes Tribunal if the report is made by a trade union that

"represents a substantial proportion of . . . workers . . . in the trade or industry or section of trade or industry concerned."

A trade union as a rule represents workers in an industry or possibly in a branch of industry. *ORMEROD, J.*, has great knowledge of these subjects in Lancashire and he has pointed out that practically every class of worker in the textile trade has its own particular union. It is clear from the wording of the order that if there is a dispute in an undertaking, that is to say, in some unit in the industry, the Minister may refer it to the tribunal if a report is made by a trade union which represents workers in the industry. Nor do I think anything favourable to the company in the present case can be made out of the words "section of trade or industry". I think that "section" clearly refers to functions and does not refer to localities. I do not think that it refers, for instance, to all breweries in a particular county. I think that "section" refers to the section of trade or industry which is some particular part of the trade or industry. Thus in the case of mineworkers the union can represent all of them though the dispute may only be in one section, namely, surface workers or winders; or in the case of railwaymen, the dispute might concern only the section of carriage cleaners or permanent way men. It need not be a dispute relating to the industry as a whole. "Section" does not mean a geographical section.

It seems perfectly clear from the affidavits that whereas the majority of the company's workmen at Alton are not members of the Transport and General Workers' Union, there are some fifty or sixty workers who are members of the union; and the Minister is satisfied and has stated and no one disputes, that the union does represent a substantial proportion of workers in the brewing industry

A throughout the country. Therefore, the union seems to me clearly entitled in the terms of the order to speak on behalf of its members.

[His LORDSHIP reviewed the facts and in the course of his review concluded that the union, in putting forward the demand in December, 1955, acted on behalf of its members. His LORDSHIP continued:]

B It seems to me clear that there is a dispute in the present case. The company did not see fit to grant the proposed increase, and therefore at once there is, so it seems to me, a dispute. The group secretary has sworn in an affidavit that the workers authorised him to make the report and it is probable that they did if they thought there was any chance of getting more money. He has also given us the number, or the approximate number, of the workers, although it is not necessary to show a substantial proportion of the workers, at the company's
C brewery. I can only say that it seems to me as clear as anything can be that there is a dispute, that the dispute has been reported to the Minister by a trade union representative of workers who are members of the union, and therefore the Minister had power and, indeed it was his duty, to refer it to the Industrial Disputes Tribunal. For those reasons, I think that an order for prohibition should be refused.

D **ORMEROD, J.:** I agree, and there is little I wish to add. I think that the principal point made by counsel for the company was the fact that no dispute had arisen here which would warrant the Minister in referring the dispute. "Dispute" is defined in art. 12 of the Industrial Disputes Order, 1951, and the definition contains these words:

E "but . . . means any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen."

It has always been clear from the beginning that if there was a dispute it was a dispute connected with the terms of employment or with the conditions of
F labour of some of the workmen employed in the brewery because the matter was a question of wages; but it was argued by counsel for the company that there never was in fact a dispute because the negotiations were never instigated or authorised by employees of the company and were in fact nothing more than what was described in one of the cases as a frolic on the part of the trade union acting entirely independently. It is clear on the evidence which has
G subsequently come to light in this court that that is not the position. Not only does the second affidavit of the group secretary (dated June 22, 1956), make it clear that he was acting under the express instructions of certain members of the union who were employed by the company, but the correspondence disclosed in that affidavit amply bears out the fact that the union was acting not only in the earlier dispute but in the continuation of that dispute, or in a new dispute,
H in December, 1955. In those circumstances, I do not think that it can possibly be said that there was no dispute between the company and certain of their workers. It is argued, however, on behalf of the company that that in itself is not sufficient, that the claim was made in much too vague a manner and that the reference to the tribunal was so vague that it was not possible to say which particular class of workmen was engaged in the dispute and which particu-
I lar class of workmen employed by the company was intended to benefit by any award which might be made in favour of the workmen. On reading art. 1 and art. 10 of the Industrial Disputes Order, 1951, and reading the reference of Feb. 11, 1956, it is clear that the subject-matter of the dispute and the persons who were intended to benefit by it or otherwise are clearly defined. It may be that the strict rules of pleading have not been observed, but it has been made sufficiently clear what the dispute was and what were the matters which were to be referred to the tribunal. In those circumstances, it appears to me that the conditions of art. 1 have been sufficiently complied with.

With regard to the third point which has been made on behalf of the company, that the union was not representing a substantial proportion of a section of the trade or industry concerned, I respectfully agree with the construction which LORD GODDARD, C.J., has put on that part of the order. It appears to me that the term "section of trade or industry" refers to function rather than to geographical situation and, in those circumstances, those particular words of art. 1 (b) do not apply to the present case; but even if they did, the figures which are before the court are that some fifty or more members of this union are included in the total of three hundred and fifty employees in this brewery, and apart from any other consideration that could be regarded as a substantial proportion of the workmen engaged in this particular section of the industry. I do not think that the contention of counsel for the company is correct. I think that the words that apply in the present case are the words that the

"trade union represents a substantial proportion of employers or workers, as the case may be, in the trade or industry."

That is admitted by everybody and, in those circumstances, it appears to me that there is no reason why this tribunal should not act in accordance with the terms of the order, and I agree that the order of prohibition should be refused.

DONOVAN, J.: I agree. I think that there is a dispute as defined in art. 12 of the Industrial Disputes Order, 1951, because of the evidence before us that the union was acting on behalf of its members when putting forward the claim for an increase of wages in December, 1955. It is said that, there being some members who would not be concerned, there is no evidence that the union was acting on behalf of those very members who were seeking an increase; but that, I think, can be reasonably inferred.

On the point of construction of art. 1 (b) of the order, I do not think that an individual brewery can be said to be a section of the brewing industry for the purpose of the order. It is a part of the industry and is a section in that sense, but art. 1 (b) is contemplating, in my opinion, something quite different, namely, a conglomerate industry divided into sections in which different functions making up an industry are performed; for example, the tinplate section of the steel industry, the spinning section of the cotton industry or, to come right up to date, the nuclear energy section of the electricity industry. Therefore, both points taken on behalf of the company fail, and I concur with the other members of the court in agreeing that this motion should be dismissed.

Motion dismissed.

Solicitors: *Speechly, Mumford & Craig*, agents for *Lamport, Bassitt & Hiscock*, Southampton (for the company); *G. Howard & Co.* (for the union); *Solicitor, Ministry of Labour and National Service.*

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

A

JONES v. CROSVILLE MOTOR SERVICES, LTD.

[CHESTER ASSIZES (Hallett, J.), June 7, 1956.]

Factory—Premises used for housing and cleaning of, and minor repairs to, transport vehicles—Work carried on by way of trade or for purposes of gain—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 151 (1) (vi).

B

An omnibus depot which is within the description “premises used for the purpose of housing . . . vehicles where only cleaning, washing, running repairs or minor adjustments are carried out” in para. (vi) of s. 151 (1) of the Factories Act, 1937, is not a factory within s. 151 (1), notwithstanding the definition of factory by previous words in that sub-section as meaning “any premises in which . . . persons are employed in manual labour in any process for or incidental to any of the following purposes, namely . . . (b) the . . . cleaning, or washing . . . of any article.”

C

Griffin v. London Transport Executive ([1950] 1 All E.R. 716) considered.

Quaere: whether the work of washing windows of buses before they set out from an omnibus depot on working journeys was “work carried on by way of trade or for purposes of gain” within s. 151 (1). See p. 418, letter H, post.

D

[For the Factories Act, 1937, s. 151 (1) (vi), see 9 HALSBURY'S STATUTES (2nd Edn.) 1114.]

Cases referred to:

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(1) *Cole v. Blackstone & Co., Ltd.*, [1943] K.B. 615; 112 L.J.K.B. 510; 107 J.P. 209; 2nd Digest Supp.

(2) *Galashiels Gas Co., Ltd. v. O'Donnell (or Millar)*, [1949] 1 All E.R. 319; [1949] A.C. 275; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.

(3) *Nash v. Hollinshead*, [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 24 Digest 901, 29.

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(4) *Curtis v. Shinner*, (1906), 95 L.T. 31; 70 J.P. 272; 24 Digest 903, 40.

(5) *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; on appeal H.L., [1931] A.C. 151; Digest Supp.

(6) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

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(7) *Thorogood v. Van den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood v. Van den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.

(8) *Griffin v. London Transport Executive*, [1950] 1 All E.R. 716; 114 J.P. 230; 2nd Digest Supp.

H Action.

The plaintiff was employed by the defendants as a cleaner at their omnibus depot at Johnstown in Denbighshire. On Sunday, June 28, 1953, he was the only employee on the premises. In order to clean the windows at the back of an omnibus he placed a ladder, approximately ten feet in length, against the back of the bus and climbed it. The foot of the ladder was fitted with a device to prevent it slipping, but the swivel of the device was seized up and the rubber pad on the base had deteriorated. The ladder slipped and the plaintiff fell to the ground. He suffered a fracture and was off work for six months, but sustained no loss of earning capacity. The plaintiff claimed damages against the defendants for negligence both at common law and under the Factories Act, 1937. HALLETT, J., found that the defendants had taken no steps to see that the ladder was in an efficient state and in good repair, that they were therefore in breach of their common law duty and that the plaintiff was entitled to recover. The case is

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reported for the observations of HALLETT, J., on the question whether the depot was a factory within the Factories Act, 1937. A

H. E. Hooson for the plaintiff.

R. E. G. Howe for the defendants.

HALLETT, J., in the course of his judgment said: The statement of claim alleges that this garage where the buses were kept "constituted premises which were a factory within the meaning of the Factories Act, 1937". If that position could be made good, then it is not disputed that s. 25 (4) of the Factories Act, 1937, would apply. It is not disputed that the requirements of that sub-section are absolute, so that they cannot be fulfilled by the occupier merely taking all practicable steps to see that the ladder is in an efficient state and good repair. The authority for that is *Cole v. Blackstone & Co., Ltd.* (1) ([1943] K.B. 615), a case which has been mentioned with approval in *Galashiels Gas Co., Ltd. v. O'Donnell (or Millar)* (2) ([1949] 1 All E.R. 319). Theoretically, therefore, it is all-important for the plaintiff to establish, if he can, that these premises were premises to which the Factory Acts apply. I doubt very much, however, whether in the present case it makes any practical difference, because if the occupiers, in the present case the defendants, did not take all practicable steps to see that the ladder was in an efficient state and in good repair, then they would be liable at common law, and the absolute obligation under s. 25 (4) would not be required. I am prepared to hold that the defendants did not take all practicable or, indeed, any steps to see that the ladder was in an efficient state and in good repair, and, therefore, I desire to say very little about the legal point. B C D

It is an interesting point because of the difficult wording of s. 151 (1) of the Factories Act, 1937, and of the differences of opinion regarding its construction. Section 151 (1) reads thus: E

"Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely . . . (b) the . . . repairing . . . cleaning, or washing . . . of any article." F

Counsel for the plaintiff rightly says that the garage premises at Johnstown were used by persons employed in manual labour, including the plaintiff, in a process for or incidental to the following purpose at least, namely, repairing, cleaning and washing the buses; and that a bus is an article. Therefore, says counsel, if the matter stopped there, there could be no doubt at all that these premises were a factory. G

The sub-section continues:

" . . . being premises in which . . . the work is carried on by way of trade or for purposes of gain . . . " H

Whether or not the work of, for instance, washing the windows of the buses is carried on by way of trade or for the purposes of gain, I should have thought, apart from authority, was at the least extremely doubtful. What the defendants are doing by way of trade for the purposes of gain is carrying passengers. To say that the work of washing the windows of the buses before they set out on their journey and after they come back is work carried on by way of trade seems to me difficult. The words "for purposes of gain" are alternative to the words "by way of trade". If, however, the matter were free from authority I should feel some diffidence in saying that the windows are washed for the purposes of gain. The windows are washed in order to make the bus fit to go out on the road without discredit to its owners. Counsel for the plaintiff contended, however, that the view that I have been indicating was wrong, having regard to the fact I

A that certain cases, where it was suggested that the gain must be direct, have now been disapproved by a higher authority; in particular counsel reminded me that *Nash v. Hollinshead* (3) ([1901] 1 K.B. 700) and *Curtis v. Shinner* (4) ((1906), 95 L.T. 31) were dealt with in such a way as to make them no longer authoritative*.

The cases dealing with de-rating, which are to be found in *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (5) ([1931] 1 K.B. 385) throw light on the matters I have to consider. In the *Potteries Electric Traction Co.* case (5) the occupiers were a transport company and in *Turpin v. Middlesbrough Assessment Committee & Bailey* (6) ([1931] A.C. 451) the occupier was a garage proprietor. In those cases, however, to succeed the occupiers had to have not merely a factory, but a factory which was an industrial hereditament as defined, and it is in connection with that second requirement that difficulties more particularly arose. None the less, I recognise that some assistance may often be derived from these rating cases—in so far as the views expressed by DEVLIN, J., did not have the approval of the Court of Appeal in *Thorogood v. Van den Berghs & Jurgens, Ltd.* (7) ([1951] 1 All E.R. 682)†.

Section 151 (1) of the Factories Act, 1937, continues:

D “And (whether or not they are factories by reason of the foregoing definition) the expression ‘factory’ also includes the following premises . . .”

I have not examined all the categories in detail, but I can safely say that those which I have examined all appear to be directed to dealing with difficulties which have been felt by the courts in various reported cases, in deciding that the foregoing part of the sub-section had rendered that particular type of premises a factory. For instance, para. (ix) deals with the question whether people who make or mend nets for fishermen are conducting work which will result in the premises where the work is done being a factory, a question which has given difficulty in the past, and may give difficulty in the future. Paragraph (vi) deals with the use of premises in connection with the business of a transport undertaking, and ancillary to the main purpose of the undertaking. Whether or not premises would, by reason of what I will call the basic definition, be regarded as a factory, it is provided in para. (vi) that they shall be so regarded if they are

“premises in which the construction, reconstruction or repair of locomotives, vehicles or other plant for use for transport purposes is carried on as ancillary to a transport undertaking . . .”

That part of the paragraph is including something which it might otherwise be argued would not have been included. Counsel for the plaintiff says that it does not exclude anything which would otherwise have been included by virtue of the main definition, and he points to the words, “(whether or not they are factories by reason of the foregoing definition)” and the words “also includes” as showing that these thirteen paragraphs are bringing in something which otherwise would

*See per SCRUTTON, L.J., in *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (5) ([1931] 1 K.B. at p. 492), and *Hendon Corpn. v. Stanger* ([1948] 1 All E.R. 377 at pp. 379, 380).

†See per COHEN, L.J., in *Thorogood v. Van den Berghs and Jurgens, Ltd.* ([1951] 1 All E.R. at p. 686, letters C-H). COHEN, L.J., there referred to the following passage in the judgment in the court below: “It is a decision under a Rating Act, and I do not think, paradoxical though it may sound, that a definition section which is common to two Acts is necessarily to be given the same meaning in both. The way in which sections taken from an earlier should be construed in the later Act has been the subject of varying judicial comment.” COHEN, L.J., pointed out that in none of the cases cited were words used so definite as “shall have the same meaning” (which were the words of the enactment that was the subject of the decision referred to in the court below) and said that counsel had displayed a wise discretion in not seeking to support this part of the reasoning.

be, or might be, left out. With all respect to him, I take the view that unless the words

“not being any premises used for the purpose of housing locomotives or vehicles where only cleaning, washing, running repairs or minor adjustments are carried out”

have the effect of excluding something which might otherwise arguably be included, they are completely useless. Although the framework is difficult, and counsel for the plaintiff has admirably conveyed to me the difficulties, yet I think that those words must be regarded as throwing light on what otherwise might be dark, and as showing what will not be included as a factory. One must always go back to the words “work is carried on by way of trade or for purposes of gain” and although the explanation formerly accepted, that it must be directly for the purposes of gain, is now rejected as not warranted by the language of the sub-section, I think that in a case to which para. (vi) applies, it may be that there has been, by statutory authority, reversion to some extent to what I may describe as the older view.

I do not think that any direct authority on this has been cited to me, but there is one reported case from which I derive considerable encouragement in the view which I have endeavoured to state, and that is *Griffin v. London Transport Executive* (8) ([1950] 1 All E.R. 716). In that case the claim was under the Factories Act, 1937, s. 25 (3), and raised the question whether a transport depot belonging to the London Transport Executive was a factory. LORD GODDARD, C.J., discussed ([1950] 1 All E.R. 717) succinctly but in some detail whether the work done in the depot was limited to the work contemplated by the last part of para. (vi) in s. 151 (1), and he came to the conclusion on the facts that the premises of the London Transport Executive in question could not be regarded as being premises used for the purpose of housing vehicles, where only cleaning, washing, running repairs or minor adjustments were carried out, and he gave his reasons why he came to that conclusion. That case has been of help to me in that it has enabled me to know what to look out for, to see whether operations are carried on at Johnstown depot which would put the defendants in the same position as the London Transport Executive. I am far from satisfied that anything was done at the Johnstown depot beyond housing vehicles and cleaning, washing, running repairs or minor adjustments. Counsel for the plaintiff made attempts, with such evidence as he had got, to persuade me that more work was done, but I feel reasonably certain that it was not. Therefore, having regard to the provision of the second part of para. (vi) I conclude that these premises were not a factory, that s. 25 (4) of the Factories Act, 1937, did not apply, and that if the plaintiff had been compelled to rely solely on the breach of statutory obligation he would have failed. In my judgment, however, that which he would have to prove to establish a breach of the statutory requirement, he equally has to prove to establish a breach of the common law duty, and that he has done to my satisfaction, and accordingly the plaintiff is entitled to recover.

[His LORDSHIP then dealt with the quantum of damages and gave judgment for the plaintiff in the sum of £437 15s. 9d. of which £115 15s. 9d. was agreed special damage.]

Judgment for plaintiff.

Solicitors: *Cyril Jones, Son & Williams*, Wrexham (for the plaintiff); *Laces & Co.*, Liverpool (for the defendants).

[Reported by SEYS LLEWELLYN, Esq., Barrister-at-Law.]

A

NOTE.

R. v. STREAMS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Ashworth, J.J.), October 3, 1956.]

B

Criminal Law—Committal—Power of justices to commit for trial at convenient assizes—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 10 (1).

[For s. 10 (1) of the Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 430.]

Application.

C

Application by Ernest Henry Streams for leave to appeal against conviction and sentence. The applicant was convicted at Shrewsbury Assizes of robbery with violence and was sentenced to three and a half years' imprisonment.

The appellant did not appear and was not represented.

D

LORD GODDARD, C.J., delivered the judgment of the court: This is an application for leave to appeal against a conviction for robbery with violence and a sentence of three and a half years' imprisonment which was passed at the Shrewsbury Assizes. There is no ground whatever for giving leave to appeal either against conviction or against sentence, but I want to make one observation of general application about this case for the guidance of committing justices.

E

The offence was committed in Berkshire, in Reading borough, just after the assizes. No doubt the justices thought that it would be a proper thing—I am not criticising this at all—that they should use the powers which have been given* to them of committing to what is called a foreign court, that is, instead of sending the prisoner to Berkshire Assizes, to send him elsewhere for trial to prevent him being detained for a long time in prison without trial. I hope, however, that justices will bear in mind that, when they are exercising that power, they should send the case to the nearest convenient court that is possible, because, if they

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send it to a far distant court, the expense which is put on public funds is very greatly increased. This case was committed by the Reading justices to Hereford, no doubt because Hereford is on the Oxford Circuit and, in the ordinary course, the case would go to the Reading Assizes, which are also on the Oxford Circuit. The learned judge on the circuit had only three days at Hereford, and he could not have tried it there, so it was sent to Shrewsbury. Whether it went to Hereford or Shrewsbury is neither here nor there; they are both a long distance from Reading and the increased expense of this prosecution must have been very great. The obvious place to have sent this case was to the Old Bailey, because the Old Bailey is very much nearer Reading than Shrewsbury or Hereford. I am far from suggesting that, in all such cases, justices in the Home counties should be very ready to commit to the Old Bailey because the Old Bailey has plenty of

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work as it is, but there are occasions when, in order to prevent a man being detained a long time in prison without trial, cases do go to the Old Bailey and the judges there are willing to try them.

I

I hope that justices all over the country will remember that, if they are exercising their powers to send the case to a foreign court, they should commit to the nearest court that can conveniently be found. It is unnecessary to send a case to a place on the same circuit; it may very often happen that the case will go to another circuit, but the question of keeping down the costs of prosecutions should be borne in mind.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* By the Magistrates' Courts Act, 1952, s. 10 (1); 32 HALSBURY'S STATUTES (2nd Edn.) 430.

ANDREWS v. HOPKINSON.

[LEEDS ASSIZES (McNair, J.), July 2, 3, 30, 1956.]

Hire-Purchase—Fitness of article sold—Warranty—Breach—Sale of motor car—Car sold by dealer to finance company—Hire-purchase agreement between finance company and buyer—Buyer injured owing to dangerous condition of car—Action for damages by buyer—Measure of damages.

Dangerous Goods—Negligence—Car in dangerous condition—Condition discoverable by supplier using reasonable diligence—Liability of supplier.

On Sept. 11, 1952, the plaintiff visited the premises of the defendant, a dealer in second-hand cars, and was shown by the defendant's sales manager a 1934 saloon car which the defendant had had for about a week. The manager said: "It's a good little bus. I would stake my life on it. You will have no trouble with it". The price was agreed and it was arranged that the plaintiff should pay a deposit and that the balance should be payable on hire-purchase terms. On the following day an agreement was signed to sell the car to a finance company and a hire-purchase agreement was executed in the usual form between the finance company and the plaintiff. The plaintiff acknowledged in a delivery note that he was satisfied as to the car's condition, and the car was collected on his behalf. The defendant had no reason to anticipate that the plaintiff would have the car examined by a competent mechanic before taking it on the road or would himself examine it. On Sept. 19, while the plaintiff was driving the car, there was a collision between the car and a lorry and the plaintiff was seriously injured. The accident was due to the failure of the drag-link joint of the steering mechanism of the car which was not safe or fit for use on the highway. The defective condition of the joint was of long standing and, although probably not discoverable by an ordinary owner-driver, could have been easily discovered by any competent mechanic. Any motor dealer should have appreciated that in a car of this kind the steering mechanism was one of the most likely places in which to find excessive and dangerous wear affecting roadworthiness. In an action by the plaintiff for damages for breach of warranty and negligence,

Held: (i) the words used by the defendant's sales manager amounted to a warranty that the car was in good condition and reasonably safe for use on the highway (*Crosse v. Gardner* ((1688), Carth. 90) and *Medina v. Stoughton* ((1700), 1 Salk. 210) applied); the plaintiff had acted on this warranty in accepting delivery of the car and entering into the hire-purchase agreement, and, therefore, could enforce the warranty although he was not a purchaser from the defendant.

Brown v. Sheen & Richmond Car Sales, Ltd. ([1950] 1 All E.R. 1102) and *Shanklin Pier, Ltd. v. Detel Products, Ltd.* ([1951] 2 All E.R. 471) applied.

(ii) although the measure of damages in an action for breach of the warranty was prima facie the difference between the value of the car as warranted and its value as delivered, yet the plaintiff's personal injuries were a direct and natural result of the breach and damages were recoverable in respect of them.

(iii) on the facts the defendant was also liable in damages to the plaintiff for negligence in delivering to the plaintiff for use on the road a car which was in a dangerous condition when the defect could have been discovered by reasonable diligence on the part of the defendant and he had failed either to have the car examined or to warn the plaintiff that it had not been examined.

Herschtal v. Stewart & Ardern, Ltd. ([1939] 4 All E.R. 123) applied.

Observations on whether a condition or warranty similar to that arising under s. 14 (1) of the Sale of Goods Act, 1893, should be implied in a transaction which was closely akin to a transaction of sale.

- A** [**Editorial Note.** An owner of a chattel which is let on hire is, it seems, under a duty in the absence of express contractual stipulation, to ascertain that the chattel is reasonably fit for the purpose for which it is intended to be used; see 16 HALSBURY'S LAWS (2nd Edn.) 515, para. 759. The decision summarised in the headnote above relates to the hire-purchase of a car which was not examined by the intending purchaser. Where, however, a car, which is to be let on hire-purchase, is examined and the application for hire-purchase is on the basis of the inspection, a term may be implied in the hire-purchase agreement that the car will be kept in suitable order pending delivery; see *Karsales (Harrow), Ltd. v. Wallis* ([1956] 2 All E.R. 866, per DENNING, L.J.).
- B**

As to warranties on the sale of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 52, para. 64; and for cases on the subject, see 39 DIGEST 438-446, 679-747.

- C** As to the duty to warn imposed on a vendor or supplier of dangerous goods, see 23 HALSBURY'S LAWS (2nd Edn.) 631, para. 886.

For the Sale of Goods Act, 1893, s. 14 (1), see 22 HALSBURY'S STATUTES (2nd Edn.) 993.]

Cases referred to:

- D** (1) *Drury v. Victor Buckland, Ltd.*, [1941] 1 All E.R. 269; 2nd Digest Supp.
 (2) *Crosse v. Gardner*, (1688), Carth. 90 (90 E.R. 656); Comb. 142 (90 E.R. 393); 39 Digest 419, 515.
 (3) *Medina v. Stoughton*, (1700), 1 Salk. 210 (91 E.R. 188); Holt, K.B. 208; 1 Ld. Raym. 593 (91 E.R. 1297); 39 Digest 419, 516.
 (4) *Brown v. Sheen & Richmond Car Sales, Ltd.*, [1950] 1 All E.R. 1102; 2nd Digest Supp.
- E** (5) *Shanklin Pier, Ltd. v. Detel Products, Ltd.*, [1951] 2 All E.R. 471; [1951] 2 K.B. 854; 2nd Digest Supp.
 (6) *Herschthal v. Stewart & Ardern, Ltd.*, [1939] 4 All E.R. 123; [1940] 1 K.B. 155; 109 L.J.K.B. 328; 161 L.T. 331; 2nd Digest Supp.
 (7) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- F**

Action.

- The plaintiff, Mr. George Alwynn Andrews, who was a commercial traveller, wished to acquire a small motor car for private and business purposes, and on Sept. 11, 1952, he visited the Doncaster premises of the defendant, Mr. Frank Hopkinson, a dealer in second-hand motor cars. Having no mechanical knowledge, the plaintiff took with him a friend, Mr. Bilby, who was the owner of a car but had no expert knowledge of cars. The plaintiff saw the defendant's sales manager, Mr. Frank Hopkinson junior, and explained that he wanted a second-hand car costing about £100. During the course of the interview he said that he did not know a great deal about cars. The sales manager arranged for the plaintiff and Mr. Bilby to be taken out for a drive of some five miles in a small 1934 Standard saloon car which had been in the defendant's possession for about a week. After pointing out the good points of the car, the sales manager said: "It's a good little bus. I would stake my life on it. You will have no trouble with it". The plaintiff said that he would take the car, the price was agreed at £120, and it was arranged that the plaintiff should pay a deposit of £50 on the following day and that the balance should be payable on hire-purchase terms. The sales manager agreed to have the car insured for the plaintiff and undertook to arrange for an engineer's report to be prepared for submission to the proposed insurers, but the plaintiff, finding that he could get cheaper insurance cover elsewhere, cancelled these instructions before the engineer had made more than a preliminary inspection of the car, and, accordingly, a full inspection was not carried out.
- G**
- H**
- I**

On Sept. 12, 1952, the plaintiff paid to the defendant a deposit of £50, and the formal hire-purchase documents were executed in the usual form. These consisted of (i) an agreement by the defendant to sell the car to Berkeley Finance

Co., Ltd., and (ii) a hire-purchase agreement between the finance company and the plaintiff whereby the company agreed to hire the car to the plaintiff for a period of eighteen months at a monthly rental of £4 9s. 6d. and the plaintiff was granted an option to purchase the car for 5s. on completion of the hiring. The hire-purchase agreement also provided that the hirer's acceptance of delivery should be conclusive that the vehicle was complete and in good order and condition and in every way satisfactory. On the same day the plaintiff signed a delivery note acknowledging that he had taken delivery of the vehicle the subject of the hire-purchase agreement and was satisfied as to its condition. The car was then collected and driven to the plaintiff's house by a friend of the plaintiff, as the plaintiff himself did not have a driving licence at the time.

On Sept. 19, 1952, the plaintiff, who had obtained a provisional driving licence, was driving the car along a main road. Although it was good weather and the surface of the road was dry, the car, while proceeding on its proper side of the road, suddenly swerved and collided with a lorry. The car was wrecked and the plaintiff was seriously injured. On the following day the steering mechanism of the car was examined by a member of the county police department dealing with the examination of motor vehicles and it was discovered that the drag-link joint of the steering mechanism had failed owing to the badly worn condition of the socket and the ball pin which the socket was designed to hold in position; that at some time one of the pressure springs, which held the two halves of the ball cups together, had broken and been replaced by a weaker spring, part of the play being taken up by a nut and washer; that all the steering joints were dry and rusty and showed a serious lack of lubrication; and that an oil nipple and split pin were also missing. The car had been driven about 155 miles between the time when the plaintiff took delivery of it and the time of the accident.

In an action against the defendant, the plaintiff, by his statement of claim, as amended, claimed damages: (i) for breach of an express warranty that the car was in good condition and reasonably safe and fit to use on the public highway whereby he was induced to enter into a hire-purchase agreement in respect thereof; (ii) for breach of an implied warranty that the car was reasonably fit for driving on the public highway; (iii) for negligence in that the defendant knew or ought to have known that the car was dangerous and unfit to use on the public highway and would be so used without prior examination and failed to take proper care that the car was fit so to use and free from defects or to warn the plaintiff of its condition.

W. H. Greenwood for the plaintiff.

J. F. S. Cobb for the defendant.

Cur. adv. vult.

July 30. **McNAIR, J.**, read a judgment in which after stating the facts and reviewing the evidence, he continued: On the evidence before me I am satisfied (i) that the defective condition of the drag-link joint was the cause of the accident; (ii) that this condition was of long standing; (iii) that at the time when the plaintiff took delivery of the car it was, by reason of these defects, not in good condition and safe and fit for use on a public highway; (iv) that this defective condition should have been discovered by any competent mechanic (though probably not by an ordinary owner-driver) without stripping down the steering mechanism, by the simple and recognised method of manually pulling on the ball pin after jacking up the car for examination; (v) that any motor dealer ought to appreciate that, in the case of an old car such as the car in question, one of the most likely places to find excessive and dangerous wear affecting the roadworthiness is in the steering mechanism, and particularly in the drag-link joint where such joint forms part of the steering mechanism; (vi) that the defendant had no reason to anticipate that the plaintiff would have the car examined by a competent mechanic before taking it on the road or would himself examine it.

A As a result of the accident the car was wrecked and the plaintiff suffered serious injuries involving the fracture of three ribs and a fracture of the left wrist. Happily the fractures united well and there was no residual disability. The plaintiff was off work for seven or eight weeks. The special damages have been agreed at £245 5s. 6d., and I assess the general damages at the sum of £400.

B In these circumstances the plaintiff brings his action against the defendant, basing his claim on three grounds. First he claims that the defendant warranted that the car was in good condition and reasonably safe and fit for use on the public highway, that the plaintiff acted on this warranty, and that damage was caused by breach of the warranty. Secondly, he claims that the collision was caused by the negligence of the defendant, particularly by the negligence set out in para. 6 of the statement of claim, that the defendant knew, or ought to have known that the car was defective and, therefore, dangerous and unfit for use on a highway, and that the defendant failed to take any or sufficient steps to remedy this defect to ensure that the car was reasonably safe and fit to use on a public highway, and failed to warn the plaintiff that the car was defective and dangerous and unfit to be used on a public highway. Thirdly, by way of amendment made at a late stage of the hearing, the plaintiff relied on the implied warranty similar to that implied in certain cases of sale of goods by virtue of s. 14 (1) of the Sale of Goods Act, 1893.

C As to breach of warranty, in the first place it is clear that in law the relationship between the plaintiff and the defendant was not a relationship of seller and purchaser. The hire-purchase transaction, evidenced in the documents, was a reality and cannot be treated as a mere colourable transaction: see *Drury v. Victor Buckland, Ltd.* (1) ([1941] 1 All E.R. 269). Secondly, I am satisfied (i) applying the principle stated by Holt, C.J., in *Crosse v. Gardner* (2) ((1688), Carth. 90), and *Medina v. Stoughton* (3) ((1700), 1 Salk. 210), that, if the transaction between the plaintiff and the defendant had been in law a sale, the words deposed to by the plaintiff as being the words used by Mr. Hopkinson junior could properly be held to be words of warranty, i.e., an affirmation made at the time of sale intended to be a warranty; (ii) that the words amounted at least to a warranty that the car was in good condition and reasonably safe and fit for use on a public highway; and (iii) that the plaintiff acted on this warranty in the sense that without it he would not have accepted delivery of the car or entered into the hire-purchase agreement.

F On these findings I adopt the reasoning of Jones, J., in *Brown v. Sheen & Richmond Car Sales, Ltd.* (4) ([1950] 1 All E.R. 1102), and follow my own decision in *Shanklin Pier, Ltd. v. Detel Products, Ltd.* (5) ([1951] 2 All E.R. 471), where I set out at some length the reasons that led me to the conclusion, (as they do in this case) that there may be an enforceable warranty between A, the intended purchaser of a car, and B, the motor dealer, supported by the consideration that B should cause the hire-purchase finance company to enter into a hire-purchase agreement with A, the intended purchaser.

H It was rather faintly argued that even on these findings the defendant would only be liable for the difference in value between the car as delivered and the car as warranted. Although this may be the prima facie measure of damages in an ordinary case of breach of warranty in the sale of goods, I feel no doubt at all that on the facts of this case the whole of the damages can fairly be considered as loss directly and naturally resulting in the ordinary course of events from the breach of warranty and so recoverable as damages for breach. I hold, accordingly, that as damages for breach of warranty the plaintiff is entitled to judgment for £645 5s. 6d.

I Although this conclusion is sufficient to dispose of the action in the plaintiff's favour, it is right that I should also state my views on the second ground of complaint, namely, negligence. In *Herschtal v. Stewart & Ardern, Ltd.* (6) ([1939] 4 All E.R. 123), Tucker, J., held that motor dealers, who supplied for the

plaintiff's use on hire-purchase terms a car which they themselves had repaired, were liable to the plaintiff for personal injuries which he suffered when the near-side wheel of the car came off owing to faulty workmanship on the part of the motor dealers' staff in the re-conditioning of the car. The basis of this decision was that, as the motor dealers were supplying a motor vehicle to their customer for his own use, the very close proximity or relationship between them was such as to impose a duty on the motor dealers to take reasonable care to see that the article which they were delivering, knowing that the customer was going immediately to put it on the road, was not in a condition whereby a wheel might come off, causing possibly very serious and grave damage. The learned judge, after an elaborate review of the authorities including and following on *M'Alister (or Donoghue) v. Stevenson* (7) ([1932] A.C. 562), further held that the test of liability in such a case depended on whether or not the car would be examined by the party taking it, or by a third party, before being put on the road, and not on whether such examination was possible. Although in *Herschthal v. Stewart & Ardern, Ltd.* (6) the negligence relied on was negligence in actually effecting the repair, I see no reason why the motor dealer should not equally be held liable if he put into circulation in the hands of his customer a motor car which is in fact in a dangerous condition, when the defect rendering the condition dangerous is one which could and ought to have been discovered by reasonable diligence on his part.

There was abundant evidence before me that in the case of an old car such as this the danger spot is in the steering mechanism and that this particular defect could have been discovered by a competent mechanic if the car had been jacked up. No such examination was in fact carried out, although the defendant, who had taken the car in part exchange, had had the car in his possession for a week or so. Having regard to the extreme peril involved in allowing an old car with a defective steering mechanism to be used on the road, I have no hesitation in holding that the defendant in the circumstances was guilty of negligence in failing to make the necessary examination, or, at least, in failing to warn the plaintiff that no such examination had been carried out. The defendant is, accordingly, also liable for negligence for the like damages.

As to the third ground, namely, the implied warranty, I think it is sufficient to say that I do not feel disposed in this case, in which I have decided in favour of the plaintiff on two independent grounds, to examine this head of claim exhaustively. In *Drury v. Victor Buckland, Ltd.* (1) the Court of Appeal rejected the claim of the plaintiff, who had taken goods from the defendants on hire-purchase terms, to rely on the implied warranty arising under s. 14 (1) of the Sale of Goods Act, 1893, on the ground that the transaction between the parties was not a transaction of sale, and that, accordingly, the Sale of Goods Act, 1893, did not apply. In *Herschthal v. Stewart & Ardern, Ltd.* (6) TUCKER, J., also rejected a claim based on implied warranty on the ground that there was no contract between the parties. Both these decisions were before the decision of JONES, J., in *Brown v. Sheen & Richmond Car Sales, Ltd.* (4), where a contractual relationship was found to exist on a principle not apparently advanced or considered in either of the two earlier cases. Bearing in mind that the statutory implied warranty now embodied in s. 14 (1) of the Sale of Goods Act, 1893, was merely a modification of the long existing common law in relation to sales, I feel that there is much to be said for the view that in a transaction such as the present, which, though not in law a transaction of sale between the parties, is closely akin to such a transaction, the court ought to imply such a condition or warranty if any contractual relationship between the parties can in fact be established. I prefer, however, not to rest my judgment on this view.

Judgment for the plaintiff.

Solicitors: *R. Stanley Pennington*, Doncaster (for the plaintiff); *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the defendant).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

R. v. LACEY.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Ormerod and Ashworth, J.J.), July 24, 1956.]

Court-Martial—Appeal—Time for appealing against conviction—No power to extend time—Courts-Martial (Appeals) Act, 1951 (14 & 15 Geo. 6 c. 46), s. 3 (1), (2)—Courts-Martial Appeal Rules, 1952 (S.I. 1952 No. 194), r. 6 (1) (b), as substituted by the Courts-Martial Appeal (Amendment) Rules, 1954 (S.I. 1954 No. 1557), r. 2.

The Courts-Martial Appeal Court has no power to extend the prescribed time for presenting a petition for leave to appeal against conviction by a court-martial.

[For the Courts-Martial (Appeals) Act, 1951, s. 3, see 30 HALSBURY'S STATUTES (2nd Edn.) 466.]

Application for leave to appeal against conviction by court-martial.

Albert James Lacey, a senior aircraftman, applied for leave to appeal against his conviction by court-martial for obtaining money by false pretences. His petition craving leave to appeal was sent to the Air Ministry forty-two days after the date of promulgation of the court-martial and was, therefore, two days out of time. The petition was rejected for that reason, but by the direction of LORD GODDARD, C.J., the matter was brought before the court as the question of power to extend the time for applying for leave to appeal had not previously been considered by the court.

The applicant did not appear and was not represented.

The Crown was not represented.

LORD GODDARD, C.J.: The applicant, Albert James Lacey, a senior aircraftman, was convicted before a court-martial at Lichfield in February of this year of obtaining money by false pretences, and was sentenced to be reduced to the ranks and to serve eighty-four days' detention. He applies to the court for leave to appeal against his conviction; or, rather, what he did was to send a petition to the Air Ministry, who refused to accept it on the ground that it was out of time. The question then arose: what was to be done? The Air Ministry said: "This petition is of no value as a petition under the Courts-Martial (Appeals) Act, 1951", but they accepted it as a petition for the exercise of the royal prerogative. I thought that the best course was to have the matter brought before the court in order that we could consider whether or not the Air Ministry were right in the view that they took. There is no question about it that the petition was presented two days out of time, and it does not appear that there is any power to extend the time.

The Courts-Martial (Appeals) Act, 1951, s. 3, provides:

"(1) Subject to the following provisions of this Part of this Act, a person convicted by a court-martial may, with the leave of the court, appeal to the court against his conviction.

"(2) Except in the case of a conviction involving sentence of death, the right conferred by the foregoing sub-section on a person convicted by a court-martial shall not be exercisable—(a) unless, within such period as may be prescribed, he presents to the appropriate authority a petition praying that his conviction be quashed . . ."

The time which is prescribed by the Courts-Martial Appeal Rules, 1952, r. 6 (1) (b), as substituted by the Courts-Martial Appeal (Amendment) Rules, 1954, r. 2, is

"in the case of a conviction by an army or air force court-martial: (i) forty days next following that on which the finding of the court-martial was promulgated, if the court-martial was held in the United Kingdom; and (ii) sixty days next following that on which the finding of the court-martial was promulgated in any other case."

There is no provision either in the Act or the rules for extending the time. There may be very good reason for it because these matters should not be left undecided. Whether or not it would be desirable to have a rule or to prescribe a period subject to the right of the court to extend it, is a matter of policy which may be considered by the appropriate authority. We can only say here that this man cannot apply for leave to appeal because he did not comply with the conditions precedent which the Act lays down, that is, that he must present his petition within the prescribed time. The court comes to this decision without any real reluctance in this matter because it is quite obvious that there is no ground for interfering with this conviction. The applicant's only objection to the conviction is that he says the offence had been condoned by an officer who had power to condone. It is true that the Air Force Act does provide that an offence may be condoned, but it is equally clear that in this case there had been no condonation, and the officer who, he says, would have condoned it had not any power, nor did he purport, to do so.

For these reasons, if we could have extended the time, we should not have given leave to appeal because there was no ground for it. Therefore, we dismiss this application, and say that the Air Ministry were right in refusing to accept the petition as a petition of appeal under the Courts-Martial (Appeals) Act, 1951.

Application dismissed.

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

NOTE.

R. v. DARKHU.

[BIRMINGHAM ASSIZES (Finnemore, J.), July 12, 1956.]

Criminal Law—Trial—Plea—Fitness to plead—Disagreement by jury—New jury to be sworn to determine issue.

[As to the trial of an issue whether the defendant is fit to plead, see 10 HALSBURY'S LAWS (3rd Edn.) 402, 403, paras. 729, 730.]

Trial on Indictment.

The defendant, David Sebe Agyeman Darkhu, was charged at Birmingham Assizes, before FINNEMORE, J., and a jury, with wounding a prison officer with intent to murder him. On May 4, 1956, the defendant, while in Birmingham Prison, was certified as being of unsound mind and was removed to a mental hospital. On July 11, 1956, he was returned to Birmingham Prison for the purpose of the trial. Before his plea was taken a jury was empanelled to determine the issue whether he was fit to plead. Medical evidence, which was not contradicted, was called by the prosecution to show that the defendant was suffering from paranoid schizophrenia, but the defendant himself claimed that he was quite well mentally. The jury disagreed on the issue, and the question arose whether the trial should proceed or whether a new jury should be empanelled to determine the issue.

J. E. S. Simon, Q.C., and M. Newell for the Crown.

R. K. Brown for the defendant.

FINNEMORE, J., accepted the submission* of counsel for the Crown that, since the issue whether the defendant was fit to plead had been raised, there must be a final verdict on the matter, and, accordingly, he discharged the jury and directed that another jury be sworn.

Solicitors: *Director of Public Prosecutions; Faber & Co., Birmingham (for the defendant).*

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

* Counsel referred to s. 2 of the Criminal Lunatics Act, 1800; 5 HALSBURY'S STATUTES (2nd Edn.) 593.

A

R. v. JENNINGS.

[COURTS-MARTIAL APPEAL COURT (Pilcher, Ormerod and Ashworth, JJ.), July 30, 1956.]

B *Court-Martial—Conviction—Civil offence—Driving without due care and attention—Offence committed in Germany—No warning given of prosecution in accordance with Road Traffic Act, 1930, s. 21—Court-martial entitled to convict—Army Act, s. 41 (5)—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 12, s. 21.*

C On Dec. 10, 1955, the appellant drove a motor vehicle in Germany in such circumstances and manner as in England would have constituted an offence of driving without due care and attention contrary to s. 12 of the Road Traffic Act, 1930. Though interviewed by the military police immediately after the alleged offence he was not informed that it was intended to take proceedings against him until a date in February, 1956. He was charged under s. 41 (5) of the Army Act with the civil offence. At the court-martial he entered a plea in bar on the ground that he had not been warned of the intended prosecution within fourteen days as required by the Road Traffic Act, 1930, s. 21. His submission was overruled and he was convicted and fined. On appeal,

D **Held:** the appeal failed because s. 21 of the Road Traffic Act, 1930, was a procedural section and the court-martial was entitled to convict in spite of the fact that the procedure for which s. 21 provided was not carried out.

E [**Editorial Note.** The Army Act is replaced by the Army Act, 1955, which will come into force on Jan. 1, 1957 (see the Army Act, 1955 (Commencement) Order, 1955, S.I. 1955 No. 1805). The enactment of the Army Act, 1955, corresponding to s. 41 of the former Army Act, is s. 70; 35 HALSBURY'S STATUTES (2nd Edn.) 489, 490.

F For the Army Act, s. 41, see 22 HALSBURY'S STATUTES (2nd Edn.) 284; and for s. 12 and s. 21 of the Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 588, 594.]

Appeal against conviction by district court-martial.

G The appellant, Warrant Officer Arthur John Jennings, was convicted before a district court-martial sitting in Germany of the offence of careless driving and fined £15, the penalty being later reduced by the confirming officer to a fine of £10. At his trial he entered a plea in bar. He contended that it was necessary that he should have received warning of the intended prosecution in accordance with s. 21 of the Road Traffic Act, 1930. No such warning had been given to him. His contention was rejected by the court-martial. On the appeal no question H was raised as to his guilt and the sole issue argued was whether the court-martial had power to record a conviction.

Melford Stevenson, Q.C., and Dennis Lloyd for the appellant.

The Solicitor-General (Sir Harry Hyllon-Foster, Q.C.) and E. Garth Moore for the Crown.

I

PILCHER, J.: This is an appeal by Warrant Officer Arthur John Jennings against a conviction by a district court-martial in Germany of the civil offence of driving without due care and attention. That is made an offence by the Road Traffic Act, 1930, s. 12. No particular punishment is assigned to the offence in that section. Warrant Officer Jennings appeals against this conviction, which was implemented by a fine of £15, subsequently reduced by the confirming authority to £10, on the ground that the provisions of the Road Traffic Act, 1930, s. 21, were not fulfilled by the military authorities.

Section 21, the caption to which is "Restrictions on prosecutions under the preceding sections", is in the following terms: A

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying . . . "

a number of matters, was sent to him by registered post. B

The offence in this case was committed on Dec. 10, 1955, and immediately after the offence apparently the appellant was interviewed by the military police, but he was not informed that it was intended to take proceedings against him by court-martial until some date in February. The court-martial proceedings took place on Mar. 10, 1956. The court-martial took place in respect of this civil offence under the Army Act, s. 41, which is an offence punishable by ordinary law, and s. 41 is in the following terms: C

"Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows; that is to say . . . "

I need not read the first four paragraphs which deal with convictions for treason, manslaughter, rape, etc., but I will come to para. 5: D

"If he is convicted of any offence not before in this section particularly specified, which when committed in England is punishable by the law of England, he liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England." E

The appellant took the point at the court-martial by way of what was called a plea in bar that he could not be punished—I suppose convicted or punished—in respect of this civil offence. It was quite clear that a civil offence of careless driving had been committed and that he had not been warned at the time when the offence was committed that he would be prosecuted. No summons had been issued because no summons could be issued in Germany, nor had he received within fourteen days a notice of his intended prosecution. That contention was rejected at the court-martial and it is against his conviction by the court-martial that he now appeals. F

Counsel for the appellant in his succinct address puts the matter quite shortly. He puts it in this way: under s. 41 of the Army Act a court-martial can convict only of offences which are punishable by the law of England. This offence was not punishable by the law of England because there was a failure to give the appellant the appropriate warning and notice provided for by the Road Traffic Act, 1930, s. 21; consequently it was not competent to the court-martial to convict him under s. 41. G

The Solicitor-General, on the other hand, whose address was equally succinct, said that s. 21 is only a procedural section. There is no question here that the H

- A accused man was guilty of the offence of careless driving and as such under the Road Traffic Act, 1930, s. 113, would under the civil law have been liable, among other things, to be fined in respect of a first offence a fine not exceeding £20. He says that all that s. 41 of the Army Act does is to make a person who is guilty of a civil offence guilty of a military offence, that s. 21 of the Road Traffic Act, 1930, is merely a procedural section and that para. (b) of s. 21 which applies to persons
- B in England is quite inapplicable to a soldier serving abroad. The Solicitor-General says that it is in fact no offence under the Road Traffic Act, 1930, to drive carelessly in Germany. None the less, the authorities are enabled by the Army Act, s. 41, to invoke the provisions of the Road Traffic Act, 1930. The terms of s. 41 (5) of the Army Act, which I have already read, specifically say that if a soldier is convicted of any offence, not being an offence already mentioned, which when committed in England is punishable by the law of England a certain consequence follows. The Solicitor-General submits, with some force, as I think, that the offence here being careless driving, it is an offence punishable by the law of England. Section 41 (5) of the Army Act then provides that such a man shall be liable whether the offence is committed in England or elsewhere either to suffer such punishment as may be awarded to him in pursuance of the Army Act in respect of an act to the prejudice of good order and military discipline "or to suffer any punishment assigned for such offence by the law of England"; which in this case, being a first offence, is a fine not exceeding £20. The Solicitor-General submits, again with some force, that it is idle to say that a man who has clearly committed the offence of careless driving under the Road Traffic Act, 1930, has not committed the offence until one or other of the provisions of s. 21 of that Act has been complied with.
- E

In the opinion of the court the submission of the Solicitor-General is correct, and s. 21 is a procedural section. Consequently, in spite of the fact that the procedure provided for by that section was not carried out in this case, the court-martial were entitled to convict the appellant in respect of an offence of which he was guilty. The appeal, therefore, will be dismissed.

F *Appeal dismissed.*

Solicitors: *Lomer & Wheeler* (for the appellant); *Director of Army Legal Services* (for the Crown).

[*Reported by T. J. KELLY, Esq., Barrister-at-Law.*]

R. v. OWEN AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Ashworth, J.J.),
July 23, 24, October 2, 1956.]

Criminal Law—Conspiracy—Conspiracy to commit crime abroad—Whether indictable in England.

Criminal Law—Forgery—Uttering a forged document—Forgery Act, 1913 (3 & 4 Geo. 5 c. 27), s. 6 (2).

The appellants, when in England, conspired to obtain strategic metal in the Federal Republic of Germany and to consign and sell the metal to countries in Eastern Europe. As part of the conspiracy forged documents, known as end-user certificates, were obtained purporting to be issued by the appropriate department of the government of the Republic of Ireland and showing that the metal would be imported into and used in the Republic of Ireland. These certificates were to be presented to the authority, known as Z.A.K., in the Federal Republic of Germany which controlled the granting of licences to export metals. The export of the metal would not have been licensed by Z.A.K. for consignment to the countries in Eastern Europe. The forged end-user certificates were obtained in Dublin and were posted in London to Z.A.K. in Germany, but it would have been possible to deliver the forged certificates to representatives of Z.A.K. in England. The appellants were charged with (i) a conspiracy to defraud Z.A.K. and (ii) a conspiracy to utter forged documents, namely, the end-user certificates; and the first appellant was charged also with uttering a forged document, an end-user certificate, contrary to s. 6 (1) of the Forgery Act, 1913. On appeal against convictions on these charges,

Held: (i) the convictions on the counts of conspiracy to defraud Z.A.K. must be quashed because, even assuming that the facts disclosed an intention to defraud Z.A.K. as distinct from an intention to deceive, a conspiracy to commit a crime abroad was not indictable in this country, unless the contemplated crime was one for which an indictment would lie in England, and would not have become indictable even if the contemplated crime had amounted also to a civil wrong committed abroad.

R. v. Kohn ((1864), 4 F. & F. 68) explained; *R. v. Warburton* ((1870), L.R. 1 C.C.R. 274) considered; dictum of LORD CAMPBELL, C.J., in *R. v. Tchorzewski* ((1858), 8 State Tr. N.S. 1091) not followed.

(ii) the convictions on the counts of conspiring to utter forged documents should stand (a) because the posting of the forged documents in London to Z.A.K. constituted an uttering within the definition in s. 6 (2) of the Forgery Act, 1913,* and was therefore an overt criminal act within the jurisdiction (*R. v. Finkelstein & Truscovitch* (1886), 16 Cox, C.C. 107, and *R. v. Giles* (1827), 1 Mood. C.C. 166, followed), and (b) because the object of the conspiracy could equally well have been carried out in England by delivery of the forged documents to representatives of Z.A.K. in London (observations of WILLES, J., in *R. v. Kohn* (1864), 4 F. & F. at p. 72, applied).

(iii) the conviction on the charge of uttering a forged document should stand on the ground stated at (ii) (a) above.

Semble: a conspiracy to injure a person abroad would be indictable if some interest of his in England were affected (see p. 436, letter I, post).

Appeal allowed on one count.

[As to limits of criminal jurisdiction, see 10 HALSBURY'S LAWS (3rd Edn.) 316 et seq.; as to the offence of conspiracy, see *ibid.*, pp. 312, 313, para. 570, and as to the offence of uttering forged documents, see *ibid.*, p. 869, para. 1684.

For the Forgery Act, 1913, s. 6 (2), see 5 HALSBURY'S STATUTES (2nd Edn.) 987.]

* The terms of s. 6 (2) of the Forgery Act, 1913, are printed at p. 437, letter G, post.

A Cases referred to:

- (1) *Re London & Globe Finance Corpn., Ltd.*, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 15 Digest 940, 10,354.
- (2) *Mulcahy v. R.*, (1868), L.R. 3 H.L. 306; 14 Digest 111, 810.
- (3) *R. v. Page*, [1953] 2 All E.R. 1355; [1954] 1 Q.B. 170; 3rd Digest Supp.
- (4) *R. v. Bernard*, (1858), 1 F. & F. 240 (175 E.R. 709); 8 State Tr. N.S. 887; 15 Digest 787, 8491.

B

- (5) *R. v. Tchorzewski*, (1858), 8 State Tr. N.S. 1091; 14 Digest 141, 1143.
- (6) *R. v. Kohn*, (1864), 4 F. & F. 68; 176 E.R. 470; 14 Digest 114, 830.
- (7) *R. v. Warburton*, (1870), L.R. 1 C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 14 Digest 113, 822.

C

- (8) *R. v. Finkelstein & Truscovitch*, (1886), 16 Cox, C.C. 107; 15 Digest 1069, 12,096.
- (9) *R. v. Giles*, (1827), 1 Mood. C.C. 166 (168 E.R. 1227); Car. C.L. 191; 15 Digest 1067, 12,082.

Appeal against conviction.

D The appellants, Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith, appealed against their convictions at the Central Criminal Court on May 8, 1956, on counts 3 and 5 of an indictment containing in all six counts. The first appellant also appealed against his conviction on count 6.

E Count 3 alleged against the appellants conspiracy to defraud in that they between Dec. 1, 1951, and Dec. 1, 1953, in the City of London and elsewhere conspired together with Austay London, Ltd. and Alfred Robert Cummings and with other persons unknown to defraud Gruppe Zentrale Ausfuhrkontrolle of the Bundesstelle fur den Warenverkehr der Gewerblichen Wirtschaft of the Federal Republic of Germany (known as and thereafter referred to as "Z.A.K."), i.e., to cause Z.A.K. to grant licences to export certain metals from the Republic of Germany by furnishing to Z.A.K. forged documents purporting to be end-user certificates made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland certifying that such metals to be imported into the said republic would not be re-exported therefrom knowing the said documents to be forged and by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

G Count 5 alleged against the appellants and Leslie Eric Hamson conspiracy to utter forged documents in that they between Dec. 1, 1951, and Dec. 1, 1953, in the City of London and elsewhere conspired together and with Austay London, Ltd. and with other persons unknown to utter forged documents purporting to be end-user certificates made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland on behalf of the Minister of the said department certifying that certain metals to be imported into the said republic would not be re-exported therefrom knowing the same to be forged and with intent to defraud.

I Count 6 alleged against the first appellant uttering a forged document contrary to the Forgery Act, 1913, s. 6 (1) in that he on or about Jan. 29, 1953, in the City of London uttered a forged document to wit a document purporting to be an end-user certificate dated Jan. 28, 1953, made and given at Kildare Street, Dublin, in the Republic of Ireland by the Secretary of the Department of Industry and Commerce of the said republic certifying that forty tons of high grade steel of West German origin were for use in Ireland and not for re-export knowing the same to have been forged and with intent to defraud.

The first appellant was sentenced to imprisonment for four years on counts 3 and 5 and to two years' imprisonment on count 6, the sentences to run concurrently. The second appellant was sentenced to imprisonment for three

years on counts 3 and 5, the sentences to run concurrently. Hamson was A sentenced to imprisonment for two years on count 5.

A. D. Karmel, Q.C., and I. C. Baillieu for the appellant Seth-Smith.

Neil Lawson, Q.C., and Sebag Shaw for the appellant Owen.

Neville Faulks and D. C.-H. Hirst for the Crown.

Cur. adv. vult.

Oct. 2. **LORD GODDARD, C.J.**, read the judgment of the court in which, after referring to the charges and convictions, he continued: The learned judge granted a certificate of appeal on the ground that the conviction raised an important point of law not apparently covered by existing authority, namely, whether a conspiracy in England to effect an unlawful object abroad is indictable in England.

The conspiracy and the method adopted to effect it can be quite shortly stated. The German government would not grant licences for the export of strategic metals to Eastern European countries. The appellants were directors of a company called Austay London, Ltd. and the second appellant was chairman of an Irish company called Smith Miller (Eire), Ltd. Austay London, Ltd. bought metal in Germany and the appellants put false documents before Z.A.K., the licensing authority of the German government, purporting to show that the metal would be exported only to Ireland whereas in fact it was to be exported to "Iron Curtain" countries. They also obtained through Smith Miller (Eire), Ltd. and presented to Z.A.K. documents which are known as end-user certificates which purported to be given by a government department of Eire certifying that the metal would not be exported from but would be used in Ireland. These documents, six of which were proved in evidence, were bought for a substantial sum of money from a person named Higgins who apparently carried on a business in Dublin of supplying forged certificates.

It is not altogether easy to appreciate what offence it was intended to allege in the first of these counts, which was called throughout the case count 3, as distinct from that alleged in the other, called count 5. The evidence would seem to be identical on both counts. Presumably count 3 was intended to refer to the fraudulent representations as to the destination of the goods and to the false shipping documents used in support, while count 5 is confined to the forged end-user certificates subsequently produced in support of the earlier representations. With regard to count 3 the court has felt considerable doubt whether it was right to charge an intent to defraud and not an intent to deceive. According to the well-known definition given by BUCKLEY, J., in *Re London & Globe Finance Corp'n., Ltd.* (1) ([1903] 1 Ch. 728 at pp. 732, 733), to deceive is by falsehood to induce a state of mind and to defraud is by deceit to induce a course of action, that is to induce a man to act to his injury; in other words, to deprive by deceit. It may well be doubted whether a government department can be said to act to its injury merely by issuing a certificate which it would not have granted had the true facts been known. Certainly it has not been deprived of anything. It is, however, unnecessary to decide this point because of the view the court has formed on the main question raised by the certificate of appeal granted by the learned judge. The case put forward by the prosecution on count 3 was that a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country and the case was argued both at the trial and in this court on that footing. This question has never been authoritatively decided though it has on different occasions been raised and has been the subject of discussion by text writers of authority and now falls for express decision. There is no doubt that a conspiracy is indictable here if an agreement is made within the jurisdiction to do an unlawful act, or to do a lawful act by unlawful means, in either case within the jurisdiction, whether the agreement is carried into effect or not. As soon as agreement is reached the very plot is an act itself and is indictable: *Mulcahy v. R.* (2) ((1868), L.R. 3 H.L. 306). The

- A question, however, remains whether it is indictable if the unlawful act is to be effected outside the jurisdiction. Another principle of English law is that apart from express statutory provision offences committed by British subjects out of England are not punishable here by the criminal law. This matter was discussed and the authorities considered in the recent case of *R. v. Page* (3) ([1953] 2 All E.R. 1355), and we need not further enlarge on it. The only
- B statutory provision relating to conspiracy to commit a crime is s. 4 of the Offences against the Person Act, 1861, which makes conspiracy in this country to murder any person abroad whether within the Queen's domains or not and whether the person is or is not a subject of the Queen a misdemeanour punishable with a maximum of ten years' imprisonment. Now certainly since the Act
- C 33 Hen. 8 c. 23* a British subject has been indictable in this country for murder committed abroad and the Offences against the Person Act, 1828,† expressly provided [by s. 7] for the trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without. It follows that being an accessory to murder abroad or conspiracy to murder abroad is indictable in this country. Section 4 of the Offences against the Person Act, 1861, did not therefore add to
- D or alter the common law on the subject; it provided a special penalty and made it clear that a conspiracy by anyone in this country was indictable.

- [HIS LORDSHIP referred, as a matter of history, to the introduction of the Conspiracy to Murder Bill in 1858, which was the predecessor of s. 4 of the Offences against the Person Act, 1861, to the charge and acquittal of Simon Bernard (*R. v. Bernard* (4) (1858), 8 State Tr. N.S. 887) and to *R. v. Tchorzewski* (5) ((1858), 8 State Tr. N.S. 1091). HIS LORDSHIP, after citing the statement of LORD CAMPBELL, C.J., in the latter case that it was a crime for a British subject or a foreigner resident here to conspire for the commission of a crime in a foreign country, observed that that statement must be regarded as an obiter dictum, the case not having been argued. That case could not rank as a decision and did not seem ever to have been followed or even quoted. HIS LORDSHIP
- F continued:] It is in our opinion clear that s. 4 of the Offences against the Person Act, 1861, did not create a new offence. It merely dealt with the sentence applicable to an already existing offence. Accordingly, there is no ground for arguing that, as Parliament had expressly provided for the case of conspiracy to murder abroad, it followed by applying the maxim *expressio unius exclusio alterius* that it was only in relation to murder that a conspiracy to commit a
- G crime abroad was indictable in this country. Both before and since the Offences against the Person Act, 1861, the question has been whether the substantive offence alleged in the conspiracy was triable here.

- We now turn to *R. v. Kohn* (6) ((1864), 4 F. & F. 68). The accused, a Prussian and captain of a Prussian merchant ship, was indicted for a conspiracy at Ramsgate with the owner and mate to cast away and destroy the ship to the
- H prejudice of the underwriters. The ship was in fact sunk far from the English coast and so out of the jurisdiction. WILLES, J., directed the jury that a conspiracy in this country to commit the offence was criminal by our law, but that the case did not raise the point which arose in *R. v. Bernard* (4) (1 F. & F. 240), as to a conspiracy limited to a criminal offence to be committed abroad, for it was clearly contemplated that the ship might be destroyed off the bar at
- I Ramsgate which was within the jurisdiction; and he concluded his charge by saying that for the principal offence, that is the casting away, the accused could not be indicted here as he was a foreigner, the ship was foreign and the offence was committed on the high seas, but that the question was whether there was a conspiracy here to destroy the ship whether at sea or in port. He is, however, reported as saying (4 F. & F. at p. 72) that the offence of conspiracy would be

* Repealed by the Offences against the Person Act, 1828.

† Repealed by 24 & 25 Vict. c. 95.

committed by persons conspiring together to commit an unlawful act to the prejudice of others if the conspiracy was in this country though the overt acts were abroad. The case is not very satisfactorily reported, but taking the report together with the note of the learned reporter it seems that the learned judge meant to lay down (i) that an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (ii) that to conspire to scuttle out of the jurisdiction is not indictable; but that (iii) to conspire to scuttle whether the ship should be within or without the jurisdiction is indictable as the ship might be scuttled in an English port or within English territorial waters; (iv) that to conspire to injure persons within the jurisdiction by doing an act out of the jurisdiction is indictable. This would seem to be the opinion also of SIR JAMES FITZJAMES STEPHEN, though he says in his HISTORY OF THE CRIMINAL LAW (Vol. 2 at p. 13), that he abstains from giving a decided opinion because the question as to conspiracy to commit a crime abroad remains unsettled and may be raised judicially. He puts as a strong argument that the criminal law of England does not deal with crimes committed abroad at all, and submits that if incitement to commit crimes abroad is to be made criminal it should be done by legislation and not judicial decision. In that well-known and authoritative work, the LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS by R. S. WRIGHT, the learned author, afterwards a judge of the Queen's Bench Division, points out that the modern law of conspiracy is in truth merely an extension of the law of attempts, and at p. 74 of the book, after referring to *R. v. Kohn* (6), he says that if the contemplated act when done would not by reason of the place and the nationality of the actors be punishable here there would be much difficulty in holding criminal an agreement here for doing that which when done would not be a crime against our laws. Now, clearly if two Englishmen commit a burglary in France they cannot be indicted for that crime in England. It would certainly seem illogical to hold that by agreeing to go to France to commit the offence they are guilty of a crime against our laws. There are, however, certain acts which by statute are crimes punishable in England wherever committed. Instances are murder, bigamy, offences against the Foreign Enlistment Act, 1870, the Official Secrets Act, 1911, and the Merchant Shipping Act, 1894. The statutory exceptions are all collected on p. 29 et seq. of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.). In our opinion the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For instance, if two persons agreed here to stage a sham burglary abroad in order to collect insurances from English underwriters the conspiracy would be indictable here though the overt act was to be done abroad, because if the plot were carried out the obtaining or attempting to obtain the insurance money would be clearly indictable. In the present case the plot, though formed here, was carried out in Germany and assuming, as we have, that Z.A.K. were defrauded and not only deceived, the persons defrauded were Germans in Germany. In our opinion no offence was committed in Germany for which the appellants could have been indicted in England and consequently in our opinion the conspiracy is not indictable.

It was further argued that a conspiracy to effect a civil wrong is indictable and that the evidence disclosed a fraud for which Z.A.K. could have sued in this country. It is no doubt true that a conspiracy to commit a civil wrong in this country is indictable even though the wrong has not been effected; but we know of no case where it has been held that a conspiracy to injure a person abroad is indictable here, though it may be that it is so indictable if some interest of his in this country is affected. Much reliance was placed below on *R. v.*

- A *Warburton* (7) ((1870), L.R. 1 C.C.R. 274), and it is necessary therefore to see exactly what that case did decide. The facts were that there was a partnership consisting of Warburton and one Lister who traded in the West Riding and also had a branch business in Cologne carried on there by managers. Warburton conspired with the managers in Cologne to fabricate documents and accounts there with the object of depriving Lister of his proper share in the partnership.
- B These documents and accounts were to be produced to Lister in this country and would have constituted false and fraudulent representations as to what was due to him with the object of injuring or depriving him of his equitable rights in the partnership. While the material was fabricated abroad the fraud would have been carried out here and it was never even suggested in argument that because the conspiracy took place abroad that could have any bearing on the matter.
- C The actual decision seems to have been that a conspiracy to injure was indictable though the injury was to equitable and not legal rights. If it is not indictable to conspire to commit a particular crime abroad it would be impossible to hold that it becomes indictable if that crime also amounts to a civil wrong. Moreover, we are unable to see that in this case *Z.A.K.* would have had a cause of action in this country. Conspiracy or deceit alone gives no cause of action. As in all
- D actions on the case it is damage which is the gist of the action. *Z.A.K.* were deprived of nothing; they were tricked into giving a licence which may well have been a crime in Germany but we do not see that they suffered any damage for which an action would lie in this country. In our opinion the conviction on count 3 must be quashed on the ground that the offence which the appellants conspired to commit was one to be committed abroad and one which would
- E not have been indictable in England.

We now pass to count 5. This count charged the two appellants and Hamson with conspiring together and with Austay London, Ltd. and with other persons unknown to utter forged documents purporting to be end-user certificates knowing the same to be forged and with intent to defraud. All three men were convicted.

- F The first point taken on behalf of the appellants was similar to that taken in regard to count 3, namely, that the offence which the appellants conspired to commit was one to be committed abroad and would not have been indictable in England. The alleged object of the conspiracy was the uttering of forged documents knowing them to be forged and with intent to defraud, and it therefore becomes necessary to consider first what constitutes uttering and secondly
- G where uttering takes place.

Section 6 (2) of the Forgery Act, 1913, provides:

- H "A person utters a forged document, seal, or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document, seal, or die, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the said forged document, seal, or die."

- I Although for the purposes of this count it was not necessary for the prosecution to prove that any of the forged documents was in fact uttered within the meaning of that sub-section, evidence was tendered to show that of the six forged documents three were enclosed in letters from Austay London, Ltd. to *Z.A.K.* Each of these letters appeared to show that the first appellant had dictated it, as his initials were typed on it. As the original letters were not available at the trial, there was no direct evidence to prove that any of them had been posted to *Z.A.K.*, but a carbon copy of each letter was found in the files of Austay London, Ltd. and in the absence of any evidence to the contrary it was open to the jury to infer that each letter with its enclosed forged document was sent in the normal course of business by post to Germany.

It was contended for the appellants that the posting of a letter enclosing a forged document does not constitute an uttering of the document within the meaning of the Forgery Act, 1913, and that the uttering (if any) occurs when the letter is received and opened by the addressee. A similar contention was put forward in *R. v. Finkelstein & Truscovitch* (8) ((1886), 16 Cox, C.C. 107), and although the case is only shortly reported, it is plain that STEPHEN, J., was of opinion that the posting in London of forged bonds in a letter addressed to a company in Brussels constituted an uttering of the bonds in London. The earlier decision of *R. v. Giles* (9) ((1827), 1 Mood. C.C. 166), is to the same effect. Apart from authority, the statutory definition already quoted is in sufficiently wide terms to include within its scope the posting of a letter containing a forged document.

It follows, therefore, that there was evidence to show that the alleged object of the conspiracy was in fact carried out, and carried out in London. But even if such evidence had not been tendered, it is clear that the alleged object of the conspiracy might have been carried out in this country, for example, by personal delivery of the forged documents to representatives of Z.A.K. or the German companies who might be in London. In such circumstances it is clear from *R. v. Kohn* (6) that the appellants could properly be indicted in this country.

It was also contended for the appellants that the learned judge failed to direct the jury adequately as to the difference between a false document and a forged document, or as to the necessity of establishing knowledge on the part of the appellants that the documents in question were forged. There is no substance in this contention. The fact that the documents were forged was not seriously challenged at the trial and on several occasions in the course of his summing-up the learned judge emphasised the point that the jury could not convict either appellant unless they were satisfied that he knew that the documents were forged.

The only other point in regard to this count of the indictment relates to the alleged intent to defraud. The same argument was put forward as was relied on in regard to count 3, but it is to be noted that in regard to count 5 the intent to defraud is alleged in general terms and is not directly related to Z.A.K. Even if it were right that no intention to defraud Z.A.K. was or could be established, it is clear that German suppliers were to be defrauded by means of the conspiracy alleged in count 5, and in these circumstances it was open to the jury to take the view that an intent to defraud was proved.

Count 6 charged the first appellant alone with a single offence of uttering a forged document knowing the same to be forged and with intent to defraud. For the reasons given in respect of count 5, it was open to the jury to convict this appellant on this count and it is unnecessary to discuss the matter further.

[The sentences, being re-considered at the request of counsel, were reduced in view of the quashing of the convictions on count 3 as follows: the sentence on the first appellant to four years' imprisonment on count 5 was reduced to two years to run concurrently with the sentence to two years' imprisonment on count 6, and the sentence on the second appellant to three years' imprisonment on count 5 was reduced to eighteen months. Leave to appeal against sentence out of time was granted to Hamson*.]

Convictions on one count quashed: sentences on two other counts reduced.

Solicitors: *Galbraith & Best* (for the appellant Seth-Smith); *Stikeman & Co.* (for the appellant Owen); *Solicitor, Board of Trade* (for the Crown).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

* On Oct. 15 the Court of Criminal Appeal reduced the sentence on Hamson from two years' imprisonment to twelve months.

A

BARCLAYS BANK, LTD. v. STASEK AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 4, 1956.]

B

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Mortgage subject to existing tenancy—New tenancy granted—New tenancy effecting surrender of old tenancy by operation of law as between tenant and mortgagor—New tenancy not binding on mortgagee—Whether old tenancy surrendered as between tenant and mortgagee.

C

Landlord and Tenant—Surrender of tenancy—Surrender by operation of law on grant of new tenancy—Whether existing tenancy surrendered if new tenancy not effective.

D

In 1947 C., the owner of a freehold dwelling-house, let to S. two rooms on the first floor and one room on the second floor on a weekly oral tenancy at a rent of £1. In 1948, C. mortgaged the house to a bank by means of a registered charge under the Land Registration Act, 1925, by which the exercise of the mortgagor's statutory powers of leasing was made subject to the consent of the bank. In 1951 and again in 1952, C. (without the bank's consent) granted to S. a weekly tenancy of rooms on the second floor in place of the previously existing tenancy, including in each new tenancy one of the rooms originally let to him. The rent charged to S. under the second tenancy was 15s. per week and under the third tenancy was £1 per week. In 1955 the bank obtained possession of the house against C., and now sought an order for possession against S.

E

Held: the bank was not entitled to an order for possession against S. because, as the second and third lettings were not effective against the bank, the original tenancy (which bound the bank) had not been surrendered by operation of law in favour of the bank on the occasion of the grant by C. of the second or third tenancy, since only the grant of an effective new tenancy would have resulted in a surrender of the original tenancy; accordingly S. was entitled to occupy the rooms comprised in the original tenancy.

F

Cadle v. Moody ((1861), 30 L.J.Ex. 385) applied.

G

[As to the surrender of a lease by operation of law on the grant of new lease to tenant, see 20 HALSBURY'S LAWS (2nd Edn.) 270, para. 303; and for cases on the subject, see 31 DIGEST (Repl.) 571-576, 6913-6971.]

Cases referred to:

H

- (1) *Cadle v. Moody*, (1861), 30 L.J.Ex. 385; 7 Jur. N.S. 1249; 31 Digest (Repl.) 566, 6872.
- (2) *Doe d. Egremont (Earl) v. Courtenay*, (1848), 11 Q.B. 702; 17 L.J.Q.B. 151; 11 L.T.O.S. 25; 116 E.R. 636; 31 Digest (Repl.) 575, 6957.
- (3) *Doe d. Biddulph v. Poole*, (1848), 11 Q.B. 713; 17 L.J.Q.B. 143; 11 L.T.O.S. 25; 116 E.R. 641; 31 Digest (Repl.) 576, 6966.

Adjourned Summons.

I

The plaintiff, Barclays Bank, Ltd., as mortgagee, applied by originating summons under R.S.C., Ord. 55, r. 5A, for delivery of possession of the property comprised in an instrument of charge dated Apr. 23, 1948, under the seal of the mortgagor in favour of the plaintiff and registered under the Land Registration Act, 1925.

R. M. Bell for the plaintiff, the mortgagee.

J. Montgomerie for the defendants, persons in occupation of part of the mortgaged premises.

DANCKWERTS, J.: This is a summons taken out by a mortgagee, Barclays Bank, Ltd., to recover possession of mortgaged property from two persons, a husband and wife, who are in occupation. The property is a house of which parts have been let on separate tenancies. The mortgage was created on Apr. 23, 1948, by way of legal charge under the Land Registration Act, 1925. The property was owned by the mortgagor in fee simple, but, at the date of the mortgage, there had already been, among other lettings, a letting [in August, 1947] to the first defendant of two rooms on the first floor and one room on the second floor at a rent of £1 a week. It was a weekly tenancy, no doubt orally created, but binding at law and binding in the circumstances on the mortgagee who took the property subject to the existing tenancy.

The legal charge to Barclays Bank, Ltd., contained a restriction on letting by the borrower in very ordinary form which rendered the exercise of the powers conferred by s. 99 and s. 100 of the Law of Property Act, 1925, operative only with the consent of the bank. Section 99 enables a borrower in possession of property to make certain leases, and s. 100 prevents the borrower accepting surrenders of leases except for the purpose of granting such a lease or tenancy as is permitted under the terms of the Act. Section 100 (9) makes it quite plain that a tenancy is included in the provisions relating to leases.

In September, 1951, there was a new letting by the borrower to the first defendant of two rooms on the second floor, in replacement of some of the rooms included in the original letting, at a rent of 15s. a week. Thereafter the tenant held the two rooms which included one of the old rooms contained in the first letting. There was no consent to this transaction by the bank. In 1952 there was a third letting to the same tenant which was in replacement of the existing tenancy, and that was of three rooms on the second floor at a weekly rental of £1, two of which rooms were contained in the second letting and one of them being one which had been throughout included in the occupation of the tenant in question.

In March, 1955, the bank took proceedings under its mortgage to obtain possession of the property from the borrower and it was successful in getting an order for possession which was obeyed by the borrower. Now it is found that the defendants in the present case, husband and wife, are in possession of the rooms which were given to them under the last-mentioned letting and they claim to be tenants holding at any rate some part of the premises effectively against the landlord.

It is quite plain that, as the consent of the bank was not obtained for the second or third lettings, those lettings, on the face of it, would not be effective against the bank by reason of the provisions of the Law of Property Act, 1925, and the terms of the mortgage. At first it appeared to me that there could not be a possible defence to the bank's claim; but rather a nice point has been taken.

As between the borrower and his tenant, each of the second and third lettings was effective against the borrower and, being effective lettings, by operation of law, they created a surrender of the existing tenancy. In other words, so far as the position between the borrower and his tenant is concerned, the original letting in 1947 was terminated by operation of law through the effect of a surrender on the creation of the new tenancy and, so far as the borrower was concerned, no doubt came to an end; but it is claimed by the bank that the result of that is that the original tenancy, effective against the bank, no longer exists, because it is said that the bank can accept that surrender as being effective by operation of law without recognising in any way the second tenancy as being effective.

There are authorities which show that when a lease is granted, with the result of effecting a surrender of an existing lease and the second lease is not effective in law because it exceeds the powers which the lessor had, then the surrender, whether it appears that it was an express surrender or a surrender through operation of law, is ineffective, and consequently the original term remains

- A effective. That is brought out very clearly in *Cadle v. Moody* (1) ((1861), 30 L.J.Ex. 385). That was a case of a surrender by operation of law. Other cases are *Doe d. Egremont (Earl) v. Courtenay* (2) ((1848), 11 Q.B. 702), which was the case of an express surrender, and *Doe d. Biddulph v. Poole* (3) ((1848), 11 Q.B. 713). I must apply the principle of those cases to the circumstances of the present case, although the facts in those old cases were considerably different from those in the present case.
- B Those old cases established principles which are easier of application in the case of a surrender which is only operative through law than in the case of an express surrender, even though the same rule has been extended to the case of an express surrender. The principle is that if a new lease is not effective but would, if it were effective, produce a surrender, then, by reason of the fact that the new lease is not effective, there is not an effective surrender.
- C The bank in the present case claims that it is entitled to recognise the surrender without recognising the new tenancy. It seems to me that that argument cannot succeed because there is no surrender except through the new tenancy. It is a surrender by operation of law simply because the new tenancy cuts out the old. If the old is not cut short because the new tenancy is not operative, then the old tenancy remains, and there is no effective surrender. In the present case it is claimed that a new tenancy was not effective against the bank unless the bank chose to affirm it and recognise it. Consequently, so far as the bank is concerned, there seems to me to have been no effective surrender of the tenancy created in August, 1947. It was a weekly tenancy and a weekly tenancy continues until it is determined by notice or by surrender or in some other manner. It is a continuing tenancy. In the present case the result is very odd because the defendants
- E are in occupation of rooms to some extent different from those which were included in the tenancy on which they find themselves bound to rely; but I am forced to the conclusion that there has been no effective surrender of the original tenancy so far as the bank is concerned, and consequently it is open to the defendants to resume occupation of their old rooms, including the one which they still occupy (because, apparently, there are no other tenants in those rooms).
- F If and when the tenancy is determined by notice awkward and difficult questions under the Rent Restriction Acts will no doubt arise.

Order for possession, as asked, not granted.

Solicitors: *Forbes & Son* (for the plaintiff); *Joynson-Hicks & Co.*, agents for *J. Burt Sugar*, Palmers Green (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

GOLD v. BRIGHTON CORPORATION.

A

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), July 27, 1956.]

Landlord and Tenant—New tenancy—Business premises—Terms—New restrictions on use—Proposed term preventing use for substantial part of existing business—County court judge's discretion—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 35.

B

The yearly tenant of a shop in Brighton under a tenancy agreement permitting use of the premises as a shop, without restriction, carried on the business of selling new and second-hand furs and new and second-hand ladies' wear, the sale of second-hand clothing being the main part of her business. She applied for a new tenancy under the Landlord and Tenant Act, 1954. In their counter-proposal for a new lease, the landlords, Brighton Corporation, sought to include clauses imposing a restriction on the use of the premises including a prohibition on the sale of second-hand clothing other than furs, on the ground that they wished to maintain the tone of the street. They called no substantial evidence that the tone of the street would in fact be affected by such sales, and an order had been made for a new lease of the landlords' adjoining premises permitting the sale of second-hand clothing there. The county court judge, in the exercise of the discretion conferred by s. 35* of the Landlord and Tenant Act, 1954, made an order for the new lease to contain clauses imposing the restriction. On appeal,

C

D

Held: a restriction preventing the tenant from continuing to carry on an important part of her existing business, viz., the sale of second-hand clothing, should not be imposed on the grant of a new tenancy under the Act, as there was no sufficient evidence to justify its imposition.

E

Per DENNING, L.J.: the object of the [Landlord and Tenant Act, 1954] is to protect a tenant in respect of his business, and not to put a new saleable asset in his hands (see p. 444, letter C, post).

Appeal allowed.

F

[For s. 35 of the Landlord and Tenant Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 419.]

Appeal.

The tenant of shop premises, No. 40, North Street, Brighton, appealed against an order of His Honour JUDGE DUTTON BRIANT, Q.C., in Brighton County Court, made on May 28, 1956, directing that the grant by the landlords to the tenant of a new lease of the premises under the Landlord and Tenant Act, 1954, include two clauses (cll. 13 and 14) imposing restrictions on the use of the premises, and in particular prohibition on the sale by the tenant of second-hand goods other than furs except with the landlords' consent. The court also ordered the tenant to pay one-half of the landlords' costs.

G

Harold Brown, Q.C., and T. J. Sophian for the tenant.

H

L. G. Scarman for the landlords.

DENNING, L.J.: This is a claim for a new lease under the Landlord and Tenant Act, 1954. It concerns a shop, No. 40, North Street, Brighton, which is owned by Brighton Corporation, the landlords. They bought the premises some twenty-five years ago for the purposes of road improvements which have never come to pass, and they have now agreed (and the Minister of Housing and Local Government has consented to the agreement) to re-let them for another fourteen years before any question of road improvement arises. The particular lease under which the present tenant holds was granted in 1940, under a yearly letting, to a Mr. Zeff. He was a bespoke tailor and dealt in second-hand clothes. In February, 1954, he assigned the lease to Mrs. Gold,

I

* The relevant terms of the section are printed at p. 444, letter H, post.

A the present tenant. She took it over, and when she went there she sold new and second-hand furs and ladies' wear, new and second-hand. She described the business as "Adrienne, Furs and Fashions".

After she had been there for some months, the landlords gave her notice to terminate the tenancy on Dec. 25, 1955; whereupon she applied for a new tenancy under the Act. The landlords said that they were agreeable to grant
B a new tenancy for fourteen years, but there was a difference as to what the proposed rent should be. The judge fixed it at £650 a year, and there is no appeal on that point. There was also a difference as to the kind of business to be carried on on the premises, and it is this difference which is the subject of this appeal.

C In the yearly tenancy hitherto held by the tenant, a clause provided that the tenant was

"not to use or suffer or permit to be used the said premises or any part thereof otherwise than as shops offices photographer's studio or dental surgery with or without residential flats or accommodation without the consent of the corporation",

D and so forth. Under that clause the tenant was entitled to use the premises for any kind of business which she chose to carry on; but, when the landlords made a counter-proposal for the new lease, they said that the lease should contain a clause whereby she was restricted in the user of it. They said that she should use it for business as a furrier and for selling ladies' new clothes; but not for any second-hand clothes. The tenant objected to this restriction,
E and, as the parties could not negotiate a settlement, the matter came for determination before the county court judge. He decided that she could use it for a furrier's business, i.e., for selling furs new or second-hand, and she could use it for the selling of ladies' and children's clothes when new, but that she could not use it for the purpose of second-hand clothes. He said that a restrictive clause was to be inserted in the new tenancy to that effect. The
F tenant appeals to this court. She says it was wrong for the judge to restrict her from selling second-hand clothes, because that would deprive her of part of her existing business. She says that the second-hand clothing was the main part of her business. She says it was a very high class second-hand shop, and it was the main part of her business. She asks for the restriction to be removed, on the ground that that was not a proper order for the judge to make. It is
G common ground that the rent of £650 is not affected by the restriction one way or the other.

The landlords seek to impose this restriction because they say that to use these premises in North Street, Brighton, for second-hand clothes would lower the tone of the street, and would hamper them in their efforts to keep up the character of the street. There was very little evidence in the court below to support this contention—it was only hinted at—and since the decision the
H landlords have acted in a way that is hardly consistent with it. It has been disclosed to us that the very next door premises, No. 40A, North Street, which are also owned by the landlords, have since been the subject of a similar application for a new tenancy. A new lease has been ordered whereby the tenant of those premises (a relative of the tenant in the present case) is permitted to
I continue to sell second-hand clothes there as she has done for some years.

The Landlord and Tenant Act, 1954, plainly intends to protect the tenant in respect of his business. Section 23 (1) provides that the Act applies to premises which are occupied by the tenant "for the purposes of a business carried on by him". Inasmuch as the tenant is to be protected in respect of his business, the terms of the new tenancy should be such as to enable him to carry on his business as it is. They should not prevent him from carrying on an important part of it. At any rate, if he is to be prevented from using the premises in the future in the way in which he has used them in the past,

it is for the landlord to justify the restriction: and there ought to be strong and cogent evidence for the purpose. I find no such evidence here. The mere suggestion or hint that the tone of the street would be lowered is not enough. On this ground, I would allow the appeal. A

It seems to me that the new tenancy ought to be such as to permit the tenant to carry on her existing business of a furrier and seller of ladies' wear, and the additional business of selling children's wear, and that it should not be confined to new clothes, but should extend to second-hand clothes as well. B

A question has arisen before us whether the tenant should not be allowed more liberty still. It was suggested that she should be left unrestricted to the same extent as in the former lease, with the result that she could carry on any kind of shop there. I do not think that would be right. When he gave his judgment, the judge said that he thought it was reasonable to impose some restriction. The object of this Act is to protect a tenant in respect of his business, and not to put a new saleable asset into his hands. The clause which I have proposed enables the tenant to carry on her existing business, and, indeed, in respect of children's wear, enables her to expand it. That is, I think, sufficient. After all, if in the years to come a change of user was reasonable, no doubt the landlords would give their consent. So it seems to me that this appeal should be allowed and the terms of the new lease ordered by the judge should be varied in the way I have indicated. C

A question arose as to costs. The judge ordered the tenant to pay one-half of the landlords' costs. I do not think that was right. Both parties negotiated for a new lease and they could not come to terms. It had to be referred to the judge on the amount of rent and other terms. He struck a middle course. I see no reason why the tenant should have to pay any part of the landlords' costs. I think that there should be no costs of either side in the court below, but in this court the tenant should have her costs. D

BIRKETT, L.J.: I am of the same opinion, for the reasons given by my Lord. When an Act like the Landlord and Tenant Act, 1954, containing such very important provisions in respect of tenancies, is used to strike at the livelihood of somebody and a vague phrase like "the tone of the district" is used for that purpose, the matter calls for close examination. For example, it was contended that a second-hand mink coat could be sold in this street without lowering the tone of the district, but to sell a second-hand ladies' costume, because some lady had found it did not fit her properly or through some other cause, for some obscure reason lowered the tone of the district. I was not able to follow that. To say to somebody who has a business on premises that "You shall not carry on that business though it be the principal means of your livelihood", is so important that it needs careful examination. E

Counsel for the landlords (who has conducted this case with great moderation and tact) said that by s. 35 of the Act the discretion vested in the learned county court judge was naturally made very wide. The section provides that: F

"The terms . . . (other than terms as to the duration thereof and as to the rent payable thereunder) . . . in default of . . . agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances." G

Counsel says: "Phrasing it as widely as that, the learned county court judge, particularly in view of his local knowledge, was in a position to look at the tenancy, at the premises, and at all the facts proved before him, and to come to his own conclusions". On that, I think with my Lord that the manifest purpose of this Act, certainly in Part 2, which is headed "Security of tenure for business, professional and other tenants", was to give some security to a tenant (who possibly by industry had built up a fine business on the premises) H

I

A when his tenancy came to an end. It would require careful consideration before a county court judge should be held to be entitled to say that the tenant had carried on this business for two years and his predecessors had carried it on for ten years, but that if he got a new tenancy he could not carry on that business and would be restricted in the way which has been suggested in this case. The Act was designed to provide security for the tenant, and I do not think that there is room for a prohibition of the nature sought to be imposed in this case.

Even if I am wrong about that, there should be some evidence to support such a change. It was suggested rather vaguely that dealing in second-hand clothing would in some way lower the business tone of the district. If so, some evidence should be given about it and an opportunity should be afforded to the person most closely concerned to offer evidence to the court about it, too.

C It is remarkable that, in the notes of the case as it was conducted before the learned judge, there is no direct evidence of that kind at all. Counsel for the landlords says that one may infer the point that was at issue from particular questions. But Mr. Nye, the estates valuer to the landlords, never said a word about it in chief. He never told the learned county court judge: "The landlords instruct me to say how very important it is that second-hand clothing should not be sold along there". Indeed, he was compelled to say: "Why, next door, in 40A, the landlords are permitting this very kind of thing to be done". It was not till the very end of the professional witness's evidence that he said, apparently in answer to some question by the court, "I should expect a prudent landlord to restrict user so as not to lower the tone of the district". So would I. But I should like to hear some evidence of what it is suggested does it and how it does it, and also some opportunity for the person most closely concerned to be able to deal with it.

It is on those two points that I feel that the decision of the learned county court judge cannot be supported. There were other matters, but it is now conceded there was no real argument here about tenure and user being associated,

F and counsel for the landlords said with great frankness that there was no question of the rent being fixed because of any condition. It seems that the matter was left with the very vague point that in some way the tone of the district was to be lowered. I feel that this judgment of the learned judge in this respect ought not to stand, and am also in favour of allowing the appeal to the extent indicated by my Lord. On the question of costs, I agree entirely with what

G my Lord has said.

PARKER, L.J.: I agree. Undoubtedly under s. 35 of the Act the county court judge is given a very wide discretion, but in the ordinary case, at any rate, it is difficult to think of any considerations which would justify changing the restrictions on user in such a way as to alter or limit the nature of the business which the tenant has lawfully carried on on those premises and which

H it is clearly the object of the Act to preserve. This is a somewhat special case, however, in that the tenant only had a tenancy from year to year, the landlords being enabled to give six months' notice to expire on any quarter day. Nevertheless, the landlords throughout have been ready and willing to grant a tenancy for a fixed term of fourteen years and to abandon the right which they had previously of giving six months' notice. In those circumstances, it might

I well be that a landlord would desire to make the case, and could make the case, that there ought to be some restriction on user, at any rate in that he was abandoning the right to give six months' notice. In the present case, however, not only did the landlords offer a fourteen years' lease, but negotiations proceeded on that basis for some time, and, as the county court judge himself said in his judgment:

"The only issue is to the terms on which a lease of that duration shall be granted."

It seems to me that the landlords utterly failed to make out any case for a restriction of user. Such evidence as there was was of the flimsiest nature and quite insufficient to justify the imposition of a restriction which seriously alters the nature of the business previously carried on. I would allow the appeal and I agree with the proposed order.

Appeal allowed. Terms of tenancy varied by deleting cl. 14.

Solicitors: *Amery-Parkes & Co.*, agents for *Gates & Co.*, Brighton (for the tenant); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Brighton (for the landlords).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

SANSOM *v.* SANSOM.

[COURT OF APPEAL (Denning, Birkett and Parker, L.JJ.), July 9, 1956.]

Court of Appeal—Notice of appeal—Grounds of appeal—Statement of broad issues and not detailed reasons—Rules of the Supreme Court (Appeals), 1955 (S.I. 1955 No. 1885)—R.S.C., Ord. 58, r. 3 (2), (3).

Motion.

The Rules of the Supreme Court, Ord. 58, r. 3 (2), (3)* provide:

“(2) Notice of appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below; and every such notice shall specify the grounds of the appeal and the precise form of the order which the appellant proposes to ask the Court of Appeal to make.

“(3) Except with the leave of the Court of Appeal, the appellant shall not be entitled on the hearing of an appeal to rely upon any grounds of appeal, or to apply for any relief, not specified in the notice of appeal.”

The petitioner applied to the Court of Appeal for leave to appeal out of time against an order made by Mr. Commissioner EDGEDALE, Q.C., on May 15, 1956, dismissing a petition for divorce. Counsel raised the question of the detail required in the grounds of appeal.

John Latey for the petitioner.

D. Loudoun for the respondent.

It was stated by DENNING, L.J., that the object of the rule was to eliminate points not intended to be put in issue and so to save expense in copying documents and preparing the case. The grounds of appeal were intended to be shortly and simply stated, but not to be set out in detail or at great length. The broad issues to be raised should be stated and not the detailed reasons in support of them. The grounds could be extended by letter if a special point arose later.

Solicitors: *Devonshire & Co.* (for the petitioner); *Huntley, Son & Rowlands* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

* The Ord. 58 substituted by S.I. 1955 No. 1885 came into force on Apr. 10, 1956.

A

SAMPLE AND ANOTHER v. HULME.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ashworth, JJ.),
October 4, 1956.]

B

Street Trading—Pedlar—Definition—Travelling and trading on foot—Salesman travelling in motor van to street and there going from house to house on foot—Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3.

C

The appellants travelled to a street in a town by motor van and then went from house to house in that street on foot offering goods for sale. Neither appellant had obtained a pedlar's certificate. On an appeal by the appellants against convictions for acting as pedlars without such a certificate, contrary to s. 4 of the Pedlars Act, 1871, it was contended that the appellants were not travelling and trading on foot within the meaning of the definition of pedlar in s. 3 of the Act*, and so were not acting as pedlars.

Held: in going from house to house after leaving the motor van the appellants were travelling and trading on foot and so were rightly convicted. Appeals dismissed.

D

[For the definition of a pedlar, see 22 HALSBURY'S LAWS (2nd Edn.) 105, para. 189; and for cases on the subject, see 33 DIGEST 568, 535-539.

For the Pedlars Act, 1871, s. 3, s. 4, see 14 HALSBURY'S STATUTES (2nd Edn.) 1078, 1079.]

Case Stated.

E

This was a Case Stated by the Dewsbury justices in respect of their adjudication as a magistrates' court sitting at the Town Hall, Dewsbury, in the County of Yorkshire. On July 1, 1955, informations were preferred by the respondent against the appellants that each of them on May 26, 1955, at Dewsbury had unlawfully acted as a pedlar within the meaning of the Pedlars Act, 1871, without having obtained a certificate contrary to s. 4 of the Act.

F

The justices heard the informations on Jan. 19, 1956, and found the following facts: The appellants were employed as salesmen by a firm. On May 26, 1955, the appellants with two other employees of the same firm travelled to Dewsbury in a motor van in which there were also goods that the appellants intended to offer for sale or use as samples. The appellants had no horse or other beast bearing or drawing burden. In Dewsbury the motor van was parked in Reform

G

Street. The appellants left the van and went separately and on foot from house to house in Reform Street carrying goods with them. The appellant Sample offered for sale to a Mrs. Gledhill of 54, Reform Street, Dewsbury, one pair of blankets and one carpet. She agreed to buy the goods which were then left in her possession. A small deposit was paid. The appellant Sample gave two payment cards to her. The sale took place at the door of her house.

H

At the time of the sale the appellant Sample had also in his possession an eider-down. The appellant Walmsley offered for sale to a Mrs. Brierley of 34, Reform Street, Dewsbury, aforesaid, towels, sheets and a table cover. She agreed to buy a table cover which was left in her possession. The appellant Walmsley gave a payment card to her. The sale took place at the door of her house.

I

It was contended by the appellants that on the evidence adduced by the prosecution there was no case in law to answer in that the appellants had not acted as and were not pedlars as defined by s. 3 of the Pedlars Act, 1871. It was contended by the respondent that on the evidence the appellants did so act and were pedlars.

* The terms of the definition are printed at p. 448, letter D, post. Section 4 of the Pedlars Act, 1871, provides: "... Any person who—(1) acts as a pedlar without having obtained a certificate under this Act authorising him so to act ... shall be liable for a first offence to a penalty not exceeding 10s., and for any subsequent offence to a penalty not exceeding £1."

The justices were of the opinion that the appellants had acted as pedlars as defined by s. 3 of the Act at a time when they were not holders of pedlars' certificates and accordingly found that the charges against them had been proved and ordered each of them to pay a fine of 10s. and 7s. 6d. costs. The question for the opinion of the High Court was whether on these facts the justices came to a correct determination in point of law.

Richard Elwes, Q.C., and P. M. Syrett for the appellants.

A. G. F. Rippon for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by justices for the county borough of Dewsbury, before whom the appellants were charged with unlawfully acting as pedlars within the meaning of the Pedlars Act, 1871, without having obtained a certificate, contrary to s. 4 of the Act.

The facts found by the justices show that these men, who are employed by a firm at Barnsley, travelled by motor van to Dewsbury and then got out of their van at Dewsbury and proceeded to go from house to house offering goods for sale. The question was whether they were acting as pedlars and, with all respect to the strenuous argument of counsel for the appellants, I should not have thought there was the smallest doubt about it.

The Pedlars Act, 1871, s. 3, provides:

"The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft."

As the word "or" is disjunctive, the section reads in this way: "without any horse . . . travels and trades on foot and goes . . . to other men's houses carrying or exposing goods for sale". It seems to me that it is impossible to say that because a man arrives at a fixed point and there leaves his vehicle and proceeds to walk through the town, it may be for a mile or it may be for six miles, he is not travelling on foot. He is going from house to house and he is travelling from house to house. The word "travelling" cannot be used here as meaning travelling by train or travelling from one town to another. The man travels on foot as soon as he has left his car or his van or a house. I think that the justices came to the only possible conclusion, and I would dismiss this appeal.

HILBERY, J.: I agree.

ASHWORTH, J.: I agree.

Appeals dismissed.

Solicitors: *Paisner & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Dewsbury (for the respondent).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A BELL v. HOLMES.

[LEEDS ASSIZES (McNair, J.), July 26, 1956.]

Res Judicata—Judgment after commencement of action in which plea raised—Action in High Court between drivers of two motor vehicles claiming and counterclaiming damages for negligent driving—Subsequent action in county court against both drivers by passenger injured in the accident—Damages awarded to plaintiff in county court action apportioned between drivers of vehicles—Whether parties bound in High Court action by apportionment of responsibility determined in county court action.

Tort—Joint tortfeasors—Contribution—Jurisdiction to apportion blame without special application—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5 c. 30), s. 6 (2).

On Mar. 26, 1955, a collision occurred between two motor vehicles driven by B. and H. respectively, and on Aug. 18, 1955, B. commenced the present action in which he claimed damages against H. for personal injuries suffered as a result of the collision. H. counterclaimed for his own injuries. On Oct. 7, 1955, a passenger in H.'s vehicle at the time of the collision instituted proceedings against both B. and H. in the county court in respect of injuries received by her in the collision. This action was heard and determined on Feb. 17, 1956, when the passenger was awarded damages against both B. and H. No formal notice claiming contribution was served by either of the defendants in that action on the other, but the county court judge was requested to deal with the matter of apportionment between B. and H. and adjudged that B. should contribute five-sixths of the damages and H. one-sixth thereof. Both B. and H. paid the damages awarded against them. In the present action the allegations of negligence between B. and H. were substantially the same as in the county court action, and H., the defendant, claimed that, by reason of the judgment in the county court proceedings, B., the plaintiff, ought not to be admitted to say that he was other than five-sixths to blame for the collision.

Held: (i) despite the absence of a notice claiming contribution in the county court proceedings, the county court judge had jurisdiction to apportion the damages (*Croston v. Vaughan*, [1937] 4 All E.R. 249, followed); and, even if a contribution notice were necessary in the first place, the fact that B. had raised no objection to the county court judge dealing with the matter of contribution amounted to a waiver of the necessity for the notice.

(ii) estoppel by *res judicata* could arise although the judgment in the county court was not pronounced until after the commencement of the present action (*The Delta, The Erminia Foscolo* (1876), 1 P.D. 393 and *Houstoun v. Sligo (Marquis)* (1885), 29 Ch.D. 448, considered), and, since the issues of fact and the evidence to support them were identical with those in the county court, H.'s plea of estoppel succeeded.

Dicta of LUSH, J., in *Ord v. Ord* ([1923] 2 K.B. at pp. 439, 443) applied.

[**Editorial Note.** The view that estoppel by *res judicata* would not arise unless the judgment relied on for the estoppel were given before the issue of the writ in the action in which the plea of estoppel was made is held to be incorrect (see (ii) above). This view had had some support from text writers, for the proposition had been stated in a qualified form in 13 HALSBURY'S LAWS (2nd Edn.) 449, and 15 HALSBURY'S LAWS (3rd Edn.) 211, and a similar view had been indicated in PHIPSON ON EVIDENCE, see (4th Edn.), 339 (9th Edn.), 430. The court's reasons for deciding against this view are stated at p. 453, letter A, to p. 454, letter I, post.

As to *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184-186, paras. 357-359.

As to assessment of contribution as between joint tortfeasors, see 11 HALSBURY'S LAWS (3rd Edn.) 316, para. 511.]

Cases referred to:

- (1) *Croston v. Vaughan*, [1937] 4 All E.R. 249; [1938] 1 K.B. 540; 107 L.J.K.B. 182; 158 L.T. 221; 102 J.P. 11; Digest Supp.
- (2) *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376; 63 L.J.Ch. 793; 71 L.T. 11; 27 Digest 130, 1058 (27 Digest (Repl.) 114, 842).
- (3) *Clayson v. Rolls Royce, Ltd. & Evans Lifts, Ltd.*, [1950] 2 All E.R. 884; [1951] 1 K.B. 746; 2nd Digest Supp.
- (4) *The Delta, The Erminia Foscolo*, (1876), 1 P.D. 393; 45 L.J.P. 111; 35 L.T. 376; 11 Digest (Repl.) 550, 1579.
- (5) *The Mali Ivo*, (1869), L.R. 2 A. & E. 356; 38 L.J.Adm. 34; 20 L.T. 681; 11 Digest (Repl.) 550, 1578.
- (6) *The Catterina Chiazzare*, (1876), 1 P.D. 368; 45 L.J.P. 105; 34 L.T. 588; 11 Digest (Repl.) 551, 1585.
- (7) *Houstoun v. Sligo (Marquis)*, (1885), 29 Ch.D. 448; 52 L.T. 96; *on appeal*, 29 Ch.D. 457; 21 Digest 182, 325.
- (8) *Re Defries, Norton (or Nordon) v. Levy*, (1883), 48 L.T. 703; 21 Digest 190, 379.
- (9) *Ord v. Ord*, [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 21 Digest 152, 140.
- (10) *Kingston's (Duchess) Case*, (1776), 1 East, P.C. 468; 1 Leach, 146 (168 E.R. 175); 20 State Tr. 355; 2 Smith, L.C. 12th edn. 754; 21 Digest 159, 213.
- (11) *Hunter v. Stewart*, (1861), 4 De G.F. & J. 168; 31 L.J.Ch. 346; 5 L.T. 471; 45 E.R. 1148; 21 Digest 201, 442.
- (12) *Marginson v. Blackburn Borough Council*, [1939] 1 All E.R. 273; [1939] 2 K.B. 426; 108 L.J.K.B. 563; 160 L.T. 234; Digest Supp.
- (13) *Johnson v. Cartledge & Matthews*, [1939] 3 All E.R. 654; Digest Supp.
- (14) *Jackson v. Goldsmith*, (1950), 81 C.L.R. 446.

Preliminary Issue.

On Mar. 26, 1955, there was a collision between an Austin taxicab, the property of the plaintiff, Henry Bell, and a Hillman shooting brake driven by the defendant, Keith Robinson Holmes. Miss Betty Elsworth was a passenger in the defendant's vehicle at the time of the accident. On Aug. 18, 1955, the plaintiff issued the writ in the present action claiming damages against the defendant for personal injuries occasioned by the negligence of the defendant. By way of counterclaim the defendant claimed damages against the plaintiff for injuries suffered by the defendant in the collision. On Oct. 7, 1955, proceedings were instituted by Miss Elsworth in Bradford County Court against the plaintiff in the present action and the defendant in the present action in respect of personal injuries and damage suffered by her as a result of the same collision. On Feb. 17, 1956, the county court action came before His Honour JUDGE ARCHIBALD, who gave judgment for Miss Elsworth and awarded her £100 damages against the defendants in that action, five-sixths being awarded against the present plaintiff and one-sixth against the present defendant.

By para. 3 of his defence (as amended) the defendant claimed that the plaintiff ought not to be admitted to say that he was other than five-sixths to blame for the collision by reason of the action heard on Feb. 17, 1956, in the Bradford County Court between Betty Elsworth, as plaintiff, and the plaintiff and the defendant, as the defendants, arising out of the same collision; that by their defences and in the course of the said action the plaintiff and the defendant each alleged that the collision was caused by the negligence of each other and His Honour JUDGE ARCHIBALD, having given judgment for Miss Elsworth against the plaintiff and the defendant, in contribution proceedings under the Law Reform (Married Women and Tortfeasors) Act, 1935, adjudged that the plaintiff should contribute five-sixths of the damages and the defendant one-sixth thereof. By para. 1 of his reply the plaintiff admitted the allegations of

A fact in para. 3 of the defence, save that it was not admitted that there were contribution proceedings, but the plaintiff denied that he ought thereby not to be admitted in the action to say that he was other than five-sixths to blame. McNAIR, J., directed that the issue so raised should be tried as a preliminary issue.

B *C. D. Chapman* for the plaintiff.
A. K. Hollings and *T. R. Nevin* for the defendant.

McNAIR, J.: In this action Henry Bell, the plaintiff, who was the owner of an Austin taxicab, claims to recover from Keith Robinson Holmes, the driver of a Hillman shooting brake, damages for personal injuries which the plaintiff claims to have suffered when on Mar. 26, 1955, his taxicab came into collision with the Hillman shooting brake driven by the defendant. In the action the defendant, by way of counterclaim, seeks to recover from the plaintiff damages for personal injuries which he himself suffered in the same collision. It has been agreed that, subject to liability, the amount of damages recoverable by the plaintiff for his injuries is the sum of £450, and the amount of damages recoverable by the defendant on the counterclaim, again subject to liability, is the sum of £50, but there is raised a preliminary plea of estoppel.

D [HIS LORDSHIP stated the facts, and, after reading para. 3 of the amended defence, continued:] It was proved before me that at today's date the time for appeal against the judgment of the county court judge had long since expired, and it was also proved that the judgments against the plaintiff in this action and the defendant in this action have been satisfied. By his reply, the plaintiff E in the present action says:

"Save that it is not admitted that there were contribution proceedings between the defendants the allegations of fact contained in para. 3 are admitted."

F Accordingly, when this action came on before me I directed, by agreement with counsel, that the issue raised by para. 3 of the defence and para. 1 of the reply should be tried as a preliminary issue.

I have had before me the pleadings in the county court action, that is, the particulars of claim delivered by Miss Elsworth, the plaintiff in that action, and the defence put in by the two defendants in that action who are, respectively, G the plaintiff and the defendant in the present action. Having looked at the particulars of negligence advanced in that action, and comparing them with the allegation of negligence raised on the respective sides in the present action, I find them to be substantially identical, and I further find that in the defence in the county court action each of the defendants there blames the other defendant and, in fact, adopts as against his co-defendant the allegations of negligence H made against him by the plaintiff in the county court action.

The point taken in the reply, which it is convenient to deal with first, is that in the county court action there were no contribution proceedings. It is true that in the county court action no formal notice of contribution was filed by either of the defendants against the other, but it is plain to me, having heard the statements as to the course of proceedings made by Mr. Hollings, who appeared I for the present defendant both before me and in the county court action, that the county court judge was requested to deal with the matter of apportionment between the parties. It is equally plain that the result of his judgment was as stated in para. 3 of the defence in the present action and admitted in para. 1 of the reply, namely, that there should be judgment for Miss Elsworth against both the defendants in that action for £100 with costs, five-sixths awarded against the plaintiff in the present action and one-sixth against the defendant in the present action.

In those circumstances can it be said that there were no contribution proceedings? On that point I was referred first to *Croston v. Vaughan* (1) ([1937] 4 All E.R. 249), a decision of the Court of Appeal, where it seems to me the precise point was decided. The Court of Appeal there held that the trial judge had jurisdiction at the end of the proceedings, in which it had been held that the plaintiff was entitled to recover, to entertain an application to apportion the blame between the two defendants for the purpose of fixing the contribution as between the two joint tortfeasors, and that it was not necessary that some separate formal legal proceedings should be instituted for that purpose. SLESSER, L.J., dealt with the matter quite shortly. After stating the terms of s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, he said ([1937] 4 All E.R. at p. 254):

"I am satisfied on the authorities that . . . this application was in the nature of a proceeding. It was a lis arising out of the original action, and was a proceeding which comes within the language of the section, as decided in such a case, for instance, as *Hood Barrs v. Cathcart* (2) ([1894] 3 Ch. 376)."

SCOTT, L.J., said ([1937] 4 All E.R. at p. 261):

"The other point of importance in this appeal is the question of procedure which was raised before us, as to whether the judge had jurisdiction at all to enter upon the task of apportioning the blame between the two co-defendants, whom he had held liable, without some separate formal legal proceedings being instituted. I agree with the judgment delivered by my colleagues on this point, holding that he had jurisdiction, and that it was the intention of s. 6 (2) of the Act of 1935 that the trial judge should deal with the matter, and that he had . . . power to dispense with any formal application. I am inclined to think that it was open to the judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. Reading that section as a whole, I think it was the intention of Parliament that the judge who had heard a case of primary liability at the instance of a plaintiff, should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment, not merely of the damage, but also of the blame."

In *Clayson v. Rolls Royce, Ltd. & Evans Lifts, Ltd.* (3) ([1950] 2 All E.R. 884) the question arose whether interrogatories could be administered by one defendant against another in the absence of a third-party notice having been given. SOMERVELL and DENNING, L.J.J., while not questioning the decision in *Croston v. Vaughan* (1), held that, where a defendant desired to administer interrogatories to a co-defendant, a notice claiming contribution should be served, so that the issues between the parties could be properly defined.

It seems to be quite plain on those authorities, and also consistent with my experience, that contribution as between co-defendants, whether in a running-down action or in a factory case where the issues are simple, is commonly and properly determined between the two defendants without the formal notice of contribution, and I am quite satisfied that, if the judge does deal with contribution at the end of a trial, that is a determination in legal proceedings. Furthermore, I think that the fact that the plaintiff in the present action raised no objection to the county court judge dealing with the matter of contribution would amount to a waiver on his part of the necessity for a notice claiming contribution, if, contrary to my view, any notice claiming contribution was in the first place necessary.

The next point which was taken was of this nature. It is said that the plea of estoppel by res judicata cannot arise in this case by reason of the fact that at the time when the writ was issued in the present action, namely, Aug. 18, 1955, no judgment had been given in the Bradford County Court, and it was argued that for the plea of res judicata to arise, the res must have been judicata in

A the sense that judgment must have been given before the institution of the action in which it is sought to raise estoppel. In support of that I was referred to a passage in 15 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 211, para. 395, which reads:

B "A lis pendens without judgment creates no estoppel, and it seems that a judgment cannot take effect as a res judicata or an estoppel unless it was given before the proceedings in which it is relied upon were commenced."

C In support of that qualified statement two judgments are referred to. It is not contended that those judgments decide the point, but it is said that I should follow them. The first case to which I have been referred is a collision case, *The Delta, The Erminia Foscolo* (4) ((1876), 1 P.D. 393), which was a decision of that great Admiralty judge, SIR ROBERT PHILLIMORE. Any expression of his is clearly entitled to great respect, and in that action he had to consider the effect in the English Court of Admiralty of a judgment which had been given between the same parties in a foreign court, after the institution of the English proceedings. SIR ROBERT PHILLIMORE said (1 P.D. at p. 403):

D "On the questions of foreign law both French and Italian advocates were examined. Their evidence left it at least doubtful whether the judgments of the Court of Commerce, given as they were in default of appearance or prosecution, and never having been executed, would now have in France or Italy the force of res judicata. But I think it unnecessary to go into their evidence in detail, as I am of opinion this defence must fail, for two reasons: the first is that at the time when the suit against the Delta was begun there was confessedly no res judicata; there was only a lis alibi pendens; and if the owners of the Delta had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the Erminia Foscolo to their election, compelling them to abandon one or the other of the suits, according to the rule laid down by me in *The Mali Ivo* (5) ((1869), L.R. 2 A. & E. 356), and quite recently applied in *The Catterina Chiazzare* (6) ((1876), 1 P.D. 368)."

G It is quite plain to me that the basis of SIR ROBERT PHILLIMORE's judgment in that case was the former rule which was in force in 1876 under which it was possible for a party, who was embarrassed with the possibility of two suits, to call on the opposing party to make an election. It is not unreasonable that if a party fails to take this course, he should not be entitled to rely on a decision in one action to operate as an estoppel in the other. I humbly take the view that the decision of SIR ROBERT PHILLIMORE in that case does not support the broad principle stated in the text in HALSBURY'S LAWS OF ENGLAND.

H The next case referred to is *Houstoun v. Marquis of Sligo* (7) ((1885), 29 Ch.D. 448), where, according to the headnote, it was held by PEARSON, J., sitting as a judge in the Chancery Division,

I "... that in order to raise the defence of res judicata it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as res judicata, but, in order to judge whether the same questions were at issue in the first action as in the second, the court will look at the pleadings in the first action, though they were not set forth in the defence in the second action. Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as res judicata, unless the judgment was obtained before the issue of the writ in the second action, *Quære*."

PEARSON, J., dealing with that point, said (*ibid.*, at p. 454):

"I am rather inclined to think that that view is right, and that I cannot stop the proceedings in this action upon the ground that in the interval between the issue of the writ and the hearing of the present application,

judgment has been pronounced in the Irish action. But I am unwilling to decide this case entirely upon that ground, because, however right the decision in *The Delta* (4) may have been under the old practice, I am not satisfied, without a closer examination of the existing Rules of Court, that a defendant is not now at liberty to set up as *res judicata* a decision of the point at issue by a court of competent jurisdiction during the progress of the action."

The matter went to the Court of Appeal on the main point in the case as to the admissibility of the proof of facts of what took place in Ireland. The Court of Appeal ruled on that, but did not determine the point discussed by PEARSON, J., because, after the decision on the admissibility of evidence the parties came to terms and settled the matter. I do not find that that case, although it is of interest, really supports the proposition stated in HALSBURY'S LAWS OF ENGLAND.

On the other hand, I was referred to, but have not had an opportunity of fully examining, the judgment in *Re Defries, Norton (or Nordon) v. Levy* (8) ((1883), 48 L.T. 703), where it certainly appears that in the Chancery Division a claim in an action was held to be barred by a decision of the same Court of Chancery in another action, but given since the issue of the writ in the action in which the estoppel was raised. In my judgment, therefore, it is not right to say that the plea of *res judicata* cannot be founded on a judgment given after the issue of the writ in the action in which it is sought to raise the plea of estoppel.

Much valuable guidance on the topic of *res judicata* is to be found in the classic judgment of LUSH, J., in *Ord v. Ord* (9) ([1923] 2 K.B. 432), and in particular in the passage where LUSH, J., said (*ibid.*, at p. 439):

" . . . there is no difficulty in seeing what, in its strict and proper sense, the plea of *res judicata* means. The words ' *res judicata* ' explain themselves. If the *res*—the thing actually and directly in dispute—has been already adjudicated upon, of course by a competent court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of *res judicata*, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with *res judicata* in its strict sense. As is said in the notes to the *Duchess of Kingston's Case* (10) ((1776), 2 Smith, L.C. 12th Edn. 754 at p. 767) . . . ' An estoppel, therefore, is an *admission*; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it '. The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law."

There are other passages in the same judgment which support the view, which I suggested in the course of the argument, that it is a matter of evidence. If it is a matter of evidence, it is a question what evidence can properly be given in this court today, and if it is a matter of evidence I can see no reason at all why I should be limited in considering evidence consisting of a judgment to a case where that judgment has been given before the issue of the writ in the present action.

A further point was taken of this nature. It was said that the issues in the county court action and the issues in the present action were not the same because in the county court action the matter in issue between Miss Elsworth

A and the two defendants to that action was whether or not there had been a breach of their respective duties towards her, whereas in the present action the question was whether there had been a breach of the duties: (i) owed by the defendant to the plaintiff, and (ii) owed by the plaintiff to the defendant. Those are different legal issues of course, in a sense, but I do not feel that the fact that they are technically different should prevent effect being given to the plea of
 B estoppel in a case where, having examined the pleadings in the county court action and compared them with the pleadings in the present action, I am satisfied that the issues of fact, and the evidence to support them in respect of liability, would be identically the same. In *Ord v. Ord* (9) ([1923] 2 K.B. at p. 443) LUSH, J., quoted this passage from the judgment of LORD WESTBURY, L.C., in *Hunter v. Stewart* (11) ((1861), 4 De G.F. & J. 168 at p. 178):

C “One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both.”

Furthermore, it seems to me that as the county court judge's decision on the material matter in the present action was as to the apportionment of the
 D responsibility which rested on the two defendants in that action, that question is identical with and would be supported by the same evidence as the issues in this action if it were allowed to go to trial.

The conclusion which I have reached on that point seems to me to be wholly consistent with the views expressed by the Court of Appeal in *Marginson v. Blackburn Borough Council* (12) ([1939] 1 All E.R. 273), and I do not feel that it
 E is inconsistent with the decision of CASSELS, J., in *Johnson v. Cartledge & Matthews* (13) ([1939] 3 All E.R. 654), if I correctly understand the effect of that judgment. If there are inconsistencies between those two, it is my duty to follow the decision in *Marginson v. Blackburn Borough Council* (12) in the Court of Appeal.

I was referred to a short citation of the judgment of the High Court of
 F Australia in *Jackson v. Goldsmith* (14) ((1950), 81 C.L.R. 446), but I have not had the opportunity of seeing the judgment*. As I understand, that case went as follows. A motor car driven by G. was in collision with J.'s motor cycle on which W. was a passenger. W. brought an action against J. for personal injuries arising out of the collision, and in that action J. served a third-party notice on G. In the action between W. and J., G. sought to set up an estoppel
 G based on a judgment in an action which G. had brought against J. arising out of the same collision, and in which G. recovered, it being held that J. was one hundred per cent. to blame. The High Court of Australia rejected the plea

* In *Jackson v. Goldsmith* (14) ((1950), 81 C.L.R. 446) the facts and decision, as taken from the headnote, were these. W. brought an action in the Supreme Court of New South Wales against J. for damages for personal injuries arising out of a collision
 H between J.'s motor cycle, on which W. was a passenger, and a car owned and driven by one G. Prior to this action G. had brought an action in the District Court against J. for damage to his car, alleging that the damage was caused by J.'s negligence, and recovered a verdict. In the Supreme Court proceedings J. joined G. as a third party, alleging that G. by his negligence had materially contributed to the collision and claimed under the Law Reform (Miscellaneous Provisions) Act, 1946 (New South Wales), to be entitled to recover either contribution or a complete indemnity from him in respect of any verdict which W. might recover. In a plea G. alleged, inter alia, that
 I (i) the District Court found that he was not guilty of any contributory negligence and that J. was guilty of negligence which caused damage to him; and (ii) that the present cause of action was the same as that which he claimed against J. in the District Court and that the negligence alleged against him by J. was the same supposed negligence which J. alleged against him in the District Court. J. demurred to the plea. On an appeal from the Supreme Court of New South Wales, it was held by the High Court of Australia (FULLAGAR, J., dissenting), that the proceedings in the District Court did not determine whether there was any breach by G. of a duty which he owed to W., and therefore the decision in that court did not estop J. from alleging that G. was guilty of a breach of duty which he owed to W.

of estoppel on the ground that the previous action had not decided the same issues as arose in the first action. It seems to me that there is a distinction between that case and this, as in the Australian case the judgment which it was sought to set up as an estoppel was a judgment in an action between two only of the three parties who were involved in the collision, and I can well understand that the introduction of an additional party might operate to destroy the conclusiveness of the judgment given in the earlier action. A B

There is only one further point with which I need deal in regard to the admission of this estoppel. It was contended that this was really a plea of estoppel by record and that the record could only be proved by the production of the record itself, which had not been done. It was not disputed that the previous case was heard by a court of record and that its judgment could have been proved by the production of the judgment book in which the registrar, under the County Court Rules, 1936, Ord. 24, is required to enter up the judgment. Admitting that, I think that on the pleadings in this case it is quite plain that, by the admission made in para. 1 of the reply, the plaintiff has dispensed with that form of proof, if that form of proof be the only method of record, and I am very far from being satisfied that that is so. On these facts, since all the allegations in para. 3 of the defence were admitted by the plaintiff except the question whether there were contribution proceedings, and having regard to the fact that I have been satisfied by the statement at the Bar made by Mr. Hollings that in the county court proceedings the decision of the county court judge was as stated in para. 3, I am unable to give effect to the contention that the judgment in those proceedings does not operate as bar merely by reason of the fact that it is not supported by record. I have reached the conclusion that the plea of estoppel succeeds. C D E

*Judgment for the plaintiff for £33 6s. 8d.**

Solicitors: *Shaw, Smith & Co.*, Manchester (for the plaintiff); *A. W. Mawer & Co.*, Manchester (for the defendant).

[*Reported by G. M. SMAILES, Esq., Barrister-at-Law.*]

* I.e., one sixth of £450 less five sixths of £50. The amounts of £450 and £50 were agreed (see p. 451, letter C, ante).

A

HOLDOWANSKI v. HOLDOWANSKA
(OTHERWISE BIALOSZEWSKA) AND PRICE.
TACZANOWSKA (OTHERWISE ROTH) v. TACZANOWSKI
(LYSTEK cited).

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 14, 15, 16, 17, 29, 30, 31, June 1, 4, October 2, 8, 1956.]

Marriage—Foreign marriage—Validity—Marriage in Italy of Polish nationals domiciled in Poland—Ceremony performed by Polish army chaplain according to rites of Roman Catholic church—Not valid by lex loci celebrationis—Whether validated as an act of “internal administration” of the armed forces—Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 22—Polish Resettlement Act, 1947 (10 & 11 Geo. 6 c. 19), s. 9.

C

In July, 1946, the petitioner and the respondent went through a ceremony of marriage in Italy. The parties were both Polish nationals and were domiciled in Poland. The respondent was a member of the Polish forces allied with the United Kingdom; after Feb. 14, 1946, however, those forces were no longer recognised by the Polish (“Lublin”) government as part of the Polish army. The ceremony of marriage was performed according to the rites of the Roman Catholic church by a Roman Catholic priest serving as a Polish army chaplain. The marriage was not valid by Italian law since certain articles of the Italian Civil Code were not read to the parties by the officiating priest nor was the ceremony registered in the Italian civil register. Although Italian law would have recognised a ceremony of marriage performed in Italy between two foreigners to be valid if it were performed according to the law of their common nationality, yet in 1946 by a decree of the Polish (“Lublin”) government dated Sept. 25, 1945, the only form of marriage valid by Polish law was marriage before a civil registrar and the power of Polish army chaplains to perform valid marriages was revoked.

D

E

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On a petition for nullity it was contended by the respondent that the marriage was valid by English law (i) since it was an act of “internal administration” within the meaning of the Polish Resettlement Act, 1947, s. 9, and therefore validated by virtue of s. 9 (8)* of that Act; (ii) because, since the Polish (“Lublin”) government no longer recognised the Polish forces in Italy as part of the Polish army those forces must have been at the date of the ceremony of marriage part of the British army, and therefore the marriage had been performed “within the British lines” by a chaplain officiating under the orders of a commanding officer of a British army serving abroad, within the meaning of the Foreign Marriage Act, 1892, s. 22†; and (iii) because the requirements of Italian law, i.e., of the *lex loci celebrationis*, as to the form of the marriage did not apply as the respondent was a member of a belligerent army in occupation of Italy.

G

H

Held: the marriage was null and void for the following reasons—

I

(i) the Polish Resettlement Act, 1947, s. 9, did not provide a statutory basis for the validity of the marriage because, although regulations as to the formation and registration of marriages were matters of internal administration within that section, the “said forces” referred to in sub-s. (8) were those defined in s. 1 (1) of the Allied Forces Act, 1940, viz., foreign forces present in the United Kingdom or on board His Majesty’s ships or aircraft, and did not include the respondent when he was in Italy (see p. 462, letter H, to p. 463, letter D, post).

* Section 9 (8) is printed at p. 462, letter B, post.

† On Feb. 1, 1948, a new s. 22 was substituted by the Foreign Marriage Act, 1947 (10 & 11 Geo. 6 c. 33), s. 2 and S.R. & O. 1947 No. 2875.

(ii) the Foreign Marriage Act, 1892, s. 22, did not apply as neither the petitioner nor the respondent was a British subject (see p. 463, letter G, to p. 464, letter A, post) and

(iii) although a marriage in common law form of a member of the armed forces occupying a foreign state would be recognised by the court when marriage by the *lex loci* was impossible or objectionable to the conscience, and although this principle extended to the marriage of a foreigner (*Ruding v. Smith* (1821), 2 Hag. Con. 371, applied), yet in the present case the celebration of a marriage which would have been valid by Italian law had not been impossible (*Savenis v. Savenis*, [1950] S.A.S.R. 309, distinguished).

Observations as to the presumption of validity of marriage (see p. 460, letter B, and p. 466, letter D, post).

[**Editorial Note.** The present case should be considered with *Pilinski v. Pilinska* ([1955] 1 All E.R. 631) to which KARMINSKI, J., refers at p. 465, letter I, post. The enactments referred to in the holding (i) above have been repealed by the Statute Law Revision Act, 1953, and the Visiting Forces Act, 1952, respectively, but the repeals would not have affected the validity of the marriage if it had been valid at the time of the ceremony (see the Interpretation Act, 1889, s. 38 (2) and the Act of 1953, s. 1).

As to the *lex loci celebrationis* governing the forms and ceremonies of marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 93, para. 168, note (1); and for cases on the subject, see 11 DIGEST (Repl.) 462-464, 953-971.

As to the presumption of validity of marriage, see 15 HALSBURY'S LAWS (3rd Edn.) 347, para. 627; and for cases on the subject, see 27 DIGEST (Repl.) 69, 70, 469-484.

For the Allied Forces Act, 1940, s. 1, see 22 HALSBURY'S STATUTES (2nd Edn.) 682.

For the Polish Resettlement Act, 1947, s. 9, see 22 HALSBURY'S STATUTES (2nd Edn.) 695.

For the Foreign Marriage Act, 1892, s. 22, as originally enacted, see 11 HALSBURY'S STATUTES (2nd Edn.) 795, note.]

Cases referred to:

- (1) *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*, (1881), 6 App. Cas. 364; 44 L.T. 895; sub nom. *Sastry Velaidar Aronegary & Sembacutty Sinnepullei v. Kassanader Sambonade*, 50 L.J.P.C. 28; 27 Digest (Repl.) 69, 476.
- (2) *Piers v. Piers*, (1849), 2 H.L. Cas. 331; 13 L.T.O.S. 41; 9 E.R. 1118; 27 Digest (Repl.) 75, 555.
- (3) *Ruding v. Smith*, (1821), 2 Hag. Con. 371; 1 State Tr. N.S. 1054; 161 E.R. 774; 11 Digest (Repl.) 459, 930.
- (4) *Maclean v. Cristall*, (1849), 7 Notes of Cases, Supp. xvii. Supreme Court of Judicature; 27 Digest (Repl.) 68, 157.
- (5) *Savenis v. Savenis*, [1950] S.A.S.R. 309; 11 Digest (Repl.) 461, 499.
- (6) *Pilinski v. Pilinska*, [1955] 1 All E.R. 631; 3rd Digest Supp.
- (7) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; 11 Digest (Repl.) 462, 954.

Petitions.

In these two suits the same question arose, namely, whether or not a ceremony of marriage performed in Italy (in June and July, respectively, 1946) according to the rites of the Roman Catholic church by a Polish army chaplain between two Polish nationals, domiciled in Poland, one of whom was serving with the Polish forces allied with the United Kingdom, constituted a valid marriage.

In the first suit Aleksander Holdowski presented a petition dated Apr. 14, 1955, for a declaration that the marriage which took place on June 8, 1946, was

A null and void, alternatively for a divorce on the ground of adultery. The suit was undefended (save as to custody of the three children of the parties) and came before KARMINSKI, J., on July 11, 1955. On that date HIS LORDSHIP heard evidence called on behalf of the petitioner and adjourned the case for argument by the Queen's Proctor.

B In the second suit Krystyna Taczanowska, otherwise Roth, presented a petition dated June 15, 1955, for a declaration that her marriage which took place on July 16, 1946, was null and void. By his answer the respondent alleged that the marriage was valid and subsisting and prayed for a decree of divorce on the ground of adultery and desertion. On Feb. 21, 1956, it was ordered that the issue of nullity be tried first before the issues of adultery and desertion. The two suits then came on together before KARMINSKI, J., on May 14, 1956. The headnote is based on the facts in the suit of Taczanowska.

C *Paul Wrightson* for the petitioner, Holdowanski.

C. Sleeman for the respondent, Holdowanska.

J. E. S. Simon, Q.C., G. Dobry and A. St. J. Davies for the petitioner, Taczanowska.

D *Harold Brown, Q.C., and N. H. Curtis-Raleigh* for the respondent, Taczanowski.
R. F. Ormrod for the Queen's Proctor in both suits.

Cur. adv. vult.

Oct. 8. **KARMINSKI, J.**, read the following judgments: I shall give judgment first in *Taczanowska v. Taczanowski*. In this case the petitioner, then Krystyna Roth, spinster, went through a form or ceremony of marriage with the respondent in the parish church of the Resurrectionists in Rome on July 16, 1946. At that time both parties were Polish nationals; the petitioner was a civilian refugee living temporarily in a convent in Rome, the respondent was an officer in the Polish 2nd Corps and serving in Italy in the course of his military duties. The ceremony of marriage was performed by a Roman Catholic priest serving as a Polish army chaplain. After the ceremony of marriage the parties cohabited until August, 1950, and had from the early part of 1947 lived together in England. There is issue of the petitioner by the respondent one child born in November, 1947.

The petitioner now alleges that the ceremony of marriage in Rome was null and void because it did not comply with the *lex loci*, namely, Italian law. It is alleged by her, and it is not denied by the respondent, that arts. 143, 144 and 145 of the Italian Civil Code were not read over to the parties by the officiating priest. Further, the ceremony of marriage was not registered in the Italian civil register of marriages as required by Italian law. It is conceded by the petitioner that Italian law would nevertheless recognise the validity of the marriage, if such marriage was valid by Polish law, since Polish law was at the material date the national law of both spouses. But it is said by the petitioner that by the Polish Matrimonial Law, 1945, which came into force on Jan. 1, 1946, a religious ceremony of marriage had no force or effect in law and was, in short, no marriage at all. The respondent, by his answer, asserts that the ceremony of marriage was and is valid and subsisting. He contends that the Polish law of Nov. 25, 1926, authorising army chaplains to marry military personnel was still in force so far, at any rate, as Polish troops in Italy in 1946 were concerned. Further, the respondent contended that if Polish law governed the marriage, it was an act of internal administration within s. 1 (1) of the Allied Forces Act, 1940. The respondent has charged the petitioner with adultery and desertion, but by an order dated Feb. 21, 1956, it was directed that the issue of nullity be tried first before the issues of adultery and desertion. I have had no evidence on the cross-charges made by the respondent.

I desire to say at the outset of the present case that there can be no doubt that when the ceremony of marriage was performed in 1946, the parties desired to be

lawfully married and at that time entertained no doubt as to the validity of the ceremony then performed. Both parties were Roman Catholics and the ceremony was performed by a Roman Catholic priest. Counsel for the respondent rightly emphasised the heavy burden which must lie on a petitioner alleging that such a marriage is invalid. The law presumes, unless the contrary be clearly proved, that where a man and woman are proved to have lived together as man and wife that they were living together in consequence of a valid marriage and not in a state of concubinage: see *Sastry Velaidier Aronegary v. Sembecutty Vaigalie* (1) ((1881), 6 App. Cas. 364 at p. 371), where the earlier authorities were considered. To rebut the presumption in favour of a valid marriage a mere balance of probabilities will not suffice. The evidence must be clear and conclusive: see *Piers v. Piers* (2) ((1849), 2 H.L. Cas. 331). I approach this case, therefore, fully conscious of the presumption in favour of the validity of a marriage entered into in the circumstances which I have briefly set out. I must now consider the matters which have been raised as impugning the validity of this marriage.

Where formalities are concerned, English law looks to the *lex loci*. This marriage was celebrated in Italy and I must look therefore first to the requirements of Italian law. Dr. Nissim, a Doctor of Law of the University of Florence and a member of the Italian Bar, made it perfectly clear that this ceremony of marriage was by Italian law no marriage at all. The defects were twofold; first the officiating priest failed to read to the parties arts. 143, 144 and 145 of the Italian Civil Code, and secondly the marriage was not registered with the Italian civil registrar as required by Italian law. Dr. Nissim also pointed out that Italian law provides an exception in the case of two foreigners marrying in Italy according to the law of their common nationality. He agreed, therefore, that if the formalities of this ceremony of marriage were valid by Polish law, then it would be recognised as valid by Italian law. Dr. Nissim summarised his views in answer to the following question put to him in re-examination by counsel for the petitioner: "If the Italian courts find that neither Italian law has been complied with nor the national law of the two parties so far as formalities are concerned, what judgment will they pronounce on the validity of the marriage?" Answer: "They will pronounce that there is no marriage according to Italian law."

I now turn to the requirements of Polish law as to formalities. It is not, in my view, necessary to make a critical examination of the Polish law of marriage before Jan. 1, 1946. It is sufficient to observe that earlier partitions of Poland had left their mark on the personal law, and that prior to Jan. 1, 1946, no less than four systems of law operating on a territorial basis determined the nature of the formalities of marriage. For the purposes of this case it is sufficient to refer to the Law of Nov. 25, 1926, concerning the ecclesiastical organisation of the army clergy. By s. 13 of that Law, army chaplains had power to solemnise legal and valid marriages of military persons. I am satisfied that such power extended beyond the then territorial limits of the Polish Republic and to places wherever there were Polish troops and Polish chaplains. Before July 5, 1945, the position of the Polish armed forces so far as His Majesty's government was concerned was defined "as the armed forces of the Republic of Poland allied with the United Kingdom", see art. 1 of the Anglo-Polish Agreement of Aug. 5, 1940. On July 5, 1945, His Majesty's government recognised as the government of Poland the Polish Provisional Government of National Unity, sometimes more shortly described as the Lublin government. By a decree of Sept. 25, 1945, the Lublin government introduced a new matrimonial law with effect from Jan. 1, 1946. That law provided a uniform matrimonial law for the whole of Poland, and at the same time provided that the only valid form of marriage was one before a civil registrar. No other form of marriage in Poland was thereafter recognised by Polish law. The power of army chaplains to perform marriages conferred on them by the Law of 1926 was abrogated by art. 1 of the introductory

- A provisions to the Law on Documents of Civil Status. By a Note dated Feb. 14, 1946, from the Polish Ministry of Foreign Affairs to His Majesty's government, the Lublin government stated that as from that date the Polish forces abroad could no longer be considered as units of the Polish army. Professor Kuratowski, a member of the Polish and of the English Bars, expressed the view that the effect of the Law of September, 1945, would take away from chaplains the right to
- B perform any valid marriage ceremony. Professor Kuratowski in cross-examination agreed that Polish law still looks at the *lex loci* in cases where Polish citizens marry abroad. It was suggested to him that a marriage celebrated abroad could cure a breach of the *lex loci* by registration in Poland, but he expressed the view, which I accept, that the provisions for registration in the Law of 1945 are to deal with cases where registration has been impracticable and not to create a new
- C marriage from a void marriage.

- On behalf of the respondent, Dr. Bloch gave evidence as to Polish law. Dr. Bloch has had long experience at the Polish Bar prior to 1939 and subsequently as a legal adviser to the Polish forces. Dr. Bloch expressed the view that art. 11 of the introductory provisions to the Law on Documents of Civil Status contained some kind of dispensation which would save this marriage. In his view art. 11
- D was to cover the administrative gap between January, 1946, and such time as sufficient staff and offices could be found to perform civil marriages. Meanwhile the former ecclesiastical authorities could continue to perform marriages. Article 11 commences with the words: "In those parts of the state", and Dr. Bloch agreed that these words referred only to the territory of Poland. But Dr. Bloch maintained that a Polish judge would, or at any rate should, by analogy apply
- E the provisions of art. 11 to marriages of Poles abroad and in particular to a case of this kind where Polish military personnel would prefer to be married by their own chaplains rather than by an Italian priest or registrar. I am bound to say that I thought Dr. Bloch's suggestion was more ingenious than convincing. It is difficult to see how the analogy suggested could apply when the power of army chaplains to celebrate marriages had been expressed cancelled by
- F the same introductory provisions. Further, it was never suggested that Polish military personnel in Italy were unable to enter into a marriage valid by Italian law in a Roman Catholic church, provided always that the required sections of the Italian Civil Code were read over and the marriage duly registered with the Italian civil authorities. Finally Dr. Bloch agreed with counsel for the petitioner that this marriage was invalid according to Polish law except so far as
- G it was saved by art. 11 of the introductory provisions. Professor Kuratowski was recalled to express his opinion on Dr. Bloch's theory of analogy. He expressed the view without hesitation that the Polish chaplains had lost their authority to celebrate marriages under Polish law either in Poland or elsewhere, and that in any event art. 11 was concerned only with Polish territory and not with Poles who were abroad. In answer to a question in cross-examination by
- H counsel for the respondent, Professor Kuratowski said: "There is no place to apply any kind of analogy, it is a very simple question." I agree entirely with both branches of this answer and am unable to accept Dr. Bloch's theory of analogy. In my view, therefore, this ceremony of marriage was invalid both by Italian law and by Polish law existing at the time of the ceremony. That it was performed in good faith by the officiating chaplain I have no reason at all
- I to doubt. Indeed it is at least very probable that the new Polish Law of 1945 was not communicated to the Polish command in Italy and was, therefore, in 1946, unknown to the chaplains to that army.

Considerations of Italian and Polish law do not, however, conclude the matter. Counsel for the respondent relied on the Polish Resettlement Act, 1947, as affording him a statutory basis in English law for asserting a valid marriage. Counsel relied particularly on s. 9* of the Polish Resettlement Act, 1947, which

* Repealed by the Statute Law Revision Act, 1953, s. 1 and Sch. 1.

contained provisions for the discipline and internal administration of certain Polish forces. He argued that the words "internal administration"* included the power of regulating the formalities of marriages in which one or both of the parties were members of the Polish armed forces. In particular he relied on s. 9 (8) which read as follows:

"As respects any period between Jan. 1, 1945, and the passing of this Act, the powers conferred by s. 1 (1) of the Allied Forces Act, 1940, shall be deemed to have been exercisable in relation to the said forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognised by the Government of Poland, and any Order in Council made under or by virtue of that Act shall be deemed to have had effect accordingly."

In the submission of counsel for the respondent, the words "said forces" related to the forces set out in s. 1 (1) of the Polish Resettlement Act, 1947. Both limbs of counsel's submission require examination. Counsel for the Queen's Proctor agreed that "internal administration" included matters affecting the celebration and registration of marriage. Counsel for the petitioner contended for a narrower meaning and submitted that the celebration and registration of marriage could not be matters of internal administration. The industry of counsel failed to find any authority in which the meaning of these words had been judicially discussed; nor do I find it easy to decide the precise extent of the sphere of internal administration in a military body.

I have looked both at the Queen's Regulations for the Army, 1955, and Queen's Regulations and Admiralty Instructions, 1953, in order to ascertain the regulations concerning marriage in Her Majesty's forces. Paragraphs 1682 to 1695 inclusive of the Queen's Regulations for the Army deal with, inter alia, the steps to be taken before marriage and its subsequent registration. Queen's Regulations and Admiralty Instructions are somewhat more extensive, and paras. 4441 to 4488 inclusive contain detailed instructions on such matters as banns and notice of marriage, marriages abroad, and registration of marriage. Counsel for the Queen's Proctor also called my attention to the provisions of the Visiting Forces (British Commonwealth) Act, 1933. Section 8 (1) of that Act provides that "internal administration" in relation to any visiting forces includes the administration of property of a deceased member of the force. From that provision counsel submitted that it was clear that internal administration required the application of the personal law of the state in which a deceased member of a visiting force was domiciled for the purposes of administering his estate. So far as the Polish forces in England were concerned, an order issued on June 13, 1941, by the Commander-in-Chief and Minister for Military Affairs dealt in some detail with the duty of chaplains in regard to documents of civil status. Under para. 5 of that order it was specifically directed that the chaplains should ensure that the provisions of civil law in force in the United Kingdom be strictly adhered to, in particular with regard to marriages.

I have come to the conclusion that regulations as to the formation and registration of marriage are matters of internal administration within the meaning of s. 9 (2) of the Polish Resettlement Act, 1947. To exclude matters affecting marriage from internal administration would, in my view, be to give too narrow a meaning to these words having regard to the complex organisation of any modern military formation, especially when serving abroad. Though counsel for the

* These words occurred in s. 9 (2) of the Polish Resettlement Act, 1947, and in the marginal heading to the section. Section 9 (2) provided: "Members of the said forces shall be under obligation to observe, in matters concerning their discipline and internal administration, the rules in force as to those matters under the law of Poland on Jan. 1, 1945 . . ."

A Queen's Proctor was in agreement with counsel for the respondent on the meaning of internal administration, he argued that the Polish Resettlement Act, 1947, was of no assistance to the respondent because of the provisions of s. 1 of the Allied Forces Act, 1940. Section 1 (1) of that Act provided* as follows:

B "Where any naval, military or air forces of any foreign power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that power."

C It is clear that apart from those on board His Majesty's ships or aircraft the Act is limited to those for the time being present in the United Kingdom. Counsel for the respondent, however, contended that the words "said forces" in s. 9 (8) of the Polish Resettlement Act, 1947, referred to the forces mentioned in s. 1 (1) of the same Act†. I am, however, satisfied that the argument of counsel for the D Queen's Proctor, which was supported by counsel for the petitioner, is correct and that the reference to the said forces in s. 9 (8) of the Polish Resettlement Act, 1947, relates to the forces defined in s. 1 (1) of the Allied Forces Act, 1940. I do not think, therefore, that the Polish Resettlement Act, 1947, validates the present marriage.

E It was further argued by counsel both for the Queen's Proctor and the respondent that this marriage was a valid marriage by reason of the provisions of the Foreign Marriage Acts, 1892 to 1947‡. It is true that the Foreign Marriage Act, 1892, limits the application of that Act to marriages between parties of whom one at least is a British subject. But it was contended by counsel for the Queen's Proctor that s. 22 of the Act of 1892, as originally enacted§, was not so limited, since it dealt with marriages within the British lines and not with F marriages before consular or other civilian officers. Counsel for the Queen's Proctor rightly emphasised that marriage within the lines had been given statutory recognition in 1823||, and suggested that it had been re-enacted in 1892 in order to complete the statute law governing foreign marriages; but I can see nothing in either the Act of 1892 or the Act of 1947 which takes G marriages within the lines outside the limitations of s. 1 of the Act of 1892. Nor do I think that the historical approach supports the argument of counsel for the Queen's Proctor, since the preamble to the Act of 1823 describes it as an Act to relieve His Majesty's subjects from all doubt concerning the validity of marriages solemnised abroad. In the present case neither of the parties was at

H * The Act was repealed by the Visiting Forces Act, 1952, as from June 12, 1954.

† Section 9 (1) of the Polish Resettlement Act, 1947, began: "The Polish forces mentioned in s. 1 (1) (a) (b) of this Act . . .", and thus the reference in s. 9 (8) to the "said forces" might refer to certain forces mentioned in s. 1 (1) of that Act.

‡ By s. 1 of the Foreign Marriage Act, 1947, which came into force on Feb. 1, 1948, s. 22 of the Foreign Marriage Act, 1892, which validates marriages solemnised within the British lines by chaplains and other persons officiating under the orders of the commanding officer of a British army serving abroad, is deemed as regards marriages solemnised before Feb. 1, 1948, always to have had effect as if (a) the reference to a British army serving abroad were construed as referring to any part of the naval, military or air forces of His Majesty so serving; and (b) the reference to the British lines were construed as referring to any place at which any part of the said forces serving abroad was stationed.

§ A new s. 22 of the Foreign Marriage Act, 1892, was substituted with effect from Feb. 1, 1948 (see S.R. & O. 1947 No. 2875) by s. 2 of the Foreign Marriage Act, 1947.

|| I.e., by Stat. 4 Geo. 4 c. 91, entitled "An Act to relieve His Majesty's subjects from all doubt concerning the validity of certain marriages solemnised abroad"; the Act was repealed by the Foreign Marriage Act, 1892, s. 26 and Schedule.

the time of the ceremony of marriage a British subject, and in my view the provisions of the Foreign Marriage Acts, 1892 to 1947, do not apply to the present case. A

I do not think, therefore, it is necessary to decide the more difficult question whether the chaplain who performed the ceremony in the present case was a chaplain operating under the orders of the commanding officer of a British army serving abroad. It is true that in 1946 the Polish corps in Italy was supplied and paid through British military channels, and was for strategic, and perhaps for tactical, purposes under the orders of the British military commander-in-chief. General Kopanski, who was chief of staff of the Polish forces from 1943 to 1945, expressed the view in evidence that General Anders, in command of the Polish 2nd Corps, was under the operational command of the Allied 8th Army but was completely autonomous as a corps commander. The chaplains of the Polish 2nd Corps were under the orders of their own unit commanders at the various levels, and ultimately under the orders of General Anders himself. General Kopanski thought that the British commander-in-chief could in turn have given General Anders orders in respect of the Polish chaplains. I do not think that this somewhat remote, and perhaps hypothetical, control could amount to the Polish chaplains officiating under the orders of the commanding officer of a British army serving abroad. As it is not now necessary for me to decide this point, I prefer merely to express my doubts and difficulties on it. B C D

There remains counsel for the Queen's Proctor's last, and perhaps most interesting, point in support of the validity of the present marriage. He argued that where a marriage takes place in a country occupied by a belligerent army, the requirements of the *lex loci* in point of form no longer applied. In the present case, it was contended, the respondent was a member of the occupying force and therefore exempt from the requirements of the *lex loci*. The precise status of the Polish 2nd Corps in Italy was the subject of a question agreed by counsel and submitted with others to the Foreign Office for answer. The answer of the Foreign Office was that both before and after Feb. 14, 1946, the Polish land forces in Italy were forces in belligerent occupation of Italian territory. Counsel for the petitioner submitted that the meaning of that answer was a matter of law for the court to decide. I do not think that the Foreign Office answer (taken in conjunction with another answer as to the position in Italy of the British land forces) means more than this: that the allied forces having fought their way by force of arms into Italy in 1943, were still there under arms in 1946, and indeed remained there until the conclusion of the peace treaty with Italy in September, 1947. In my view it is sufficient to accept that the respondent was at the time of the ceremony of marriage a member of a military force in occupation of a foreign state. The position of such persons with regard to the formalities of marriage has always been recognised by English law as one which may need special consideration. E F G H

A number of authorities were cited by counsel, but it is sufficient to refer to the judgment of LORD STOWELL in *Ruding v. Smith* (3) ((1821), 2 Hag. Con. 371). LORD STOWELL pointed out (*ibid.*, at p. 381) the inconvenience and hardship which might be caused by compelling the conqueror to submit to the laws of the conquered. In the particular circumstances of that case it appeared to be impossible for the parties to be married by Dutch law, and they were married under a licence from the British governor by the chaplain of the English garrison, the husband being himself in transit to the East Indies in the course of his military duties. LORD STOWELL found in favour of the validity of the marriage and based his decision on (i) the distinct British character of the parties; (ii) their independence of Dutch law in their own British transactions; (iii) the insuperable difficulties of getting married by Dutch law; (iv) the countenance given by I

- A British authority to the marriage in a country then under British dominion. It will be observed that LORD STOWELL placed great emphasis on the national, that is the British, side of the transaction: but I do not find in his judgment anything which would indicate that he would of necessity have refused to have taken the same view in the case of a foreigner. There can be no doubt in the light of the decided cases that when a marriage by the *lex loci* is impossible, or at least objectionable to the conscience, a marriage in common law form will be recognised by the courts of this country.

The principle, which arose in many cases from settlers and colonists going to new and undeveloped countries, was stated as follows by SIR T. ERSKINE PERRY, C.J., in *Maclean v. Cristall* (4) ((1849), 7 Notes of Cases, Supp. xvii at p. xxiv):

- C “The rule in such case is, that although colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition.”

It will be observed that the principle as there stated refers to the law of England, and not to any other municipal law. Assuming, however, that the parties have brought their personal law with them, it would be Polish and not English law; and for the reasons given above, this form of marriage would not be recognised as valid by Polish law as it stood at the time of the ceremony. Counsel for the Queen's Proctor contended that the Polish 2nd Corps was at the time of the ceremony of marriage a *de facto* part of the British forces in Italy, and that they, having been disowned by the Lublin government, had become mercenaries hired by His Majesty's government. Whatever the position of the Polish 2nd Corps at the time of this ceremony may have been, I am at least satisfied on the evidence that it was not an integral part of the British armed forces in Italy. However, even if the members of the Polish 2nd Corps were in the position of foreigners serving in the British forces, I apprehend that their personal law would remain that of their domicile, namely, Polish. It is not, therefore, necessary to examine the view expressed by a number of writers on this subject, that the common law form of marriage is available only to parties domiciled in England. See SCHMITTHOFF, *THE ENGLISH CONFLICT OF LAWS* (3rd Edn.), at p. 322.

- During the argument counsel for the petitioner called my attention to *Savenis v. Savenis* (5) ([1950] S.A.S.R. 309). There the husband, a Lithuanian who had been a prisoner of war in Germany, went through a ceremony of marriage in November, 1945, in Germany before a Roman Catholic priest. By German law at that time only a civil ceremony before a registrar could create a valid marriage; but it was found that at that time no registrars of marriages were available, nor was there any official to record a valid marriage. In a considered judgment, MAYO, J., held that the marriage was valid, notwithstanding the defects in form under German law, on the grounds that a marriage in accordance with the *lex loci* was at the time impossible and that the court could have recourse to the law of the husband's domicile, namely, Lithuania. MAYO, J., based his decision on the principle that where a marriage cannot be lawfully solemnised owing to local conditions at the time, then it may be right to extend the area of legal recognition given to marriages that conform to our own common law. Counsel for the petitioner argued that that decision was wrong. I prefer to distinguish that decision on the facts, without expressing a view as to its correctness. In *Savenis v. Savenis* (5), MAYO, J., found as a fact that a marriage according to the forms required by the *lex loci* was impossible. In the present case there was no obstacle to the performance in 1946 of a valid ceremony of marriage between Poles in Italy according to the Roman Catholic rites. There was certainly no insuperable difficulty, indeed no difficulty of any kind, in the celebration at that time and place of a marriage valid by Italian law.

One further case requires brief consideration. In *Pilinski v. Pilinska* (6) ([1955] 1 All E.R. 631) the husband went through a ceremony of marriage with

the respondent in Germany in August, 1946. The ceremony was performed by the regimental chaplain at a Roman Catholic church in Germany. Both parties were of Polish nationality, the husband at that time serving with the allied forces in Germany. At the time of the ceremony of marriage German law required a civil marriage before a registrar; no other form of marriage was valid. A German decree of August, 1948, enabled ceremonies of marriage of this kind to be validated if duly registered before Dec. 31, 1950, but no attempt had been made to register this ceremony. MR. COMMISSIONER LATEY, Q.C., in a considered judgment, held that the religious ceremony was not effective to create a valid marriage. He based his decision on the well-known principle of *Berthiaume v. Dastous* (7) ([1930] A.C. 79), that subject to certain exceptions the validity of a foreign marriage is governed as to form by the *lex loci celebrationis*. In *Pilinski v. Pilinska* (6) there was no suggestion that in August, 1946, a civil marriage was impossible or impracticable. The wife, who was represented by counsel, did not oppose the petition, with the result that that case was not so fully argued as the present one. Nor does it appear that *Savenis v. Savenis* (5) was brought to the learned commissioner's notice.

I am, therefore, left in this position. There can be no doubt that the parties to this suit went through a ceremony of marriage in Rome not only with the desire of entering into a valid marriage, but in the belief that the ceremony was effective. The presumption in favour of a valid marriage is, as I have pointed out earlier in my judgment, a very strong one. However, the presumption, though strong, may be rebutted, and must indeed fail before compelling evidence the other way. For the reasons set out in this judgment I have come to the conclusion, though with very considerable reluctance, that the ceremony of marriage celebrated between the petitioner and the respondent on July 16, 1946, must be declared to be null and void and I pronounce a decree nisi of nullity accordingly.

In *Holdowanski v. Holdowanska* the ceremony of marriage was performed on June 8, 1946, at the camp chapel of the Polish settlement of Barletta, Italy. That ceremony had the same defects as to form under Italian law as had the ceremony in *Taczanowska v. Taczanowski*. Both the petitioner and the respondent were Polish nationals and the ceremony was performed by the Polish chaplain in a Roman Catholic church or chapel according to Roman Catholic rites. For the reasons given in my judgment in *Taczanowska v. Taczanowski* I find that this ceremony of marriage was null and void and I pronounce a decree nisi of nullity accordingly.

Decrees accordingly.

Solicitors: In the suit of *Holdowanski*, *Miller & Smiths*, agents for *C. L. Hodgkinson & Benton*, Walsall (for the petitioner); *Peacock & Goddard*, agents for *Haden & Stretton*, Walsall (for the respondent). In the suit of *Taczanowska*, *E. H. Silverstone & Co.* (for the petitioner); *Lawrence & Co.* (for the respondent); *Queen's Proctor* in both suits.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A

MORRIS MOTORS, LTD. v. HOPGOOD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ashworth, JJ.), October 11, 1956.]

Factory—Dangerous machinery—Duty to fence—Horizontal milling machine—Whether contravention of regulations if guard not in position when cutter not in motion—Horizontal Milling Machines Regulations, 1928 (S.R. & O. 1928 No. 548), reg. 3 (i), reg. 6.

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A workman injured his hand while operating a horizontal milling machine which had a jig on a movable base, the jig holding the metal object to be milled. When the machinery was started, the jig moved forward, carrying the object to be milled up to the milling cutter which remained stationary until the jig got within $\frac{1}{8}$ inch of the cutter which then started to revolve. Between the cutter and the jig when in the fully retracted position there was a strong guard consisting of vertical rods which complied with the provisions of reg. 3 (i) of the Horizontal Milling Machines Regulations, 1928*. By reg. 6* of the regulations the guard had to be kept constantly in position while the milling cutter was in motion, except when the tool setter was setting up the machine. When the jig moved forward the only space left was the space sufficient to allow the jig to bring the object to be milled up against the cutter. The workman had his hand in between the front of the jig and the fence, when the jig began to move forward under power and, pushing the workman's hand in front of it, entered the gap in the fence so that, when the cutter automatically was set in motion, his hand was severely injured. The employers were convicted of a breach of reg. 3 (i) of the regulations.

Held: the employers were not in breach of reg. 3 (i), since that regulation and reg. 6 must be read together and where, as in the present case, there was a strong guard as required by reg. 3 (i) no offence was committed unless the guard was not kept in position while the cutter was in motion.

Appeal allowed.

[For the Horizontal Milling Machines Regulations, 1928, reg. 3 and reg. 6, see 8 HALSBURY'S STATUTORY INSTRUMENTS 140, 141.]

Case referred to:

(1) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.

G

Case Stated.

H

I

This was a Case Stated by the Recorder of Birmingham. On Sept. 27, 28, 1955, and Jan. 6, 1956, the appellants, Morris Motors, Ltd., appealed against a conviction at a court of summary jurisdiction in and for the City of Birmingham on an information laid by the respondent, Joan Beatrice Hopgood, one of Her Majesty's Inspectors of Factories, the conviction being that the appellants, on Apr. 22, 1955, at Drews Lane, Birmingham, were occupiers of a certain factory and on that date in the factory the cutters of a horizontal milling machine were not fenced by a strong guard which enclosed the whole cutting surface except such part as was necessarily exposed for the milling operation, contrary to reg. 3 (i) of the Horizontal Milling Machines Regulations, 1928, and in consequence of such contravention one Malcolm Edward Perry suffered bodily injury.

The following facts were admitted. The premises occupied by the appellants at Drews Lane, Birmingham, were a factory to which the provisions of the Factories Act, 1937, applied. The appellants employed in the factory a fifteen-year-old youth named Malcolm Edward Perry, whose duty was to operate a horizontal milling machine to which the provisions of the Horizontal Milling Machines Regulations, 1928, applied. The machine was operated by electrical

* The relevant provisions of reg. 3 (i) and reg. 6 are printed at p. 469, letters D and E, post.

energy controlled by a switch. The components to be milled were placed by the operator two at a time in a jig and clamped into position by compressed air pressure controlled by a lever on top of the jig. When once clamped into position it was not possible to adjust the position of the components without releasing the air pressure. The jig was movable and designed to advance towards the cutters under power controlled by the operation of a lever at the left hand front of the machine. Between the cutter of the machine and the jig when in the fully retracted position was a fence composed of vertical metal bars adjustable in height. At all material times the fence was a strong guard made up of fourteen metal rods each $\frac{5}{16}$ inch in diameter which extended on each side of the cutters to a distance no less than half the diameter of the cutters and which was adjusted to the profile of the jig. When the jig was in the retracted position, there was a gap in the fence measuring $9\frac{1}{2}$ inches by $10\frac{1}{2}$ inches, through which access to the milling cutters was possible. On the advance of the jig towards the cutters, the jig passed into the gap in the fence and completely closed the gap. The milling cutters of the machine were automatically set in motion and remained in motion only when the jig was within a distance of $\frac{1}{8}$ inch from the cutting surface of the cutters. At the moment the jig reached the position of $\frac{1}{8}$ inch from the cutters and so long as it remained within that distance of the cutters, it would be impossible for a hand to have entered the space between the fence and the jig, and from that moment the combination of the fence and the jig formed a continuous fence.

The following facts were found to have been proved. On Apr. 22, 1955, Perry was operating the machine and, when the electric power was switched on and the jig stationary in the retracted position, he put two components into the jig and clamped them into position. At a time when his right hand was in between the front of the jig and the fence, the jig moved forward under power and, pushing the hand in front of it, entered the gap in the fence so that, when the cutters automatically were set in motion, the hand was severely injured by the cutters. The components were properly seated in the jig, but had not been milled by the cutters owing to the action of Perry in operating a lever causing the jig to return to the retracted position before the forward motion was completed. On investigations and tests of the machine after the accident, no fault could be found with it and, in particular, the milling cutters were not set in motion until the jig reached the distance of $\frac{1}{8}$ inch from the cutting surface of the cutters.

It was contended on behalf of the appellants that, at the moment the cutters were set in motion and so long as they were in motion, the combination of the fence and the jig formed a strong guard properly adjusted to the work which enclosed the whole cutting surface of the cutters. The duty imposed on the appellants, by reg. 3 (i) of the Horizontal Milling Machines Regulations, 1928, was defined and limited to periods of time at which the cutters were in motion by virtue of the provisions of reg. 6 thereof. Regulation 6 did not create an obligation separate or distinct from or beyond the obligations imposed by reg. 3. The gap in the fence permitting access to the cutters when they were not in motion was necessary for the performance of the milling operation, and the presence of such a gap at a time when the electrical energy was switched on but when the cutters were not in motion did not constitute a contravention of reg. 3 (i). It was contended on behalf of the respondent that the guard required by the provisions of reg. 3 (i) was required to be in position, properly adjusted to the work, and enclosing the whole cutting surface of the cutters except such parts as were necessarily exposed for the milling operations at all times during the currency of the milling operation. The milling operation did not commence only when the cutters were set in motion or only when the jig reached a particular distance from the milling cutters, and did not conclude as soon as the jig withdrew to a

- A particular distance from the cutters or as soon as the cutters ceased to move, but extended to cover the whole period of time from the placing of the components in the jig to the removal thereof from the jig after the milling of the components. The gap in the fence which existed while the jig was in the retracted position was a breach of the obligations imposed by reg. 3 (i), because the whole of the milling cutters and not merely such part as was necessary for the performance of the milling operation was at that time exposed. Regulation 6 created an entirely separate and distinct obligation from that created by reg. 3 (i), and was aimed against any interference with the fencing provided at a time when the milling cutters were in motion.

The recorder found that the appellants were in breach of reg. 3 (i) and dismissed the appeal, and the appellants now appealed.

- C *Marven Everett, Q.C.*, and *A. E. James* for the appellants.
W. A. Sime for the respondent.

- LORD GODDARD, C.J.**, stated the facts and continued: The Horizontal Milling Machines Regulations, 1928, which have effect under the Factories Act, 1937, take the guarding of horizontal milling machines out of the scope of s. 13 and s. 16 of that Act and provide their own regulations*. By reg. 3 (i):

"The cutter or cutters of every horizontal milling machine shall be fenced by a strong guard, properly adjusted to the work, which shall enclose the whole cutting surface except such part as is necessarily exposed for the milling operations".

- E The learned recorder has held, and I think that in the circumstances he was right, that the system which formed a guard in this particular case complied with reg. 3.

Then reg. 6 provides:

- F "The guards or other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the milling cutter is in motion, except when the tool setter is setting up the machine."

The learned recorder has held that reg. 3 and reg. 6 have to be read disjunctively and that they create separate offences. With respect to the recorder, I cannot take that view. I think reg. 3 and reg. 6 are complementary; they must be read together. Regulation 3 provides that there must be a proper guard, and then reg. 6 says that that guard must be kept in position when the cutter is in motion. In other words, I do not think it would be any offence if this machine, when it was not running, was found by the factory inspector not to have a guard. As LORD PORTER put it in *Carroll v. Andrew Barclay & Sons, Ltd.* (1) ([1948] 2 All E.R. 386 at p. 390):

- H "... I conclude that it is risk arising from the motion of the machine which is being guarded against, whether the part concerned is the transmission or dangerous in working."

- I It is true that he was there dealing with s. 14 and s. 16 of the Factories Act, 1937, but it seems to me that exactly the same considerations apply here. Reading these regulations, I cannot find that an offence is committed unless the guard is not kept in position while the cutter is in motion. The learned recorder's judgment, with all respect to him, would involve reading reg. 6 as though the guard should be constantly kept in position while any part of the machine is in motion, that is to say, from the moment the jig starts to go forward. He has held that the regulations require the machine to be fenced while any part of the milling operations are in progress. If the regulations permitted that meaning, I have no doubt that his judgment would be right, because the milling operations may well be

* Cf. 17 HALSBURY'S LAWS (3rd Edn.) 10, 11, para. 11, text and note (t).

said to begin when the article to be milled is first put into the jig. I cannot read them in that way, and although, as I say, this case shows that there may be grounds for altering the regulations to prevent this sort of accident happening, I think that the recorder's judgment was wrong, and we must allow the appeal and quash this conviction.

HILBERY, J.: I am of the same opinion.

ASHWORTH, J.: I agree.

Appeal allowed.

Solicitors: *Herbert & Gowers & Co.*, agents for *Philip Baker & Co.*, Birmingham (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

GRANT v. GEORGE WIMPEY & CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), October 2, 3, 1956.]

Building—Building regulations—Temporary structure—Framing used as mould for concrete walls of building—Fall of part of framing during subsequent demolition—Whether action for damages for breach of statutory duty lay—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 93.

The walls of a house in course of being erected by the defendant builders were constructed by pouring concrete or similar material between inside and outside shuttering which formed a mould for the walls. At two opposite corners of the inside shuttering there were upright wooden corner pieces. The inside and outside shuttering, when erected, was a stable and adequate temporary structure. When the concrete had been poured into the mould and had hardened the removal of the shuttering was begun. After a piece of the inside shuttering of one wall had been removed, and as the shuttering of the wall next to it was being removed, the intervening corner piece fell and injured the plaintiff, who was employed by the defendants in removing the shuttering. Usually, in such circumstances, corner pieces remained upright being held by the concrete, and accordingly there was no reason for the defendants to expect that the corner piece would fall and there was no negligence on their part. The plaintiff claimed damages for personal injuries alleging that the defendants were in breach of statutory duty under reg. 93* of the Building (Safety, Health and Welfare) Regulations, 1948, which require a temporary structure erected for the purposes of operations to which the regulations applied to be of good construction and adequate strength and stability having regard to the purpose for which it is used.

Held: regulation 93 did not apply because (per SINGLETON and JENKINS, L.J.J.) the purpose for which the temporary structure had been erected had ended or (per PARKER, L.J.) when the corner piece fell it no longer formed part of the temporary structure.

Per PARKER, L.J.: just as reg. 93 only begins to apply when the erection is completed, so it ceases to apply the moment part of it is removed (see pp. 473, 474, post).

Appeal dismissed.

[For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 93, see 8 HALSBURY'S STATUTORY INSTRUMENTS 245.]

Appeal.

The plaintiff, a workman who was injured while demolishing timber shuttering, which had been used as a mould for the concrete walls of a house, by the fall of

* The terms of reg. 93 are printed at p. 472, letter E, post.

A a corner piece of the shuttering, appealed from a decision of LYNSEY, J., at Manchester Assizes, dated Mar. 26, 1956, that the defendants, his employers, were not liable to him for negligence or breach of statutory duty. The facts appear in the judgment of SINGLETON, L.J.

A. D. Karmel, Q.C., and J. W. Stansfield for the plaintiff, the workman.

B D. J. Brabin, Q.C., and D. G. F. Franks for the defendants, the employers.

SINGLETON, L.J.: Philip Grant, the plaintiff, was employed by the defendants, George Wimpey & Co., Ltd., as a builders' labourer. In September, 1954, they were engaged on building houses on a site at Prescott, in Lancashire. The houses which they were building were to be of concrete or of some material of that kind. For the purpose of building each house, a system of shuttering was adopted. There was an inside shutter and also an outside shutter. In the case of a room or a house there were four inside shutters and thus there would be four outside shutters, with a space in between the shuttering so that concrete could be poured or otherwise put into a position in which it would in the course of time become solid. That would form the wall of the house or of a room. The inside shuttering was put up first: it was about sixteen feet in height. At two opposite corners there were corner pieces. The corner pieces held the shutters together in some way, though that was not their express purpose. At the other two corners the shutters were closely attached to each other. Thereafter the outside shuttering was put up, and the outside shuttering was bolted to the inside shuttering in various places. Inside the building there were pieces of iron or other metal running across the shuttering and forming supports for it; and at each corner of the building there were tie-rods, further securing the stability of that which was put up. When both inside and outside shuttering was put up there was a stable and adequate structure: it would hold the concrete poured into the space, and in a short time the concrete would become hard. When the purpose of the shuttering was ended, it was removed and taken to another place on the site, where the same process had to be gone through again. The inside shuttering was removed first. It was not a very simple operation, though it was carried out very frequently. One of the inside shutters was loosened or moved by means of a crowbar.

In the case of the house with which we are immediately concerned, the right-hand shutter (as one looked at a corner containing a corner piece) was removed. It was loosened from below, and thereafter, the bolts having been taken away and the pieces of iron having been moved, the shuttering was lifted from above by means of a crane. The next portion which had to be moved was the shuttering on the left (as one looked at the same corner). The plaintiff was one of the men engaged on the work of the removal of the shuttering. As the left-hand shutter was being moved, the corner piece itself (which was an upright piece of wood some nine inches thick) fell, and struck the plaintiff on the back and did him some injury. That was an unusual happening. There was some evidence to show that on one or two occasions a corner piece had been known to fall. I do not think that LYNSEY, J., accepted that evidence; and it was clear that it was, to say the least, an unusual happening that an accident of that kind should take place. As a rule the corner piece, the upright, adheres to or is held in position by the concrete, and after the shutters at each side of it have been removed it needs some force, and the use of a crowbar or the like, to loosen the upright so that it can be taken away. On this occasion it fell as the left-hand shutter was being moved.

The plaintiff brought this action against his employers, alleging, first, that they were guilty of negligence at common law, and secondly, that they were in breach of reg. 93 of the Building (Safety, Health and Welfare) Regulations, 1948, or,

alternatively, of reg. 94 (1)*. His claim was heard by LYNSEY, J., at the assizes at Manchester on Mar. 26, 1956. LYNSEY, J., gave judgment for the defendants. He held that the claim at common law failed, and he was not satisfied that there was any breach of statutory duty on the part of the defendants. The plaintiff appeals to this court. His counsel submitted that the judge below was wrong in regard to the claim under reg. 93. Counsel did not, in this court, pursue the claim under reg. 94 (1); nor did he seek to show that the judge was wrong in saying that, on the facts of this case, there was no breach of duty at common law proved. A B

In regard to that, I am quite satisfied that counsel for the plaintiff was right. The history of a building of this type (so far as the evidence showed) makes it clear that no one could have anticipated an accident of this kind. There was no step which the defendants, as reasonable employers, were called on to take to prevent an accident of a kind which could not reasonably be anticipated. The experience of those doing this class of work was (so far as the evidence showed) that the upright, the corner piece, being held by concrete, would stand until the shuttering on each side was removed. The defendants had no reason to anticipate danger of the kind which brought about this accident. It was not shown that they had failed in their duty to take reasonable care for the safety of their workmen. The claim at common law could not succeed. C D

The same applies, without doubt, to the claim made under reg. 94 (1) of the Regulations of 1948, which would not apply to the facts of this case.

The matter which was pursued in this court and which is of importance arises under reg. 93 which is in the following terms:

“Construction of temporary structures.—Any temporary structure erected for the purpose of operations to which these regulations apply not being a scaffold or a structure to which reg. 35 applies†, shall be of good construction, sound material and adequate strength and stability, having regard to the purpose for which it is used.” E

Counsel for the plaintiff submitted that the upright, the corner piece, was a “temporary structure erected for the purpose of operations to which these regulations apply”, and that, consequently, reg. 93 required that it should be of “adequate strength and stability, having regard to the purpose for which it is used”. He submitted, further, that as it fell when the shuttering was being moved it was not of “adequate strength and stability”. On the other hand, it was submitted by counsel for the defendants that at the time the plaintiff sustained his accident the regulation had no application at all. F G

LYNSEY, J., said that this was not a very simple question; and I agree with him. Regulation 93 does not cover demolition expressly. “Demolition of buildings” is dealt with in Part 5, reg. 79, and from para. (6) of that regulation‡ it appears that during the demolition of a building that which remains may be described as “the structure”. “Structure” is not defined in the interpretation regulation, reg. 3, though the words “temporary structure” are used in the definition of “scaffold”. There are no regulations covering the demolition of “temporary structures”. Maybe it was not thought practicable to make regulations covering the demolition of temporary structures, large or small. Or maybe it was considered that the duty under the common law was sufficient. For the purposes of this appeal, it is not disputed that the shuttering formed H I

* Regulation 94 (1) requires that “All practicable precautions shall be taken . . . to prevent danger to any person employed through the collapse of any part of a structure . . . before the structure is completed.”

† Regulation 35 applies, *inter alia*, to lifting appliances and to structures, etc., which support such appliances.

‡ Regulation 79 (6) is in the following terms: “All practicable precautions shall be taken to avoid danger from collapse of the structure when any part of the framing is removed from a framed or partly framed building.”

A part of the structure; nor is it disputed that the shuttering when first erected was a "temporary structure". The question to be decided is whether the corner piece which fell and caused the plaintiff's injury was a "temporary structure", within the meaning of reg. 93, at the time at which it fell.

Counsel for the plaintiff submitted that each shutter and each corner piece was a "temporary structure", and that the fact that a corner piece fell during demolition shows that it, a "temporary structure", did not comply with reg. 93. Again, it is not plain that the shuttering and corner pieces as originally erected were not of adequate strength or stability. I do not regard it as the right approach to look at one particular part of a "temporary structure" during the process of demolition. Towards the close of that process a part or parts remaining must of necessity become unstable. Moreover, their use for the purposes covered by the regulation has ceased: they are no longer intended for use, nor are they required for that purpose: the "structure" is in process of demolition. The temporary structure was of "adequate strength and stability, having regard to the purpose for which it is used", during the time for which it was so used. A time came at which there was no further use for it: demolition commenced, and was proceeding when the accident took place. When that stage was reached, reg. 93 ceased to have any application.

It is said on both sides that the question is really one of fact, or one of degree. That is right; and in determining the question one must have regard to the facts of the case and to the purpose of the regulation. That purpose is the protection of those working on, in or near a temporary structure, as distinct from those engaged on demolition of a building, which matter is dealt with in reg. 79. It may be (though I express no final opinion on it) that if, after the purpose of the temporary structure had been exhausted, it was left standing and an accident happened, there would be liability under reg. 93, or at common law in some cases. I am not, however, prepared to hold that the defendants are liable under reg. 93, and without proof of negligence, when they are engaged in demolition of a temporary structure, which was properly erected and which did not offend against the regulation, until the purpose for which it had been erected had ended and its demolition had been undertaken. The regulation does not apply to the facts of this case.

In my judgment, the appeal should be dismissed.

JENKINS, L.J.: I agree, and find nothing that I can usefully add.

G PARKER, L.J.: I agree. Regulation 93 of the Building (Safety, Health and Welfare) Regulations, 1948, is not altogether easy to construe. It is, however, clear (and indeed it was admitted) that when the shuttering was all erected to form a mould it constituted a "temporary structure" within the meaning of reg. 93. That being so, it had to be of "adequate stability" having regard to the purpose for which it was used, namely, to receive the liquid concrete and to allow that concrete to set. It was clearly stable for that purpose, as the events proved. The question then arises when does the regulation cease to apply? Does it cease to apply when the purpose is fulfilled, even though the whole structure is left in place and not removed? does it continue to apply until the last bit of the temporary structure is removed? or does it cease to apply when the first bit is removed, or at what stage in the demolition?

I confess that I see difficulties in making the fulfilment of the purpose the sole test. The regulation applies to a temporary structure when erected, and presumably continues so long as it remains erected. On the other hand, it seems to me that the object of the regulation is to ensure safety during the actual operation for which the structure is designed. The regulation is not concerned with safety during the course of erection or in the course of demolition. That being so, I think that, just as reg. 93 only begins to apply when the erection is

completed, so it ceases to apply the moment part of it is removed. Incidentally, A
in the normal practice this will no doubt be so soon as the purpose is fulfilled.

Be that as it may when the accident in the present case occurred the corner
piece, disconnected as it was from the temporary structure, could no longer be
said to form part of the temporary structure. It was merely material, namely, B
two or three long pieces of wood joined together, which had formed part, but no
longer formed any part, of that temporary structure. Nor do I think it can be
validly contended that its purpose had not been fulfilled. That purpose, just as
in the case of every other bit of the mould, was to contain the concrete when
poured in and to allow it to set. I also would dismiss this appeal.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Leigh & Johnson*, Manchester (for C
the plaintiff, the workman); *Gardiner & Co.*, agents for *A. W. Mawer & Co.*,
Manchester (for the defendants, the employers).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

LANGTON AND ANOTHER v. JOHNSON. D

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ashworth, JJ.),
October 4, 1956.]

*Street Traffic—Heavy motor car—Braking system—Six-wheeled lorry with four
front wheels—Handbrake operating only on the two rear wheels—Road Traffic
Act, 1930 (20 & 21 Geo. 5 c. 43), s. 3—Motor Vehicles (Construction and Use) E
Regulations, 1955 (S.I. 1955 No. 482), reg. 39 (1), (7) (a) (i).*

The defendants used on a road a lorry with four front steering-wheels and
two rear twin driving wheels. The lorry had hydraulic footbrakes operating
on all wheels and a handbrake which operated only on the two rear twin
wheels. The driver and the owner of the lorry were convicted of an offence
on the ground that the alternative braking system (the handbrake) did not F
act on "not less than half the number of the wheels of the vehicle" as was
required by reg. 39 (1)* of the Motor Vehicles (Construction and Use)
Regulations, 1955. For the purposes of the regulation each pair of rear
twin wheels was to be regarded as one wheel (reg. 3 (4)) and not more than
one front wheel was to be included in the "half the number of the wheels"
(reg. 39 (7) (a) (i)). On appeal by the prosecutor against the quashing of the
conviction, G

Held: the notional "half the number of the wheels of the vehicle", on
which the handbrake was required to act, was to be ascertained by dividing
the total number of six wheels by two; and since the handbrake operated
only on the two rear wheels, there had been a contravention of reg. 39 (1).

Appeal allowed.

[For heavy motor car brakes, see 31 HALSBURY'S LAWS (2nd Edn.) 724, para. H
1104; and for cases on the subject, see 42 DIGEST 869, 870, 189-192.]

For the Road Traffic Act, 1930, s. 3, see 24 HALSBURY'S STATUTES (2nd Edn.)
574.]

* Regulation 39 of the Motor Vehicles (Construction and Use) Regulations provides:

"(1) Every heavy motor car shall be equipped with an efficient braking system or
efficient braking systems in either case having two means of operation so designed and
constructed that notwithstanding the failure of any part (other than a fixed member or a
brake shoe anchor pin) through or by means of which the force necessary to apply the
brakes is transmitted, there shall still be available for application by the driver to not
less than half the number of the wheels of the vehicle brakes sufficient under the most
adverse conditions to bring the vehicle to rest within a reasonable distance . . ."

"(7) For the purpose of this regulation—

(a) (i) not more than one front wheel shall be included in half the number of the
wheels of the vehicle for the purposes aforesaid . . ."

A Case Stated.

This was a Case Stated by the Recorder of the City of Sheffield in respect of his decision at quarter sessions on Jan. 12, 1956, allowing an appeal by the defendants against their convictions at the Sheffield Magistrates' Court on Jan. 4, 1956, on informations laid by the prosecutor. The conviction was for using on Nov. 21, 1955, on a road in the City of Sheffield a heavy motor car which did not comply with reg. 39 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955, contrary to the regulations and s. 3 of the Road Traffic Act, 1930.

On the hearing of the appeal the following facts were either proved or admitted: The vehicle which was the subject of the charge was a six-wheeled Albion lorry of 5½ tons unladen weight equipped with four front steering single wheels running in pairs on two axles one behind the other and two rear driving wheels on an axle at the rear of the vehicle. The two rear wheels were each twin wheels but each of them counted as a single wheel by virtue of reg. 3 (4)* of the regulations. The vehicle was equipped with two braking systems consisting of a footbrake which operated by hydraulic means on all the six wheels of the lorry and a handbrake which was rod operated on only the two rear driving wheels. The vehicle was owned by the defendant company. On Nov. 21, 1955, it was laden with 10¼ tons of coal and was being driven along Main Road, Sheffield, by the defendant Langton, a servant of the defendant company, in the course of his employment.

At about noon a police officer, who was on patrol duty on Main Road, stopped the vehicle in the course of a routine check. The part of the road where the vehicle was stopped by the officer was at an incline and noticing that the defendant driver was applying both his footbrake and his handbrake the officer directed the driver to release his footbrake. On the driver releasing the footbrake, the vehicle started to run slowly forward down the incline and it continued so to do for a few feet in spite of the handbrake being fully on until the driver re-applied his footbrake. Later the same day the police officer sat beside the defendant driver while he drove the vehicle along Greenland Road, Sheffield, for the purpose of testing the two brakes. The road there was level and its surface was dry and good. At the officer's request the defendant driver applied independently first of all his footbrake and then his handbrake, when the vehicle was travelling at a speed of from twelve to fifteen miles per hour. The footbrake on being so applied worked efficiently but when the handbrake was applied it had little retarding effect with the result that the vehicle rode to a standstill over a distance of about sixty yards instead of stopping within the normal distance of about twenty yards. The police officer then examined the handbrake system which, if it had been properly maintained, would have been efficient in that it was capable of holding the lorry and acting as an effective brake on the rear wheels, but he found in fact that the handbrake was quite inefficient owing to faulty adjustment of the brake parts through wear and tear. The defendant driver and the defendant company were respectively charged with (i) the offence, stated previously, against reg. 39 (1), and (ii) the offence of unlawfully using or permitting the use of the vehicle on the said occasion when its handbraking system and the means of operation of the same was not maintained in good and efficient working order and properly adjusted contrary to regs. 76 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. At the hearing at the Sheffield Magistrates' Court on Jan. 4, 1956, both defendants pleaded not guilty to the first charge but guilty to the second charge, and in respect of the second charge the defendant driver was fined £1 and the defendant company was fined £5.

* Regulation 3 (4) of the Motor Vehicles (Construction and Use) Regulations, 1955, provides: "For the purpose of these regulations any two wheels of a motor vehicle or trailer shall be regarded as one wheel if the distance between the centres of the areas of contact between such wheels and the road surface is less than eighteen inches."

The defendants contended that the facts disclosed an offence under regs. 76 A and 104 but not under reg. 39 on the grounds:—(i) that both defendants had pleaded guilty to and been fined for the offence under regs. 76 and 104, that this offence was the only offence revealed by the evidence and that the condition of the vehicle's handbrake on Nov. 21, 1955, did not justify a conviction on a charge under reg. 39 (1) that the vehicle was not equipped with an efficient braking system or braking systems; (ii) that para. (1) of reg. 39 must be read together B with para. (7) (a) (i) of the regulation* and that since on the proper construction of para. (1) and para. (7) (a) (i) of reg. 39 not more than one of the vehicle's four front steering wheels was required to be included in calculating half the number of the wheels of the vehicle to which the handbrake system had to be applied, it followed, seeing that the handbrake operated in fact on the two rear driving wheels, that no offence under reg. 39 (1) had been committed. The C prosecution contended:—(i) that the fact that the handbrake only operated on the two rear wheels constituted all the evidence necessary as to faulty construction or an inefficient braking system; and (ii) that the plain construction of reg. 39 (7) (a) (i) did not affect the plain construction of reg. 39 (1). In this case, having regard to the six wheels of the vehicle, the handbrake should have applied D to at least three of them. Paragraph (7) (a) (i) merely limited to one front wheel the number of front wheels which could be included in those wheels to which the handbrake must apply. The recorder found that the vehicle was equipped with an efficient braking system or efficient braking systems within the meaning of reg. 39 so as to comply therewith, and therefore allowed the defendants' appeal.

J. I. E. Arnold for the appellant, the prosecutor. E

D. T. Lloyd for the respondents, the defendants.

LORD GODDARD, C.J.: I will ask ASHWORTH, J., to deliver the first judgment.

ASHWORTH, J.: This appeal comes before this court by way of Case F Stated by the Recorder of Sheffield and raises a troublesome point under reg. 39 of the Motor Vehicles (Construction and Use) Regulations, 1955.

The particular provisions of reg. 39 which are material are para. (1) and para. (7) (a) (i). [His LORDSHIP then read the material terms of these provisions which are printed in the footnote at p. 474, ante, and continued:] The facts found show that this particular vehicle was to be deemed to be a six-wheeled G vehicle; in fact it had eight wheels but the four rear wheels were to be treated as two wheels. The vehicle was equipped with two braking systems, the first system consisting of a footbrake which operated by hydraulic means on all the six wheels of the lorry, and the second system consisting of a handbrake which was rod operated on only the two rear driving wheels.

The main issue in this case is whether on those facts an offence was committed H against reg. 39. It is perhaps not without importance to notice that the wording of para. (7) (a) (i) differs from what it once was. At one time the wording was such as to admit at least of the construction that the process of halving the wheels of the vehicle was to be embarked on in counting the wheels of the vehicle before I ever the half was calculated. It seems to me the change of language has rendered that process no longer operative and for my part I find the approach to this case relatively simple.

Paragraph (1) provides that a system must be provided under which there shall be available for application by the driver to not less than half the number of the wheels of the vehicle sufficient brakes. In my view, the first step to take is to ascertain the number of wheels of the vehicle. In this case it was six. Prima facie, therefore, there must be available for application to three of those wheels an efficient braking system. It is found as a fact that the alternative

* Regulation 39 (7) (a) (i) is printed in the footnote at p. 474, ante.

A system provided on this vehicle applied to two wheels only, and therefore I should be content to stop there and adopt the first of the contentions put forward by the prosecutor below

“that the fact that the handbrake only operated on the two rear wheels constituted all the evidence necessary as to faulty construction or an inefficient braking system.”

B It seems to me that the proper approach to the application of para. (7) (a) (i) is to ascertain first the notional half by dividing the total number of wheels of the vehicle by two. Then, in order to comply with the regulation, to that half there must be available an efficient braking system; but the regulation provides that in that half there must not be included more than one front wheel. Paragraph (7) (a) (i) cannot be applied for the purpose of calculating the half. When the half has been ascertained not more than one front wheel must be included in it. In this case no front wheel was included in the half at all, but a construction would be prevented which would result in relation to a six-wheeled vehicle, in two front wheels and one rear wheel being included in the half. That, in my view, would not be a compliance with the regulation.

D For those reasons, which I have stated quite shortly, I think that this appeal should be allowed.

HILBERY, J.: I agree and for the same reasons.

E LORD GODDARD, C.J.: I agree. I have found the greatest difficulty in construing these regulations, but I think that on the whole the judgment given by ASHWORTH, J., does give a meaning to these very obscure provisions which motor vehicle drivers are supposed to understand. I agree, therefore, that this appeal should be allowed, although I am not at all happy about it because I think that there really was no necessity to proceed to a prosecution under reg. 39 when there had been a conviction under reg. 76. However, that is another matter; the magistrates convicted and we have only to consider whether F the recorder was right in quashing the conviction. We have come to the conclusion that he was not, and therefore the decision of the magistrates must stand. The appeal is allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Sheffield (for the appellant, the prosecutor); *Bell, Brodrick & Co.*, agents for *A. B. Thorneloe & Son*, Sheffield (for the respondents, the defendants).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

ROE v. ROE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), June 27, 28, July 18, 1956.]

Divorce—Condonation—Revival of adultery—Constructive desertion—Husband's adultery condoned—Husband's subsequent conduct reviving adultery and justifying wife's departure from matrimonial home.

Divorce—Desertion—Constructive desertion—Condoned adultery revived and justifying aggrieved spouse in leaving matrimonial home.

The parties were married in 1946 and there was one child of the marriage. In May, 1955, the wife became suspicious that the husband had been committing adultery with a particular woman; he denied adultery but admitted that he had been taking her out. Quarrels ensued and on several occasions the husband hit the wife; she left him, returned at his request but subsequently in December, 1955, again left the matrimonial home as the husband's association with the other woman had not ceased. The husband then admitted to the wife that he had been committing adultery with the woman for five years, but begged the wife to return. In January, 1956, the husband ceased the adulterous association and shortly afterwards the wife returned to the matrimonial home. From the moment of her return, however, he adopted towards the wife a course of callous indifference and taciturnity, he refused sexual intercourse, and stayed out late at nights without explanation. After about three weeks the wife again left the matrimonial home. On a complaint by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband had deserted her,

Held: assuming that the husband's adultery had been condoned by the wife, his conduct after her return was of such a character as to revive the offence (*Richardson v. Richardson*, [1949] 2 All E.R. 330 applied); if condoned adultery was revived, it was revived for all purposes (*Beigan v. Beigan*, [1956] 2 All E.R. 630 applied) and the wife was, accordingly, justified in leaving the matrimonial home and the husband was guilty of constructive desertion.

Dictum of SIR RAYMOND EVERSLED, M.R., in *Perry v. Perry* ([1952] 1 All E.R. 1076 at p. 1081), that common or mutual intention has nothing to do with the question whether there has been condonation by an injured spouse, questioned (see p. 484, letters B to E, post).

Appeal dismissed.

[As to the effect of revival of condoned adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 307, para. 610; and for cases on the subject, see 27 DIGEST (Repl.) 406, 3347-3353.]

Cases referred to:

- (1) *Richardson v. Richardson*, [1949] 2 All E.R. 330; [1950] P. 16; 27 Digest (Repl.) 409, 3384.
- (2) *Durant v. Durant*, (1825), 1 Hag. Ecc. 733; 162 E.R. 734; 27 Digest (Repl.) 396, 3265.
- (3) *Houghton v. Houghton*, [1903] P. 150; 72 L.J.P. 31; 89 L.T. 76; 27 Digest (Repl.) 410, 3390.
- (4) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest (Repl.) 307, 2551.

- A (5) *D'Aguilar v. D'Aguilar*, (1794), 1 Hag. Ecc. 773; 162 E.R. 748; 27 Digest (Repl.) 487, 4256.
- (6) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, 3369.
- (7) *Cooper v. Cooper*, (1950), 94 Sol. Jo. 335; 48 L.G.R. 377; 27 Digest (Repl.) 411, 3398.
- B (8) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
- (9) *Lloyd v. Lloyd & Hill*, [1947] 1 All E.R. 383; [1947] P. 89; [1948] L.J.R. 85; 27 Digest (Repl.) 406, 3352.
- (10) *Beigan v. Beigan*, [1956] 2 All E.R. 630.
- C (11) *Pearson v. Pearson*, [1948] L.J.R. 1435; [1948] W.N. 225; 27 Digest (Repl.) 703, 6721.
- (12) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest (Repl.) 349, 2890.
- (13) *Keats v. Keats & Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.
- D (14) *Perry v. Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.
- (15) *Henderson v. Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, 3271.
- (16) *Mackrell v. Mackrell*, [1948] 2 All E.R. 858; 27 Digest (Repl.) 398, 3278.

E Appeal.

The husband appealed against an order of the Whitehaven justices, dated Apr. 23, 1956, whereby they found that he had deserted the wife and ordered him to pay a weekly sum by way of maintenance for herself and the child of the marriage. The grounds of the appeal were that it was not open to the justices to find that the husband had deserted the wife, that they were wrong in law in so holding, and that they were wrong in law in holding that his conduct had been

F so as to revive adultery which had been condoned.

The facts appear in the judgment of the court.

G. W. G. Jones and *L. J. Antelme* for the husband.

St. J. B. V. Harmsworth for the wife.

Cur. adv. vult.

G

July 18. **LORD MERRIMAN, P.:** The judgment which COLLINGWOOD, J., is going to read is the judgment of the court.

H

COLLINGWOOD, J., read the following judgment: The parties were married on Dec. 9, 1946. They are now both thirty-four years old, and there is one child, a girl, born on Feb. 19, 1954. About 1946 or 1947 the wife was away from home for twelve months suffering from tuberculosis, and she said that in the year following her return "everything seemed to go wrong". Things got worse until May, 1955, when, after finding contraceptives and a photograph of a girl in her husband's wallet, she taxed him with carrying on an association with this girl. At first he denied it, but finally admitted that he had been taking the girl, who was an assistant in his shop, out to dinner and dances. She threatened to leave him, but he asked her to forgive him and she did so. Afterwards she became suspicious that the association was continuing and in the summer of 1955 she found a letter from the girl to her husband. In the course of the quarrels to which this state of things gave rise he hit her on several occasions—on one, when he had been drinking, striking her head, making her neck bleed and threatening to kill her. She returned to her parents' home and asked her husband to come and see her there, and at an interview he expressed

I

contrition for the wrong he had done, said that he wanted to start again, and that he would get rid of the girl when he returned to the shop. On his volunteering these assurances the wife returned to him. He did not, in fact, dismiss the girl, though whenever his wife raised the question he repeated that he was going to do so, and on Dec. 8, 1955, she again returned to her parents. A

Her husband visited her there on several occasions, endeavouring to induce her to return to him—they went out together once or twice, and on one occasion intercourse took place between them in the husband's car. He admitted having committed adultery with the girl, saying that he had been going with her for five years, but he assured his wife that he was no longer associating with her, and begged her to return and "make a go of it". The wife once more agreed to return, provided that the girl left the shop first. He kept postponing her dismissal, excusing this on the ground that he could not send her away until she had obtained other employment. He admitted that his adulterous association continued until towards the end of January. Finally, however, the girl left on Feb. 4, 1956, and on the following day the wife returned to the matrimonial home, after an absence of over eight weeks. Her evidence as to the homecoming and his behaviour thereafter was as follows: B C

"He called, and we [that is the wife and child] went back to live with him. He did not speak on the journey home. He unpacked the luggage from the car about 7.20 p.m.; about 9 p.m. he said he must go out to post, and then see his mother. He returned before 10 p.m. We slept together, but no intercourse. I suggested it—he said nothing. He said 'In a few weeks we will settle down'. He would not speak to me unless he answered questions. After a week he grumbled about lack of help in the shop. I said it was his own fault. He said he would torture us. He went out at nights, returning 11 to 12 p.m., not saying where he had been." D E

After three weeks of this behaviour she consulted her doctor, who gave her some prescription for her nerves, a tonic and sleeping tablets. On Monday, Feb. 27, she told her husband that she had had enough of it and had decided to leave him, and on the following day she did so, going to her parents. F

In cross-examination the husband said:

"The situation as described by my wife when she returned is a fair one. There was no intercourse on her return (even though parted so long, and I said I loved her so much)—because I did not feel like it." G

He added:

"After I said I would dismiss the girl I got no co-operation—how far is one expected to go to restore a marriage? Had time been given, without the incident of the assault, I think something might have come of it so far as I was concerned." H

The reference to the "assault" was to an incident on Feb. 19, when the wife's brother struck him—an attack which the husband attributed to retaliation for his having struck his wife. His evidence concludes:

"I suppose I knew my wife was of the nervous type, who might feel strongly about such a situation which was difficult for her. Her description of my attitude and behaviour when we came together again is quite true." I

On this evidence the justices found:

"(a) That the husband had committed adultery. (b) That the husband had apart from the adultery given the wife sufficient grounds for withdrawing from the matrimonial home. (c) That there had been condonation by the

- A wife of the adultery but that his behaviour after the condonation was sufficient to revive the matrimonial offence."

In their reasons for so finding the justices state:

- " (a) That adultery had been committed by the husband for a long period, ceasing about the end of January, 1956. (b) That apart from any adultery the conduct of the husband towards his wife had been such that in our opinion the wife would have been justified in withdrawing from cohabitation on that ground alone when she did towards the end of 1955. (c) That on the return of the wife in February, 1956, she returned with full knowledge of the adultery and went back to the husband prepared to make a fresh start to the marriage in the hope that his promises would be better fulfilled than they had been in the past. (d) That after the return the wife did not find that the husband's behaviour towards her improved a great deal and there appeared to be no great change in his attitude towards her which we consider she was entitled to expect. It did not appear to us from his behaviour after the reconciliation that the husband was as eager to mend the marriage as the wife was. Having seen both parties give evidence we considered that the husband was somewhat selfish and appeared to consider that the wife should have been more patient with him than he with her even though it appeared all the faults were on his side. In our view it certainly cannot be said that he treated her with that kindness she was entitled to expect or that was consistent with his matrimonial duty. We consider the husband should have gone to far greater lengths to restore and preserve the marriage instead of behaving as though all would come well in time."

- It was contended on behalf of the husband that the justices were wrong in holding that the husband's conduct during the period between the wife's return on Feb. 5, 1956, and her leaving him on Feb. 28, was of such a character as to revive his previous offence of adultery. In support of this it was urged that they were together for a comparatively short time, not sufficiently long to afford the husband a reasonable period in which to settle down and re-adjust himself, and that his behaviour was merely a natural reaction to the inherent difficulties of the position in which he was placed.

- The question what conduct is sufficient to revive condoned adultery was considered in *Richardson v. Richardson* (1) ([1949] 2 All E.R. 330) where a number of previous decisions were reviewed. BUCKNILL, L.J., in the course of his judgment, after pointing out that condonation is conditional forgiveness, quoted (*ibid.*, at p. 332) from the judgment of SIR JOHN NICHOLL, Dean of Arches, in *Durant v. Durant* (2) ((1825), 1 Hag. Ecc. 733 at p. 762):

- "The plainer reason and the good sense of the implied condition is, that 'you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law)—"with conjugal kindness" . . . '."

BUCKNILL, L.J., referred also to the judgment of SIR FRANCIS JEUNE, P., in *Houghton v. Houghton* (3) ([1903] P. 150) where he said (*ibid.*, at p. 152):

- "The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone."

BUCKNILL, L.J., continues ([1949] 2 All E.R. at p. 332):

"Therefore, one finds a great number of expressions of dealing with the kind of offence which will revive condoned adultery. The matter must be

approached with some care because I cannot believe that, if adultery has been condoned, say for seven years, a wife is entitled to say it is revived because the husband has on one occasion slapped her face, or has come home drunk, or has done something else which may amount to matrimonial misconduct or a breach of conjugal kindness. I think that the proper test to apply is—and I think it is rather indicated in the words of SIR FRANCIS JEUNE, P., to which I have just referred—that the conduct at any rate must be such as, if persisted in, will make married life together impossible. That is putting it as broadly as I can. A matrimonial offence, seems to me to mean an offence against the vows of marriage. The vows of marriage are well known. Desertion is certainly one offence, and cruelty as defined by the law is another. The conduct of the wife in *Russell v. Russell* (4) ([1895] P. 315, [1897] A.C. 395), though it did not amount to cruelty, made married life impossible and the result was the refusal of a decree of restitution of conjugal rights.”

DENNING, L.J., said ([1949] 2 All E.R. at p. 333):

“I agree. If a husband should commit adultery and the wife should take him back, then in order to revive the condoned adultery it is not necessary that the fresh conduct of the guilty husband should be such as of itself to be a sufficient ground for a judicial separation or a divorce. A good deal less is sufficient. After all, the innocent wife does a praiseworthy thing in taking back the guilty husband, and should not be penalised for so doing. If the guilty husband after being taken back does not behave properly, and the marriage breaks down afresh by reason of his conduct without any fault of the innocent wife, she is entitled to rely on his original guilty act as a ground for divorce. Any other view would greatly hamper attempts at reconciliation, for no innocent party would be inclined to take a guilty party back if it meant being tied for ever to an unhappy marriage. The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery. That was made clear by SIR WILLIAM SCOTT in *D'Aguilar v. D'Aguilar* (5) ((1794), 1 Hag. Ecc. 773) where he said (at p. 782): ‘It is held that words of heat and passion, of incivility, or reproach, are not alone sufficient for an original cause; nor harshness of behaviour; but I cannot but think that their operation would be stronger in condonation’. That passage was quoted (1 Hag. Ecc. at p. 765) and accepted by SIR JOHN NICHOLL as good law in *Durant v. Durant* (2). He put the matter in his own words thus (ibid., at p. 762) . . .”

The learned lord justice then quoted the passage to which reference has already been made, and continued ([1949] 2 All E.R. at p. 333):

“He would be a bold man who would doubt the authority of those two great judges on this subject. SCOTT, L.J., in *Beard v. Beard* (6) ([1945] 2 All E.R. 306), clearly accepted them as authoritative, and I do the same. In the result, therefore, harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence.”

Applying these tests to the present case, one finds not merely isolated acts of unkindness (such as a slap in the face or coming home drunk on one occasion), but a calculated course of callous indifference and taciturnity, which began on the homeward journey and continued thereafter, rejection of the wife's

A advances towards intercourse, and added to this a succession of late nights, with no explanation forthcoming from a man who had been committing adultery up to within a few days of his wife's return. Further, the more serious the original offence, the less grave need be the subsequent act required to revive it: *Cooper v. Cooper* (7) ([1950], 94 Sol. Jo. 335), and see per LORD MERRIMAN, P., in *Jamieson v. Jamieson* (8) ([1952] 1 All E.R. 875 at p. 884). In the present case a long course of adultery was accompanied by treatment which, in the opinion of the justices, would of itself have justified the wife in leaving the matrimonial home when she did in December, 1955. The husband's attitude towards his wife after her return is clearly reflected in his own evidence, to which we have already referred—an attitude which drew from the justices the comment that he appeared to consider that the wife should have been more patient with him than he with her, though all the faults were on his side. And finally, his treatment had already affected her health when she left him at the end of February. For these reasons there was, in our opinion, evidence to support the justices' finding that the husband's conduct was of such a character as to revive the adultery which they have found to have been condoned.

D It was further argued on behalf of the husband that assuming the adultery was revived by the husband's conduct, it was not revived so as to justify a finding of constructive desertion. In our opinion the authorities show that if condoned adultery is revived, it is revived for all purposes. Thus in *Lloyd v. Lloyd & Hill* (9) ([1947] 1 All E.R. 383), it was held that revival of condoned adultery operated against both respondent and co-respondent, and that the petitioner was therefore entitled to ask for an order against the co-respondent for costs and damages. E HODSON, J., said (*ibid.*, at p. 384):

"I see no reason to doubt that, in any event, if the condonation goes, it goes for all purposes . . ."

F Again, in *Beigan v. Beigan* (10) ([1956] 2 All E.R. 630) (a case of adultery revived by subsequent desertion), DENNING, L.J., said (*ibid.*, at p. 632):

G "He [the husband] deserted his wife when he left the house that night. His desertion revived the condoned adultery; . . . As such, when he came back the next day or a day or two later, the wife was not bound to take him back any more than a wife is bound, when she first finds out about her husband's adultery, to take him back."

The lord justice referred to *Pearson v. Pearson* (11) ([1948] L.J.R. 1435) and *Lloyd v. Lloyd & Hill* (9). And PARKER, L.J., said ([1956] 2 All E.R. at p. 635):

H "Once the act of desertion is proved, it seems clear that the adultery previously condoned is revived, and is revived for all purposes; and accordingly, when the husband did come back a day or two or three days later to the matrimonial home, I think that the wife was perfectly entitled to refuse to negotiate with him, or to have him back, just as she would have been immediately after the original adultery."

I It follows that on the husband's being guilty of conduct which revived his previous adultery, the wife was justified in leaving the matrimonial home—any other conclusion would have the effect of rendering the wife herself a deserter: *Thomas v. Thomas* (12) ([1924] P. 194 at p. 201, per WARRINGTON, L.J.).

This is sufficient to dispose of the appeal. It was, however, contended alternatively on behalf of the wife that, on the evidence already referred to, the justices should not have found condonation by her, in that there was lacking

the element of complete reconciliation, the necessity for which has been emphasised in many cases. For example, in *Keats v. Keats & Montezuma* (13) ((1859), 1 Sw. & Tr. 334 at p. 357), LORD CHELMSFORD, L.C., said:

“ . . . the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation . . . ”

But reconciliation in turn would seem to import the element of mutuality, and in *Perry v. Perry* (14) ([1952] 1 All E.R. 1076 at p. 1081), SIR RAYMOND EVERSHED, M.R., said:

“ . . . in my judgment, with the question, aye or no, has there been condonation on the part of the injured spouse ‘ bilateral ’ (by which I understand is meant ‘ common ’ or ‘ mutual ’) intention has nothing to do.”

If this pronouncement was not obiter dictum by reason of the opinion expressed by the Master of the Rolls earlier in the judgment that the doctrine of condonation does not apply to desertion as a ground for divorce, and if it was intended to have an application wider than to the particular example of condonation dealt with in *Henderson v. Henderson & Crellin* (15) ([1944] 1 All E.R. 44) referred to in the following sentence of the Master of the Rolls' judgment, we would point out that it appears to conflict with the essence of the matter as described by VISCOUNT SIMON, L.C. (ibid., at p. 46) in the latter case, and with the decision of the Court of Appeal in *Mackrell v. Mackrell* (16) ([1948] 2 All E.R. 858), in which DENNING, L.J., following the opinion of LORD CHELMSFORD, L.C., quoted above said (ibid., at p. 861) that reconciliation was the test of condonation. It is unnecessary for us to attempt to resolve this apparent conflict of opinion, as we think that the appeal fails for the reasons we have already given.

Appeal dismissed.

Solicitors: *Broughton & Co.*, agents for *Milburn & Co.*, Workington (for the husband); *Lees, Smith & Crabb*, agents for *Sumner & Singleton*, Whitehaven (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A

G. H. CHAMBERS (NORTHIAM FARMS), LTD. v.
WATMOUGH (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Vaisey, J.), June 22, 26, 1956.]

B

Income Tax—Reliefs—Capital expenditure—Machinery and plant—Annual allowance—Motor car purchased by company—Used partly for business and partly for private purposes—Choice of car not dictated solely by needs of company's trade—Reduction of gross capital allowance for personal choice—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 289 (1).

C

The taxpayer company carried on the business of fruit farming at a farm of some seventy-five acres in Kent. The company required a motor car for the purposes of its business, and the managing director, who was, in effect, in complete control of the company, bought a second-hand Bentley car on behalf of the company in May, 1952, at a cost of £6,995. The car was used partly for the company's business and partly for the managing director's private motoring, one-twelfth of the total annual mileage being for private purposes. On an appeal to the general commissioners against an assessment to income tax under Sch. D for the year 1953-54, it was contended on behalf of the company that, in determining the annual allowance to which the company was entitled in respect of the car, under s. 289 (1)* of the Income Tax Act, 1952, the gross capital allowance, which was agreed at £1,749, should be abated only by one-twelfth, viz., the proportion attributable to the private use of the car. The commissioners found that the gross capital allowance should first be abated by £1,020 5s., as an abatement for personal choice of the car, and that one-twelfth of the reduced allowance should then be disallowed for private running. On appeal by the company,

D

E

Held: the commissioners, in determining what was just and reasonable to allow under s. 289 (1) of the Act of 1952, had properly had regard to all relevant circumstances and had rightly abated the gross capital allowance by £1,020 5s. because the car was not one which would have been bought by anyone who, in considering the question of its purchase, was directing his mind solely and exclusively to the necessities of the company's trade.

F

Kempster v. McKenzie ((1952), 33 Tax Cas. 193) distinguished.
Appeal dismissed.

G

[For the Income Tax Act, 1952, s. 289 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 281.]

Case referred to:

(1) *Kempster v. McKenzie*, (1952), 33 Tax Cas. 193; 3rd Digest Supp.

H

Case Stated.

The taxpayer company, G. H. Chambers (Northiam Farms), Ltd., appealed to the General Commissioners of Income Tax for the Lower South Aylesford Division of Kent against an assessment to income tax made on the company under Sch. D for the year 1953-54. The only question at issue was what abatement was to be made of the amount of the annual allowance due to the company under the Income Tax Act, 1952, s. 289 (1), in respect of a Bentley motor car used in the company's business.

I

The company carried on the business of fruit farming at Northiam Farm, Horsmonden, Kent, some fourteen miles from Maidstone. The area of the farm was about seventy-five acres. The managing director of the company was Mr. G. H. Chambers, whose shareholding was of such a character and amount that he was, in substance, in complete control of the company. His private house was

* The terms of the sub-section are printed at pp. 486, 487, post.

in the middle of the farm. It was necessary for the company to have a car for the purposes of its business, and, as a Humber car owned by the company was too expensive to maintain, in May, 1952, Mr. Chambers, on behalf of the company, bought a second-hand Bentley car for £6,995. The car had a special Mulliner saloon body, expensively upholstered and fitted, which would have cost £2,500 extra in a new car. The car was driven only by Mr. Chambers and was used partly for the purposes of the company's business and partly for Mr. Chambers' private motoring. The total annual mileage covered by the car was between seven thousand and eight thousand miles, mainly occupied in journeys to and from Maidstone, to shows and demonstrations, and to fetch spare parts, but only small parts could be carried in the car owing to its delicate upholstery. It was agreed that Mr. Chambers' personal use of the car amounted to one-twelfth of the total annual mileage covered by the car, so that the annual allowance to which the company was entitled under s. 289 (1) of the Act of 1952 was to be abated to the extent of one-twelfth of the amount which would otherwise have been due, and it was contended on behalf of the company that no further deductions should be made from the gross capital allowance, which was agreed at £1,749. The Crown contended that the Bentley car must be taken to have been purchased out of regard, in part at least, for considerations of Mr. Chambers' personal choice, and not exclusively having regard to the requirements of the company's business; that that was a relevant circumstance to be taken into account in determining what was, for the purposes of s. 289 (1) of the Act of 1952, a just and reasonable allowance in the circumstances of the case; and that, accordingly, the allowance due under s. 289 (1) should be abated beyond the amount agreed on for private running by such further amount as should appear to the commissioners to be a just and reasonable amount having regard to the circumstances.

The commissioners thought that the purchase of the Bentley car was dictated, not only by the consideration of saving money on the maintenance of the Humber car, but also by consideration of Mr. Chambers' personal choice or preference, which bore no relation to the requirements of the company's business, and that the Bentley was not a car of the kind that would have been bought had its purchase been dictated by consideration of the requirements of the company's business alone. Accordingly, the commissioners, having inspected the car, found that the capital allowances must be abated by something more than the agreed proportion for private running and determined the allowance due for 1953-54 at £583, calculated as follows:

	£	s.
Gross capital allowance as agreed ..	1,749	0
Abatement for personal choice ..	1,020	5
	£728	15
Disallowance for private running ..	145	15
	£583	0

The company appealed.

P. J. Brennan for the taxpayer company.

J. Senter, Q.C., and *Sir Reginald Hills* for the Crown.

VAISEY, J., stated the facts and contentions and said: Section 289 (1) of the Income Tax Act, 1952, looks like a self-contained section not referring to allowances under other sections but containing, so to speak, a complete direction to the tax officials what they may do in respect of machinery and plant. I will read the sub-section, introducing one or two comments as I go along:

"An annual allowance may be made in respect of any machinery or

- A plant in charging the profits or gains of a trade for any year of assessment, notwithstanding that the machinery or plant is also used in that year for purposes other than those of the trade . . . ”

Pausing there, I think that the words “ purposes other than those of the trade ” do not refer exclusively, or perhaps at all, to user by the trader and not by third parties. The sub-section goes on:

- B “ . . . but where, in the basis period for any year of assessment, machinery or plant is used for purposes other than those of the trade . . . ”

In my judgment, that means used by anyone, the trader or anyone else, “ for purposes other than those of the trade ”:

- C “ . . . the annual allowance to be made in respect thereof shall be so much only of the allowance that otherwise would be made as may be just and reasonable having regard to all the relevant circumstances of the case and, in particular, to the extent of the use for the said other purposes during the said basis period.”

- D “ Having regard to all the relevant circumstances of the case ” is about as wide an expression as it is possible to imagine. In arriving at what is “ just and reasonable ” everything has to be looked at which concerns or touches or is related to the matter in question. I cannot, for my part, see that the general commissioners in the present case have not had regard to “ all the relevant circumstances of the case ”, nor can I come to the conclusion that they have had regard to circumstances which were not relevant. I think that they have directed their minds in the proper direction; that is to say, by having regard to the relevant circumstances they have come to the conclusion that it is “ just and reasonable ” that the amount of abatement which can be claimed by the company under s. 289 (1) is the sum of £583 and no more. When a question is one of quantum, it is never easy to arrive at exactitude, and it may be that other persons would have fixed a larger or smaller sum. In fact, it is almost impossible to imagine that anyone can say what is a normal sum at which to arrive. I do not think that the figure of £583 was otherwise than a right sum to be assessed as “ just and reasonable ” under the provisions of s. 289 (1).

- I should have thought that it was almost *res ipsa loquitur* that it would be unreasonable to buy a Bentley motor car for nearly £7,000 for the purposes of the trade of a fruit farmer. I should have thought that that mere statement by itself would have at once aroused suspicion as to the propriety of the expenditure and justified the necessity for going into the reasons for, and objections to, such a purchase when the question of taxation had to be considered. I think that the commissioners have properly found that there was in this case such an element of “ personal choice ” or preference as to justify their taking it into consideration.
- H What is meant by the expression “ personal choice ” is that the car would not have been bought by anyone who in considering the question of its purchase was directing his mind, solely and exclusively, to the necessities of the trader or of the trade as such.

In *Kempster v. McKenzie* (1) ((1952), 33 Tax Cas. 193), which was relied on by the taxpayer company, the headnote reads:

- I “ The appellant K. bought a car for use in connection with his farming business and also for private purposes. It was agreed that, on a mileage basis, the car was used as to six-sevenths for business and one-seventh for private purposes. On appeal before the general commissioners against an assessment to income tax made on him for the year 1949-50 in respect of his farming profits, K. contended that the full initial and annual allowances in respect of the car for that year should be abated only by one-seventh for private running. On behalf of the Crown it was contended that personal

choice of the type of car bought was a relevant circumstance to which regard should be had in determining what initial and annual allowances should be made, and that in the circumstances of the case the allowances should first be reduced by one-fifth on that account. The commissioners held that the allowances should first be reduced by one-seventh for personal choice, and that one-seventh of the allowances as so reduced should then be disallowed for private running."

DANCKWERTS, J., held that there was no evidence to justify the determination of the commissioners that an abatement should be made for personal choice.

Although that is a similar type of case to the present case, there is a vital difference in its facts.* In his judgment DANCKWERTS, J., said (33 Tax Cas. at p. 197):

"In other words it is a matter which is committed for the decision of the commissioners but which depends upon circumstances, and it is not until they have found the circumstances and reached a decision on the facts that the decision is committed to the commissioners. I do not think that is really disputed on behalf of the respondent, but it is contended that the circumstances were in fact found and the commissioners accordingly rightly applied the requirements of that paragraph. It is also argued on behalf of the appellant [the taxpayer] that there is no evidence which would justify the commissioners in reaching a conclusion that the appellant bought this sort of car by reason of some special ground or consideration applicable only to himself personally, and therefore there was no evidence upon which the commissioners could reach a conclusion requiring this further deduction which they have made."

Later in his judgment DANCKWERTS, J., said (*ibid.*, at p. 199):

"Now if the commissioners had reached the conclusion upon matters of fact in respect of which there was evidence before them on which they could reach such a conclusion, there would, of course, be no right to interfere with their decision, but as it seems to me there is no evidence upon which they were justified either in holding or in inferring that the choice of the kind of car made by the appellant in this case was dictated otherwise than by his requirements for the purposes of his farming business. It appears that he wanted a car which was to travel along roads and not necessarily one which would be driven about the rough farm-land and that it was for the purposes of his business that he chose this particular car. It does not appear, on the evidence, to have been an extravagant purchase, having regard to the cost of a second-hand car of sufficiently recent vintage to be an economic proposition and it does not appear to have been an unreasonable purchase having regard to the evidence which appears in the findings of fact as to the availability [of another car]. I find it impossible to see what evidence there was which justified the commissioners in reaching the conclusion that this was a pur-

* In *Kempster v. McKenzie* (1) the taxpayer had a dairy farm of 298 acres and it was necessary for him to use a motor car on farm business. In 1937 he had purchased a second-hand 17 h.p. Vauxhall car for £80, and in 1946 and 1947 he had placed orders for a new car. In 1949 he was offered a new 14 h.p. Alvis motor car for £1,284 9s. 6d., which was a little less than the cost of a medium second-hand car twelve months old (such as an Austin 16 h.p. car) would have been at the material time, and, as new cars were then difficult to obtain, he purchased the Alvis. The old Vauxhall car was used for all farm work necessitating running over fields and hauled a trailer when necessary, and the Alvis car was used for journeys to neighbouring market towns, being employed only on roads. DANCKWERTS, J., held that, on the evidence, the purchase of the car was "entirely reasonable".

A chase dictated wholly or partly by the personal choice of the appellant which, it was suggested, might be due to a desire to impress the persons who saw him drive about in it or any other alien and outside consideration of that sort."

B The present case differs from *Kempster v. McKenzie* (1) in the vital and material respect that, whereas there was no evidence in that case on which the commissioners could have found the element of personal choice (which was suggested to, but not accepted by, DANCKWERTS, J.), in this case, in my judgment, there is ample evidence of it. I think that it is almost an inference which hardly requires any evidence to support it. That is contrary to what DANCKWERTS, J., found in *Kempster v. McKenzie* (1), as he held that the purchase of the car in that case was not an extravagant purchase. There was evidence that a list of available cars was produced to the commissioners in the present case. I have not seen the list but I should have thought that the purchase of the Bentley car for £6,995 was a most extravagant purchase. I should have thought it was not, as DANCKWERTS, J., found in *Kempster v. McKenzie* (1), a purchase which was made entirely having regard to the requirements of the farming business. Whether the commissioners have given rather a high figure or rather a low figure for the amount which they have fixed with regard to the matter of personal choice I do not know, but I do not regard it as in any way unreasonable. Having heard the evidence and considered the arguments and seen the car, they came to a conclusion, and I think that the conclusion which they reached is one that it is impossible for me to disturb. In the result, this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Edward Davis, Nelson & Co.*, agents for *Stevens & Graves*, Maidstone (for the taxpayer company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

NOTE.

Re SONGEST (*deceased*).

G After the decision of the Court of Appeal, reported at [1956] 2 All E.R. 765, that the testatrix's residuary estate should be divided by way of scheme between two institutions, and before the order had been drawn up, a third charity, "The Disabled Sailors' and Soldiers' Workshops, Bournemouth", came forward. It appeared that the objects of this charity, which was an incorporated company, extended to helping airmen, and that it was most probably the charity to which the testatrix had meant to bequeath her residuary estate. With the consent of the two institutions which the scheme had been directed to benefit, the COURT OF APPEAL on July 27, 1956, made an order for payment of the residuary estate by way of scheme to the third charity, the Attorney-General not objecting.

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re 20, EXCHANGE STREET, MANCHESTER.
AUSTIN REED, LTD. v. ROYAL INSURANCE CO.,
LTD. (No. 2).

[CHANCERY DIVISION (Harman, J.), October 10, 1956.]

Landlord and Tenant—Termination of tenancy of business premises continued by statute—Notice by landlord to terminate tenancy—Application for new tenancy refused—Appeal dismissed—Leave to appeal to the House of Lords refused by Court of Appeal—Date of termination of tenancy—When proceedings on appeal are “finally disposed of”—“Time for appealing”—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 64 (1) (c), s. 64 (2).

A lease of business premises expired at the end of 1954, but the tenancy continued thereafter by virtue of s. 24 (1) of the Landlord and Tenant Act, 1954. The landlord having served on the tenant a notice under s. 25 of the Act terminating the tenancy on Apr. 14, 1956, the tenant applied to the High Court for a new tenancy, but the application was refused. An appeal was dismissed by the Court of Appeal on July 18, 1956, and leave to appeal to the House of Lords was refused. The tenant's right to lodge a petition to the House of Lords for leave to appeal expired on Aug. 18, 1956*. By virtue of s. 64 of the Act of 1954 the tenancy terminated at the expiration of three months beginning with the date on which the application for a new tenancy was “finally disposed of”. On the question whether the date of termination was Oct. 18, 1956 (i.e., three months after July 18, when the Court of Appeal refused leave to appeal), or Nov. 18, 1956 (i.e., three months after Aug. 18, when the time for lodging a petition to the House of Lords for leave to appeal expired),

Held: the tenancy ended on Nov. 18, 1956, because the “time for appealing” mentioned in s. 64 (2)† of the Act of 1954 included the time for lodging a petition to the House of Lords for leave to appeal, and accordingly the three months' period prescribed by s. 64 (1) ran from Aug. 18, 1956.

[For the Landlord and Tenant Act, 1954, s. 23, s. 24, s. 25, s. 29, s. 63 (2), and s. 64, see 34 HALSBURY'S STATUTES (2nd Edn.) 408, 409, 410, 413, 440 and 441.]

Action.

By a lease dated Feb. 1, 1952, premises consisting of a shop at 20, Exchange Street, Manchester, were demised by the landlord, Royal Insurance Co., Ltd., to the tenant, Austin Reed, Ltd., for a term of three years from Jan. 1, 1952, at a rent of £3,400 a year. On the expiration of the term stated in the lease, the tenancy was continued by virtue of s. 24 (1) of the Landlord and Tenant Act, 1954. By a notice, dated Oct. 7, 1955, under s. 25 of the Act, the landlord terminated the tenancy on Apr. 14, 1956, and stated that it would oppose an application for a new tenancy under s. 30 (1) (f) of the Act on the ground that on the termination of the tenancy the landlord intended to demolish or reconstruct the premises comprised in the tenancy and could not reasonably do so without obtaining possession thereof. On Nov. 15, 1955, the tenant gave notice to the landlord, under the Act, that it would not be willing to give up possession of the premises on the date specified in the landlord's notice. By an originating summons dated Feb. 3, 1956, the tenant applied for the grant of a new tenancy

* The period for lodging a petition of appeal is one month; see s. 1 (2) of the Administration of Justice (Appeals) Act, 1934, and Standing Orders of the House of Lords (Judicial Business) Ord. 2.

† The material terms of s. 64 (1) are printed at p. 492, letters A and B, post, and the terms of s. 64 (2), which defines what is meant by “finally disposed of” in s. 64 (1) (c), are printed in the footnote at p. 492, post.

A under Part 2 of the Act for a period until Nov. 30, 1956, at the same rent. The application was heard by DANCKWERTS J., and was refused by an order dated May 8, 1956. On July 18, 1956, the Court of Appeal dismissed an appeal by the tenant and refused to grant leave to appeal to the House of Lords. The tenant now brought an action against the landlord claiming, among other things, a declaration that, by virtue of the provisions of Part 2 of the Act of 1954 and
 B of s. 64 of the Act, and in the events which had happened, the tenancy would not terminate until Nov. 18, 1956.

Roy Wilson, Q.C., and Adrian Hamilton for the tenant.

Charles Russell, Q.C., and M. Browne for the landlord.

C **HARMAN, J.:** The tenant sues the landlord for relief on the footing that the tenancy goes on for one month longer than the landlord avers. There is no doubt that the landlord does intend on the date which the landlord says is the true date for the determination of this tenancy to do that which, if the tenancy is not determined, would be a breach of the landlord's covenant towards the tenant for quiet enjoyment. The question simply is on what date does the tenancy (so to call it) determine; for it is by no means an ordinary tenancy as
 D lawyers have been used to regard such things.

The plaintiff company has been the tenant of 20, Exchange Street, Manchester, for a number of years under a lease, the reversion expectant on which is vested in the defendant company. The lease expired, according to its tenor, at the end of 1954; but at that time the Landlord and Tenant Act, 1954, caused it, being a lease of business premises, to continue in force. Section 23 of the
 E Act defines tenancies to which Part 2* of the Act applies, and s. 24 (1) provides:

“A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . .”

F and the tenant may apply for a new tenancy. Section 25 (1) allows the landlord to terminate the tenancy by a proper form of notice, but that sub-section is made subject to Part 4 of the Act, to which I shall come in a moment.

It is not in dispute that the defendant company, the landlord, gave a proper notice to determine the tenancy, and this would have had the effect of making the tenancy expire on Apr. 14, 1956. The tenant was still unwilling to leave, and I am content to suppose that this was for good business reasons. The
 G landlord, for equally good reasons, was anxious to obtain possession of what, after all, was its own property. Under s. 24 (1), when a tenant has been served with such a notice he may nevertheless apply to the court, and if the rateable value be over £500, to the Chancery Division of the High Court of Justice†, for a grant of a further tenancy. Under s. 29 the court must make such a grant if
 H the conditions are satisfied. Section 30 shows the grounds on which the landlord may oppose the application, and if those grounds are judged by the court to have been made good, the court must, under s. 31, refuse to grant a new tenancy, and the question is not one on which the court is given a discretion whether to grant or to refuse the application.

An application was made by the tenant to DANCKWERTS, J., but he, deciding
 I that the landlord's objections were made out, refused to make an order for a further tenancy. The order of DANCKWERTS, J., was dated May 8, 1956. The tenant appealed to the Court of Appeal, which, on July 18, 1956, made an order affirming the order of DANCKWERTS, J. That brings me to the nub of this situation, which is: When, having regard to those facts, does the statutory

* Part 2 of the Landlord and Tenant Act, 1954, is headed “Security of tenure for business, professional and other tenants” and contains s. 23 to s. 46.

† See s. 63 (2).

tenancy determine? For that I must look at Part 4 of the Landlord and Tenant Act, 1954, which contains the miscellaneous provisions, and I think that I need read only s. 64. Section 64 (1) provides that where (a) a notice to terminate a tenancy has been given or a request for a new tenancy has been made by the tenant, and where (b) an application to the court has been made, and where

“(c) apart from this section the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time.”

Why it was considered necessary to say “and not at any other time” I do not know, unless it means that there was to be one date pointed out and no other at which the long-drawn struggle was finally to come to an end. It is not disputed that the tenancy in this case ends three months from the date on which the application for a new tenancy was finally disposed of. Those three months are still running. They will end on Oct. 18, or Nov. 18, 1956, according to the decision in this action.

The Act, by s. 64 (2), indicates what it means when it uses the words “the application is finally disposed of”. Counsel for the landlord pointed out that, in some sense, applications to the court were never finally disposed of, except so far as the House of Lords was concerned, because there was an inherent power in the court to extend the time for appeal or to extend the time for a re-trial, and so forth, and those powers had been used in some very striking cases years after the decision, and that, therefore, in theory it was very difficult ever to say that an application was finally disposed of. Section 64 (2)*, however, says, in effect, that the application is finally disposed of when all time for appeal has expired; that is to say, the fact that leave to appeal was obtained out of time would not save the tenancy, because the period of three months runs according to the time for appealing, and not according to the time in which a party might be allowed to appeal. The difference between the parties is on this narrow ground: When can it be said in this case that the time for appealing has expired? *Prima facie*, I should be disposed to say that the application is not finally disposed of until finality has been reached, that is to say, until there can be no further talk about it, but this must depend on the time allowed for appeal and not on the indulgence which a court may grant.

In this case the Court of Appeal, having reached its conclusion, refused its leave to appeal to the House of Lords. If it had not done that, there is no doubt that the matter would not have been finally disposed of until six months after the Court of Appeal's decision, because if leave to appeal had been given there would have been six months within which the aggrieved party might consider whether or no to tempt his fortunes in the House of Lords†. If within that six months he had put a petition of appeal on the records of the House, the time would further have been extended until their Lordships' House had marched to its conclusion. The tenant, however, did not obtain leave to appeal, and the only way, therefore, in which the proceedings could possibly have been kept alive was to lodge a petition to the House of Lords to obtain their leave notwithstanding the refusal of the Court of Appeal. It is submitted on behalf of the tenant that

* Section 64 (2) reads: “The reference in sub-s. (1) (c) of this section to the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment.”

† See s. 1 (2) of the Administration of Justice (Appeals) Act, 1934, and Standing Orders of the House of Lords (Judicial Business) Ord. 1.

A during the month after the order of July 18, 1956, it could not be postulated that the matter was finally disposed of, because the tenant might present such a petition. The tenant did not do so. Therefore, it is submitted that, at the end of one month, that is to say, on Aug. 18, 1956, time began to run, and will end on Nov. 18, 1956.

That, however, does not satisfy the landlord on whose behalf it was submitted
B that the meaning of the expression "finally disposed of" in s. 64 (1) (c) was to be found by reading the definition in s. 64 (2), and that what one had to look for was the date on which "the proceedings on the application . . . have been determined"—and there is no doubt that they were determined by the Court of Appeal's decision—"and any time for appealing or further appealing has expired". Counsel for the landlord submits that the Court of Appeal refused
C leave to appeal; that, therefore, no right of appeal existed from that moment onwards; and that, there being no right of appeal, there was no time for appealing. Thus, out of the words of s. 64 (2), the inference is drawn that time runs against an unsuccessful appellant who has not got leave to appeal, for the simple reason that he has no right of appeal vested in him. Counsel submits that the fact that the appellant may within a month revive his right or get a new right is irrelevant,
D and really no inconvenience, because an application to the House of Lords must be made within a month, and, as the tenancy continues for three months, there is no serious danger of any overlapping.

Counsel also pointed out that under s. 7 of the Criminal Appeal Act, 1907, a distinction was carefully drawn between appeals and applications for leave to appeal. That, of course, in connection with criminal causes involving either
E corporal punishment or death, might be a very important matter. Counsel submitted that the two things were different; that the application for leave to appeal was not an appeal itself, but merely a new application, and that it would be a twisting of the language to treat it as if time for appealing was there when it was not there, there being no extant right of appeal. Nevertheless, there was a potential right to appeal, and if one looks at it from the other end of the tele-
F scope, a person who may obtain a right may be said to have an additional right just as much as he may be said to have no right until he obtains the leave which gives it to him. I do not think that either way of looking at it really helps me. Nor, I think, does the alternative view, to which my attention was drawn, but which was not pressed, that applications to the House of Lords by petition may possibly be proceedings in consequence of an appeal, with the result that, if the
G petition were presented within the month, well and good, but, if it were not, the time did not cease to run but began irrevocably from the date when the Court of Appeal pronounced its judgment.

This, I have no doubt, is an important matter to the parties, and I do not find it an easy one to determine. Parliament has thought fit to break the contract between the parties and to continue the tenant in occupation, to which no
H contract he ever made gave him any right. It may be that the courts ought not to extend such a tenancy beyond what the statute insists that they should, because, after all, the tenant is occupying somebody else's property, but I do feel (and this eventually decides the case as far as I am concerned) that, when s. 64 says "finally disposed of", I ought to take it to mean what it says. Certainty is the most valuable point of this kind of law, and I feel that I should look for a
I time at which one can say without peradventure: "The thing is over. There is nothing more that one can do before time begins to run, which shall put the landlord out of his agony of waiting". I think that, as s. 64 (1) says that the effect of the notice or request is to terminate the tenancy three months after the application is finally disposed of, I ought to take the view that, when s. 64 (2) refers to "time for appealing", it must include time for lodging a petition for leave to appeal. Counsel for the tenants said that it would be odd if leave to appeal given by the Court of Appeal was sufficient to extend the time, but leave

tenancy determine? For that I must look at Part 4 of the Landlord and Tenant Act, 1954, which contains the miscellaneous provisions, and I think that I need read only s. 64. Section 64 (1) provides that where (a) a notice to terminate a tenancy has been given or a request for a new tenancy has been made by the tenant, and where (b) an application to the court has been made, and where

"(c) apart from this section the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time."

Why it was considered necessary to say "and not at any other time" I do not know, unless it means that there was to be one date pointed out and no other at which the long-drawn struggle was finally to come to an end. It is not disputed that the tenancy in this case ends three months from the date on which the application for a new tenancy was finally disposed of. Those three months are still running. They will end on Oct. 18, or Nov. 18, 1956, according to the decision in this action.

The Act, by s. 64 (2), indicates what it means when it uses the words "the application is finally disposed of". Counsel for the landlord pointed out that, in some sense, applications to the court were never finally disposed of, except so far as the House of Lords was concerned, because there was an inherent power in the court to extend the time for appeal or to extend the time for a re-trial, and so forth, and those powers had been used in some very striking cases years after the decision, and that, therefore, in theory it was very difficult ever to say that an application was finally disposed of. Section 64 (2)*, however, says, in effect, that the application is finally disposed of when all time for appeal has expired; that is to say, the fact that leave to appeal was obtained out of time would not save the tenancy, because the period of three months runs according to the time for appealing, and not according to the time in which a party might be allowed to appeal. The difference between the parties is on this narrow ground: When can it be said in this case that the time for appealing has expired? Prima facie, I should be disposed to say that the application is not finally disposed of until finality has been reached, that is to say, until there can be no further talk about it, but this must depend on the time allowed for appeal and not on the indulgence which a court may grant.

In this case the Court of Appeal, having reached its conclusion, refused its leave to appeal to the House of Lords. If it had not done that, there is no doubt that the matter would not have been finally disposed of until six months after the Court of Appeal's decision, because if leave to appeal had been given there would have been six months within which the aggrieved party might consider whether or no to tempt his fortunes in the House of Lords†. If within that six months he had put a petition of appeal on the records of the House, the time would further have been extended until their Lordships' House had marched to its conclusion. The tenant, however, did not obtain leave to appeal, and the only way, therefore, in which the proceedings could possibly have been kept alive was to lodge a petition to the House of Lords to obtain their leave notwithstanding the refusal of the Court of Appeal. It is submitted on behalf of the tenant that

* Section 64 (2) reads: "The reference in sub-s. (1) (c) of this section to the date on which an application is finally disposed of shall be construed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment."

† See s. 1 (2) of the Administration of Justice (Appeals) Act, 1934, and Standing Orders of the House of Lords (Judicial Business) Ord. 1.

A during the month after the order of July 18, 1956, it could not be postulated that the matter was finally disposed of, because the tenant might present such a petition. The tenant did not do so. Therefore, it is submitted that, at the end of one month, that is to say, on Aug. 18, 1956, time began to run, and will end on Nov. 18, 1956.

That, however, does not satisfy the landlord on whose behalf it was submitted
B that the meaning of the expression "finally disposed of" in s. 64 (1) (c) was to be found by reading the definition in s. 64 (2), and that what one had to look for was the date on which "the proceedings on the application . . . have been determined"—and there is no doubt that they were determined by the Court of Appeal's decision—"and any time for appealing or further appealing has expired". Counsel for the landlord submits that the Court of Appeal refused
C leave to appeal; that, therefore, no right of appeal existed from that moment onwards; and that, there being no right of appeal, there was no time for appealing. Thus, out of the words of s. 64 (2), the inference is drawn that time runs against an unsuccessful appellant who has not got leave to appeal, for the simple reason that he has no right of appeal vested in him. Counsel submits that the fact that the appellant may within a month revive his right or get a new right is irrelevant,
D and really no inconvenience, because an application to the House of Lords must be made within a month, and, as the tenancy continues for three months, there is no serious danger of any overlapping.

Counsel also pointed out that under s. 7 of the Criminal Appeal Act, 1907, a distinction was carefully drawn between appeals and applications for leave to appeal. That, of course, in connection with criminal causes involving either
E corporal punishment or death, might be a very important matter. Counsel submitted that the two things were different; that the application for leave to appeal was not an appeal itself, but merely a new application, and that it would be a twisting of the language to treat it as if time for appealing was there when it was not there, there being no extant right of appeal. Nevertheless, there was a potential right to appeal, and if one looks at it from the other end of the tele-
F scope, a person who may obtain a right may be said to have an additional right just as much as he may be said to have no right until he obtains the leave which gives it to him. I do not think that either way of looking at it really helps me. Nor, I think, does the alternative view, to which my attention was drawn, but which was not pressed, that applications to the House of Lords by petition may possibly be proceedings in consequence of an appeal, with the result that, if the
G petition were presented within the month, well and good, but, if it were not, the time did not cease to run but began irrevocably from the date when the Court of Appeal pronounced its judgment.

This, I have no doubt, is an important matter to the parties, and I do not find it an easy one to determine. Parliament has thought fit to break the contract between the parties and to continue the tenant in occupation, to which no
H contract he ever made gave him any right. It may be that the courts ought not to extend such a tenancy beyond what the statute insists that they should, because, after all, the tenant is occupying somebody else's property, but I do feel (and this eventually decides the case as far as I am concerned) that, when s. 64 says "finally disposed of", I ought to take it to mean what it says. Certainty is the most valuable point of this kind of law, and I feel that I should look for a
I time at which one can say without peradventure: "The thing is over. There is nothing more that one can do before time begins to run, which shall put the landlord out of his agony of waiting". I think that, as s. 64 (1) says that the effect of the notice or request is to terminate the tenancy three months after the application is finally disposed of, I ought to take the view that, when s. 64 (2) refers to "time for appealing", it must include time for lodging a petition for leave to appeal. Counsel for the tenants said that it would be odd if leave to appeal given by the Court of Appeal was sufficient to extend the time, but leave

the Messina gang. It is unnecessary to quote further from the article, but it is not disputed that it both tended and was calculated to prejudice criminal proceedings against Micallef which were in fact pending at the time of publication. He had been arrested on June 13 and brought before the magistrate at Marylebone on that day charged with brothel-keeping. He was remanded till June 27 when he was committed for trial to the London Sessions, which opened on July 3, though his case had not been reached by the time the article was published. With the truth or falsity of the various allegations in this article this court is not concerned, for it is not and cannot be disputed that anything more calculated to prejudice a fair trial cannot well be imagined, and considering that the proprietors claim a circulation of over four million copies a week, there is a strong probability that it would be read by at least some of those summoned as jurors to the sessions. The respondent Webb's answer to the motion is that he had no knowledge that a charge had been preferred against Micallef. It is certainly remarkable that a man describing himself as an experienced crime reporter and investigator, who had been publishing these articles for some weeks, should not have known that one of the men he was so actively pursuing had not only been arrested and charged but actually committed for trial. He had sent down to interview Micallef while he was on bail another reporter, one Peter Grisewood, who describes himself as a free lance journalist, but who not infrequently worked for "The People". The purpose of this interview was never made clear to the court, but it was said that much of the material published in the article was based on what Micallef told Grisewood at this interview. While again it is unnecessary for the purposes of these proceedings to decide on the truth or falsity of Grisewood's evidence, we find his affidavits and the evidence he gave when cross-examined by the Attorney-General most unsatisfactory and in some respects frankly incredible. Webb's case as to his lack of knowledge may be summarised by saying that the company paid the court reporters at both Marylebone and Marlborough Street courts to supply them with reports of cases relating to prostitutes and brothels, and especially to those relating to the activities of the Messinas. There was a considerable conflict of evidence as to the nature of these instructions or lack of instruction, but it is accepted by the Attorney-General that no information was in fact given to Webb of the proceedings against Micallef and, as in the opinion of this court the question as to how far Webb or the publishers of the newspaper took proper steps to keep themselves informed of the chance or probability of proceedings being taken is not a material or decisive question in the case except as to penalty, we need not investigate the evidence on this point in detail. The Attorney-General accepts that Webb did not know that the charge had been made, and if he did not it follows that the editor did not, as he simply relied on Webb.

We have then to deal with the submission made on behalf of the respondents, that unless there was knowledge there can be no contempt. This can be summarised by saying that the contention is that mens rea is a necessary constituent of the offence. While this is at first sight an attractive argument as we are dealing with a criminal contempt which exposes the offender to a fine or imprisonment, in our opinion a review of the cases shows that persons who publish matter of this description charging alleged offences against the criminal law do so at the risk not only of being sued for libel, but also of being punished for contempt if the criminal law has been set in motion. And the same is true if civil proceedings have been started, at least if they are of a common law nature and may be heard before a jury. In this regard we may call attention to what was said by MAUGHAM, J., in *Re William Thomas Shipping Co., Ltd., H. W. Dillon & Sons, Ltd. v. The Co., Re Sir Robert Thomas* (1) ([1930] 2 Ch. 368 at p. 373) as to the different way that the common law courts and the Chancery courts approach these matters because of the presence of juries in the former.

A The first case to which we would refer is *Re Read & Huggonson*, sub nom. *Roach v. Garvan*, generally cited as *The St. James's Evening Post* case (2) ((1742), 2 Atk. 469). The judgment of LORD HARDWICKE, L.C., in that case has always been regarded as the locus classicus on this subject. The publication with which he was dealing was said to be both a libel and a contempt of court and the Lord Chancellor refused to deal with it as a libel, as that was not a ground for interference by a court of equity, but he did hold it to be a contempt. The publisher was a Mrs. Read, on whose behalf it was urged that she did not know the nature of the offending article, but LORD HARDWICKE, L.C., said (*ibid.*, at p. 472) that it was urged

C “. . . that she did not know the nature of the paper; and that printing papers and pamphlets, is a trade, and what she gets her livelihood by. But, though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous; and so is the rule at law, and I will always adhere to the strict rules of law in these cases. Therefore Mrs. Read must be committed to the Fleet, according to the common order of the court upon contempts.”

The case was considered by LORD ERSKINE, L.C., in *Ex p. Jones* (3) ((1806), 13 Ves. 237). Here again a libel on individuals was held also to be a contempt. After citing *Roach v. Garvan* (2), the Lord Chancellor said (*ibid.*, at p. 239):

E “As to the printers, as LORD HARDWICKE observes, it is no excuse, that the printer was ignorant of the contents. Their intention may have been innocent; but, as LORD MANSFIELD has said, the fact, whence the illegal motive is inferred, must be traversed; and the party, admitting the act, cannot deny the motive. The maxim ‘actus non facit reum, nisi mens sit rea’, cannot be made applicable to this subject in the ordinary administration of justice; as the effect would be, that the ends of justice would be defeated by contrivance.”

These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and in our opinion they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognisance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame. It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to intend to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which in fact is calculated to prejudice a fair trial. We would refer to the emphatic statement of the law by a judge of great eminence whose judgments are always received in this country with the highest respect, PALLES, C.B. In *R. v. Dolan* (4) ([1907] 2 I.R. 260), having posed the question whether a speech the subject of the motion would have a tendency to prejudice the fair trial of an indictment, the learned chief baron said (*ibid.*, at p. 284):

I “As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of court, if the court arrives at the conclusion which I have arrived at, that there is a real danger that it will affect the trial; or that absence of intention is to excuse the party of punishment. Such a circumstance as that ought, no doubt, to be taken into

consideration in considering the nature of the punishment to be awarded, as, for instance, whether it should be imprisonment."

Again this seems to dispose of any suggestion that mens rea, which means a guilty intention, is in any way material except as to penalty. The article in question here urged the arrest and prosecution of Micallef. It proceeded to give in a sensational manner details of his relationship with persons of bad character, some of whom had been convicted in this country for offences connected with prostitution, and to refer to Micallef's previous convictions, the number of which incidentally appears to have been exaggerated tenfold. Reporters and editors of newspapers know perfectly well that evidence relating to these matters cannot be given at a trial, yet they are being published broadcast so that persons who may have to sit as jurors may be informed beforehand of the bad characters of the persons they have to try. In this respect we would refer to *R. v. Parke* (5) ([1903] 2 K.B. 432), where the court said (at p. 438): "It is possible very effectually to poison the fountain of justice before it begins to flow". We do not mean to say that a newspaper may not expose and comment on someone's conduct which they believe to be fraudulent or otherwise criminal, but, if they do, the comment should be made with proper restraint, taking care especially to refrain from publishing matter of which the law forbids evidence being given at the trial. It is a perilous adventure which they undertake at their own risk, and a clear warning to this effect was given in 1924 by this court. In *R. v. Evening Standard, Ex p. Public Prosecutions Director, R. v. Manchester Guardian, Ex p. Same, R. v. Daily Express, Ex p. Same* (6) ((1924), 40 T.L.R. 833), LORD HEWART, C.J., said (at p. 835):

"It was clear that some of these newspapers, as was shown by the materials before the court, had entered deliberately and systematically on a course which was described by some of them as 'criminal investigation'. It was urged on behalf of one respondent on the previous day that it was part of the duty of a newspaper when a criminal case was pending to elucidate the facts. If he understood that suggestion when clearly expressed it came to something like this; that while the police or the Criminal Investigation Department were to pursue their investigations in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or the point of view of the defence, it had come to be somehow for some reason the duty of newspapers to employ an independent staff of amateur detectives, who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence. They were to conduct their investigation unfettered, to publish to the whole world from time to time the results of these investigations, whether they conceived them to be successful or unsuccessful results, and by so doing to perform what was represented as a duty, and, one could not help thinking, to cater for the public appetite for sensational matter."

We must now deal with *Metropolitan Music Hall Co. v. Lake* (7) ((1889), 58 L.J.Ch. 513) and *Re Marquis of Townshend* (8) ((1906), 22 T.L.R. 341) on which counsel for the respondents relied as establishing that knowledge was an essential ingredient in the offence of contempt. It is to be observed that in neither of these cases did the court consider that the matter complained of was sufficiently serious to call for action. It is true that in the first case CHITTY, J., did deal at some length with the question of lack of knowledge of pending proceedings and showed that he would be reluctant to impose punishment where a lack of knowledge was proved to the satisfaction of the court. The other case was one of a very special character and arose out of certain proceedings in lunacy. One set of these proceedings had terminated, but on the day before the publication complained of a petition under s. 116 of the Lunacy Act, 1890, for the appointment of a receiver had been presented, and of these the author of the article

A could have had no knowledge. It is clear that the court was mainly influenced by the fact that there was nothing in the article showing that it referred to any pending proceedings or contained any comment on any pending matter. It is true that LORD COZENS-HARDY, M.R., did stress the question of knowledge or lack of knowledge as a constituent of the offence (22 T.L.R. at p. 342). The other member of the court, ROMER, L.J., made no reference to this. We cannot
B consider either of these cases as qualifying the two decisions of *Roach v. Garvan* (2) and *Ex p. Jones* (3); and the subsequent decision of this court in the *R. v. Evening Standard* case (6) to which we have just referred shows that in matters of the description with which we are now dealing and which urge the prosecution of an alleged criminal, the publication is at the risk of those responsible for it. Accordingly, we hold that the respondents and each of them are guilty of
C contempt.

It remains to deal with the penalty. The court cannot look on this as otherwise than a serious offence. This was an article written in a highly sensational manner published in what the respondent Webb described as a sensational paper. Obviously a matter such as this is published with a view to increasing circulation and with no other object. We shall therefore order Odam's Press,
D Ltd. to pay to the Crown a fine of £1,000 within seven days or appropriate writs will be issued. With regard to the editor, the court can only regret the attitude he took when in the witness-box. He seemed to think this was no concern of his and that he was entitled to rely on his reporter without more. It has always been a tradition of English journalism that the editor takes responsibility for what is published in his paper, and this was held to be a rule of law in *R. v. Evening Standard Co., Ltd., Ex p. A.-G.* (9) ([1954] 1 All E.R. 1026). As it is
E accepted that neither he nor the respondent Webb had actual knowledge of the pending proceedings, grave as is this case, the court will not impose a sentence of imprisonment. It was urged for Webb that he had taken all reasonable precautions before publication, but in our opinion the evidence fell far short of showing that standard of care which persons indulging in this kind of journalism
F are bound to take. Accordingly, a substantial fine must be imposed on both these respondents. The order in their case will be that leave to issue writs of attachment against both of these respondents is granted, but the writs are not to be enforced if within seven days each respondent pays a fine of £500. The respondents will pay the costs of these proceedings.

Order accordingly.

Solicitors: *Director of Public Prosecutions* (for the applicant); *Simmons & Simmons* (for the respondents).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

A

Re C. T. (an infant). Re J. T. (an infant).

[CHANCERY DIVISION (Roxburgh, J.), October 10, 11, 12, 1956.]

Infant—Guardianship of Infants Acts—Illegitimate children—Application to justices by putative father for custody—Jurisdiction of justices—Jurisdiction of judge of Chancery Division of High Court on appeal by putative father from decision of justices—Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 5, as amended by the Administration of Justice Act, 1928 (18 & 19 Geo. 5 c. 26), s. 16.

B

The putative father of two illegitimate children applied to a court of summary jurisdiction for custody of the children under the Guardianship of Infants Acts, 1886 and 1925 (as amended by the Administration of Justice Act, 1928, s. 16*). The justices held that they had jurisdiction to entertain the applications but refused them on their merits. On an appeal by the putative father to a judge of the Chancery Division of the High Court, under s. 7 (3) of the Act of 1925 (no application to make the child a ward of court having been made),

C

Held: (i) the justices had no jurisdiction under s. 5† of the Act of 1886, as extended by s. 3 of the Act of 1925 and by s. 16 of the Act of 1928, to entertain an application by the putative father for custody of his illegitimate child, because the term “father”, within the meaning of the Acts, meant a de jure father and did not include a putative father.

D

Reasoning of VISCOUNT SIMONDS in his dissenting speech in *Galloway v. Galloway* (*Ex parte*) ([1955] 3 All E.R. at p. 432) adopted in the different context of the present case: dictum of DENNING, L.J., in *Re M. (an infant)* ([1955] 2 All E.R. at p. 912) applied.

E

(ii) even if the court had been sitting as a court of first instance and not to hear appeals from the decision of justices under the Guardianship of Infants Acts, 1886 and 1925, the court could not in the circumstances have exercised its inherent jurisdiction in relation to these infants (see p. 512, letter F, post).

F

Per CURIAM: the titles of father and mother *prima facie* belong only to those who have become so in the manner known to and approved by the law (see p. 504, letter G, post).

G

Semble: the jurisdiction conferred by s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of a child on the application of the child's mother does not extend to an illegitimate child (see p. 510, letters C and D, post).

Appeals dismissed.

[**Editorial Note.** It follows from the reasoning of this decision that there is not jurisdiction under s. 5 of the Guardianship of Infants Act, 1886, as extended by subsequent enactments, to make orders as to the custody of illegitimate children; and that there is not jurisdiction under s. 3 (2) of the Guardianship of Infants Act, 1925, to make orders for the maintenance of illegitimate children. This applies to all courts within the meaning of the term court in the Guardianship of Infants Acts, 1886 and 1925, viz., the High Court or a county court

H

I

* Section 16 of the Administration of Justice Act, 1928, reads: “The powers of a court under s. 5 of the Guardianship of Infants Act, 1886, as amended by the Guardianship of Infants Act, 1925, to make orders regarding the custody of an infant and the right of access thereto of either parent, may be exercised upon the application of the father of an infant in like manner as those powers may be exercised upon the application of the mother of the infant.”

† The terms of s. 5 of the Act of 1886 are set out at p. 502, letter F, post.

A (s. 9 of the Act of 1886) or magistrates' courts (s. 7 of the Act of 1925). See particularly p. 510, letters B to F, p. 512, letters B to D, post, for the generality of the reasoning and its application. The present case does not, however, actually decide that the mother of an illegitimate child is not entitled to apply for custody of or maintenance for the child under the Guardianship of Infants Acts, 1886 and 1925.

B As to the position of the natural father in relation to the custody of an illegitimate child, see 3 HALSBURY'S LAWS (3rd Edn.) 109, para. 169; and for cases on the subject, see 3 DIGEST 381, 383, 198-213.

As to the inherent jurisdiction of the court over infants, see 17 HALSBURY'S LAWS (2nd Edn.) 586, para. 1259.

C For the Guardianship of Infants Act, 1886, s. 5, the Guardianship of Infants Act, 1925, s. 3, and the Administration of Justice Act, 1928, s. 16, see 12 HALSBURY'S STATUTES (2nd Edn.) 943, 955, 971.]

Cases referred to:

- (1) *Horner v. Horner*, (1799), 1 Hag. Con. 337; 161 E.R. 573; 3 Digest 383, 219.
- D (2) *Barnardo v. McHugh*, [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 3 Digest 382, 207.
- (3) *Re Lloyd*, (1841), 3 Man. & G. 547; 4 Scott, N.R. 200; 133 E.R. 1259; sub nom. *Re A. B.*, 11 L.J.C.P. 43; 3 Digest 382, 209.
- E (4) *R. v. Nash, Re Carey*, (1883), 10 Q.B.D. 454; 52 L.J.Q.B. 442; 48 L.T. 447; 3 Digest 381, 204.
- (5) *R. v. Brighton (Inhabitants)*, (1861), 1 B. & S. 447; 30 L.J.M.C. 197; 5 L.T. 56; 25 J.P. 630; 121 E.R. 782; 3 Digest 375, 157.
- (6) *Ex p. Galloway v. Galloway*, [1955] 3 All E.R. 429; [1956] A.C. 299; 3rd Digest Supp.
- F (7) *Re A., S. v. A.*, (1940), 164 L.T. 230; 56 T.L.R. 934; 84 Sol. Jo. 477; 2nd Digest Supp.
- (8) *Re M. (an infant)*, [1955] 2 All E.R. 911; [1955] 2 Q.B. 479; 119 J.P. 535; 3rd Digest Supp.
- (9) *Bulter v. Gregory*, (1902), 18 T.L.R. 370; 15 Digest 856, 9400.
- G (10) *Humphrys v. Polak*, [1901] 2 K.B. 385; 70 L.J.K.B. 752; 85 L.T. 103; 3 Digest 382, 211.
- (11) *R. v. Soper*, (1793), 5 Term Rep. 278; 101 E.R. 156; 3 Digest 381, 201.
- (12) *Ex p. St. Mary Abbots Guardians*, (1887), 51 J.P. Jo. 740; 3 Digest 383, 213.
- (13) *Re Kerr (otherwise M'Iwrath)*, (1889), 24 L.R. Ir. 59; 24 I.L.T. 3; 3 Digest 383, r.
- H (14) *Re Connor*, [1919] 1 I.R. 361; Digest Supp.
- (15) *Re E.*, [1955] 3 All E.R. 174; 3rd Digest Supp.

Appeals.

I These were two appeals, by originating notices of motion under R.S.C., Ord. 55A, r. 6, by the same appellant against the refusal of a court of summary jurisdiction to make orders under the Guardianship of Infants Acts, 1886 and 1925, granting the custody of two illegitimate children to the appellant, their putative father. The justices rejected a submission by the respondent, the mother of the children, that they had no jurisdiction to entertain the appellant's applications, but they refused the applications on their merits. The appeals having come before ROXBURGH, J., in camera, the respondent submitted that neither the justices, nor the judge on an appeal from the decision of the justices, had jurisdiction to entertain an application by a putative father for custody under the

Guardianship of Infants Acts, 1886 and 1925. The case was adjourned into open court for argument on this point and judgment was delivered in court. A

B. R. Clapham for the appellant, the putative father.

J. P. Comyn for the respondent, the mother.

ROXBURGH, J.: The appellant is the putative father of two illegitimate children. It is admitted that he is the *de facto* natural father and that the unmarried respondent is the mother. He took out two summonses under the Guardianship of Infants Acts, 1886 and 1925, before the justices asking for custody of the two children of the union. The justices rejected a submission that they had no jurisdiction and decided against the appellant on the merits, or demerits, of his case. He appeals and counsel for the respondent mother takes the preliminary objection that the justices had no jurisdiction and that I, hearing appeals from them, have no jurisdiction to entertain any application by a putative father for custody under those Acts. B C

This question, which is difficult and also of general importance to the legal profession, was fully argued. When I realised that I had two litigants of small means before me and that their legal aid had apparently come to an end, I decided to hear the case *de bene esse* on its merits, and I am glad that I did so because I can say at once that if the justices had jurisdiction they came to a right conclusion; indeed, this is so clear on the evidence that I do not feel that it is necessary to say more than that, if I ought not to dismiss the appeal for want of jurisdiction, I ought to dismiss it for its demerits. D

The question of jurisdiction, however, is indeed a puzzling question. Before 1886 the mother of a legitimate child had no means of obtaining custody of the child against the father except by making the child a ward in chancery and, accordingly, s. 5 of the Guardianship of Infants Act, 1886, was passed which provided and, subject to amendment,* still provides: E

"The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father . . .". F

It is to be observed that that section, as it stands in the Act of 1886, is concerned only with applications by the mother and does not make any provision for awarding any maintenance. G

The position before 1886 was quite different in the case of an illegitimate child. SIR WILLIAM SCOTT said in *Horner v. Horner* (1) ((1799), 1 Hag. Con. 337 at p. 351): H

"Now, on all general principles, it is perfectly clear that the only father whom the law of the country has armed with the *patria potestas* is the father 'quem nuptiae demonstrant'. He only is the guardian of his child by law, and he only may delegate that trust to another at his death. The only cases in which the natural parent is acknowledged are cases to his disadvantage, in cases of civil concern, or by way of restriction, in such as are of a moral nature. He is compelled by later statutes to maintain the child, for the relief of the parish, to ease it of the charge to which it is primarily liable, because before these statutes the parish alone was bound to maintain it. It is laid down in 2 Bulstrode, 344, and Bott, 460, that before I

* The rights under s. 5 of the Act of 1886 were extended by the Guardianship of Infants Act, 1925, s. 3 (see p. 505, letter E, post) and by s. 16 of the Administration of Justice Act, 1928.

A the statute of the 18th Eliz. c. 3, the parish where the child was born must maintain it till it gained a settlement. The custody of the child, therefore, must have been at that time in the hands of the parish, he was filius populi, and there was no ground upon which the possession of the child could have been assumed by the father. Even since the enactment of that statute it continued for some time a matter of no inconsiderable doubt whether the parent had a right to take the child out of the possession of the parish."

B

After discussing that question, SIR WILLIAM SCOTT continued (1 Hag. Con. at p. 352):

C "Though this may now be settled, still [the putative father] can appoint no guardian; and, I presume, that he cannot legally take the child out of the custody of the mother, in which it is deposited by nature at its birth; though I speak with all necessary caution on a point belonging to the learning of another profession. All this is sufficient to show that he has the principal burden of maintenance, with a very small degree (if any) of parental authority."

D

To this passage extracted from a judgment pronounced in 1799 I propose to add a passage from the speech of LORD HERSCHELL in *Barnardo v. McHugh* (2) ([1891] A.C. 388 at p. 396):

E "The question principally discussed at your Lordships' Bar was whether the mother of an illegitimate child has a legal right to its custody. It was contended on behalf of the appellant that she has no such right; whilst on the other side it was argued that her rights are the same as those which a father possesses with regard to his legitimate children. In the courts below the latter proposition appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition."

F

After discussing the authorities, LORD HERSCHELL continued (*ibid.*, at p. 398):

G "It seems to me that there was in former times a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was filius nullius, and to hold that no one possessed in relation to it the full parental rights which the law recognises in the case of legitimate offspring. When MAULE, J., in the case of *Re Lloyd* (3) ((1841), 3 Man. & G. 547 at p. 548), asked, 'How does the mother of an illegitimate child differ from a stranger?' it does not appear to me that he was speaking ironically, but rather stating bluntly this legal doctrine. But whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Act (4 & 5 Will. 4 c. 76, s. 71) renders it impossible in the present day to regard the mother of an illegitimate child as destitute of any rights in relation to its custody. The obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody. It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by SIR GEORGE JESSEL, M.R., in *R. v. Nash, Re Carey* (4) ((1883), 10 Q.B.D. 454 at p. 456): 'In equity regard was always had to the mother, putative father, and relations on the mother's side' . . . I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its

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I

custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

This decision was some considerable time after the passing of the Guardianship of Infants Act, 1886, and it is worth noting that there is no suggestion that the Act applies to the position of illegitimate children.

I will now refer to the dictum of COCKBURN, C.J., in *R. v. Brighton (Inhabitants)* (5) ((1861), 1 B. & S. 447), where COCKBURN, C.J., interjected in the course of the argument (*ibid.*, at p. 451):

"The father of an illegitimate child is not recognised by the law of England as to civil purposes; but in that it differs from the law of other countries."

That was the position in 1886. The father of a legitimate child required no further fortification of his legal rights, the mother of an illegitimate child required no further fortification of her position; what she might require was maintenance for her illegitimate child, and that, at any rate until 1925, she could obtain only by bastardy proceedings. I will read a short passage from 3 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 108, para. 168:

"The father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised by the law of England for civil purposes. He is under no obligation to provide for the child, in the absence of any affiliation order, unless he has adopted it *de facto*, or obtained an adoption order."

This is, of course, a statement of the law as it is understood by the editors of HALSBURY'S LAWS to be today and impliedly adopts the view to which this judgment is now tending. It is also said in 3 HALSBURY'S LAWS (*ibid.*):

"The father may also be compelled to contribute to the support of the child by affiliation proceedings instituted by the mother . . ."

I take it that, *prima facie*, the titles of "father" and "mother" belong only to those who have become so in the manner known to and approved by the law. In *Galloway v. Galloway (Ex parte)* (6) ([1955] 3 All E.R. 429) VISCOUNT SIMONDS said (*ibid.*, at p. 431):

"First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament, that 'child' *prima facie* means lawful child, and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as 'filius nullius'. This *prima facie* meaning may, in certain circumstances, be displaced and a wider meaning given to the words . . ."

That passage is from a minority speech in a case in which the words under consideration were quite different. The words under consideration were "the children, the marriage of whose parents is the subject of the proceedings", and although by three to two the House of Lords decided that the *prima facie* meaning in that case had been displaced, I do not think anybody doubted that that was the *prima facie* meaning of the words "child" and "parent", and I think that

A the same reasoning must, and does, apply to "father" and "mother". Moreover, not only is it true to say that there is nothing in the Act of 1886 or in the circumstances in which it was passed to suggest that these titles were extended to de facto parents, but it is true to say, I think, that there is a good deal to the contrary.

B I will read s. 2 and s. 3 of the Act of 1886. These sections, which have been repealed on the substitution of provisions more favourable to the mother by a later Act,* clearly recognised the paramount position of a father as it then was and were inappropriate to the position of a father who was but a putative father. Section 2 provided:

C "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act then from and after the passing of this Act, the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

D Section 3 provided:

E "(1) The mother of any infant [I stress this because of what is coming hereafter] may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly. (2) The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the court, after her death, if it be shown to the satisfaction of the court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians who shall thereupon be authorised and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the court shall think right."

G It seems to me quite plain that, when those sections were in force, the Act could not have applied to illegitimate children. As I have already said, the sections are not now in force, but it seems to me quite clear that in the Act of 1886 "father" and "mother" meant father and mother de jure.

H The difficulties, which cannot be entirely overcome by judicial decision whatever view is adopted, spring from piecemeal amendments by the Guardianship of Infants Act, 1925, and the Administration of Justice Act, 1928. The Act of 1925, which, except so far as it amended the law relating to the marriage of infants (and those provisions have since been repealed†) has to be construed as one with the Act of 1886,‡ provides, by s. 1, as follows:

I "Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in

* The Guardianship of Infants Act, 1925, s. 4 (3), s. 5 (7).

† Section 9 of the Act of 1925 was repealed by the Marriage Act, 1949.

‡ See s. 11 (2) of the Act of 1925.

question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

Section 2 of the Act of 1925 reads:

"The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father."

It is curious that, notwithstanding the equalisation as between parents effected by s. 1, no power is there given to the father to apply for custody.

Now comes s. 3, with which the difficulties begin. Here, for the first time, the mother is given the right to apply for maintenance, and if in this case the terms "father" and "mother" include *de facto* parents, the mother, by initiating proceedings under s. 5 of the Act of 1886 as amended by s. 3 of the Act of 1925, could obtain maintenance against the putative father without regard to the restrictions imposed by the Bastardy Act.* Section 3 (1) of the Act of 1925 reads:

"The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant."

It is not on that sub-section that the point arises, but it must be read in order to understand the important sub-section, s. 3 (2), which reads:

"Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

The restrictions imposed by the Bastardy Acts in the case of putative fathers are four in number and are important, and none of them appears in s. 3 of the Act of 1925. In order to shorten this judgment, I propose to read a summary of this matter from 3 HALSBURY'S LAWS OF ENGLAND (3rd Edn.). The accuracy of these passages is not in doubt. Paragraph 172, at p. 110, reads:

"A single woman who has a bastard child may take proceedings for an affiliation order, but a woman may not obtain an order where she married before she makes her application for a summons, whether she is living with her husband or not. Case law has so extended the meaning of the expression 'single woman' that a widow, or a married woman who has a bastard child while she is married can take proceedings, but it must be shown that the child is in fact a bastard, and that she is living separate from her husband."

For the purpose of this judgment the precise extent of that restriction is immaterial. What is quite obvious is that there is a restriction and it is not every woman who is the mother of an illegitimate child who can make an application for an affiliation order.

Then in 3 HALSBURY'S LAWS (3rd Edn.) 114, in the middle of para. 175, it is stated:

* See, in particular, the Bastardy Laws Amendment Act, 1872, s. 3, s. 4.

A “An application [for an affiliation order] may be made either at any time before the birth, in which case the complaint must be substantiated on oath, or at any time within twelve months from the birth. If the putative father has ceased to reside in England before the birth, or within twelve months after, the application may be made within twelve months after his return. After the expiry of the above periods no application by the mother can be made except where the putative father has, within the twelve months after the child’s birth, paid money for the child’s maintenance, or where the mother proves that before the birth she was a party to a marriage which was invalid by reason of either party being under age, and that the other party thereto had access to her within twelve months before the birth of the child; in these cases the mother may make her application at any time.”

C Here again the importance is not the precise extent of the restrictions, which are immaterial for the present case, but the fact that the time at which the application is to be made is not unlimited.

Then, again (*ibid.*, at p. 120, para. 184):

D “The evidence of the mother as to the paternity of the child is essential, and must be heard notwithstanding any consent or admission on the part of the defendant.”

E That is very important. There is nothing whatever in the Guardianship of Infants Acts to suggest that the court may not act on an admission of the putative father. That is the third important restriction.

I shall now read a passage from 3 HALSBURY’S LAWS (3rd Edn.) 122, para. 188, although it does not deal with a restriction. Paragraph 188 commences: “The court may, at the hearing, adjudge the defendant to be the putative father of the child . . .” That is to say, the decision by the court on that evidence is a condition precedent to any order for the payment of anything. The paragraph goes on:

G “. . . and if it sees fit, having regard to all the circumstances of the case, may make an order on [the putative father] for the payment in favour of the mother or other person or body in whose favour the order is made of a weekly sum, not exceeding 30s., for the maintenance and education of the child . . .”

The last passage which I need read on this point is at the beginning of para. 209 (*ibid.*, at p. 134):

H “An appeal lies to quarter sessions from an order made in affiliation proceedings, or from a refusal by the court to make such an order, or from the revocation, revival, or variation of such an order.”

I Therefore, to summarise the difficulties, they are, briefly, as follows. Under the Bastardy Acts only a single woman, as defined either by the Acts or by judicial interpretation, can obtain an order for maintenance in respect of an illegitimate child—there is no limitation at all of that sort in the Guardianship of Infants Acts. Secondly, the application for an affiliation order and consequential maintenance has to be made during a period which is limited—there is no limitation in the Guardianship of Infants Acts. Thirdly, evidence of paternity has to be corroborated even in the face of admission—there is nothing of that sort in the Guardianship of Infants Acts. Lastly (and this, perhaps, is the least important) an appeal lies, not to the High Court as under the Guardianship of Infants Acts, but to quarter sessions. It is, therefore, almost impossible

to believe that the Guardianship of Infants Acts were intended to embrace illegitimate children. A

In his dissenting speech in *Galloway v. Galloway (Ex parte)* (6) VISCOUNT SIMONDS referred to these considerations ([1955] 3 All E.R. at p. 432):

“ Let me remind your Lordships that the putative father of an illegitimate child had no rights whatever in regard to it: nor—and this is of great importance—had he, as between himself and the mother, any obligations or liabilities in respect of it, unless she, within a short period of time and by evidence that required corroboration, established that he was the father and obtained an order against him. Is all this to be changed? Is the mother to have less than her former rights to the custody of her natural child? Is the man whom she has married and alleges to be its father to be subject to new liabilities? Is he, when the years have passed and he has by his generous treatment of the mother's illegitimate child as his own lent colour to the allegation of his paternity, to be the victim of claims which he cannot then disprove? ” B C

Although I am conscious that I am quoting from a minority speech, I adopt this reasoning in a quite different context, in which, if I may respectfully say so, it is even more cogent than in the context in which these words were originally pronounced. D

I now come to s. 4 and s. 5 of the Guardianship of Infants Act, 1925, which are substituted for s. 2 and s. 3 of the Act of 1886 and are more favourable to the mother than the corresponding repealed sections. Yet even these provisions seem to assume that if the father is alive no guardian would be absolutely necessary and that the mother cannot escape from joint guardianship after her death. This equalising process would be in accordance with modern developments in the case of a lawful father, but would be very strange in the case of a putative father whose identity might be neither ascertained nor ascertainable. Moreover it would be very inconvenient if a putative father could appoint a guardian under s. 5 of the Act of 1925, because the validity of the appointment in such a case might well depend on an investigation after his death of a disputed allegation of paternity. E F

Section 4 of the Act of 1925 reads: G

“ (1) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the mother. (2) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.” H I

I need not read sub-s. (2A), which was added by the Children Act, 1948. Section 5 of the Act of 1925 is important:

“ (1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death. (2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.

- A (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting."

Then s. 5 (4) contains provisions if the mother or father shall object. Section 5 (5) reads:

- B "Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly."

- C It was held in *Re A., S. v. A.* (7) ((1940), 164 L.T. 230) that the word "mother" in s. 5 (2) of the Act of 1925 included an unmarried mother, and it was so held for a very convincing reason, namely, that in the Schedule to the Act of 1925, which related to consents to marriage, reference was made to the guardian of an illegitimate child appointed by the mother, and there was no way in which she could appoint such a guardian except under that sub-section. Although the Schedule to the Act of 1925 has been repealed, it is replaced by a corresponding provision in Sch. 2 to the Marriage Act, 1949, which raises precisely the same difficulties. But if "mother" includes a de facto mother in s. 5 (2) of the Act of 1925, "father" would be expected to include a de facto father, certainly in s. 5 (1) of the Act of 1925 and perhaps elsewhere in the Acts of 1886 and 1925, and all the difficulties to which I have referred would arise. The sort of difficulties are illustrated by a passage from the judgment of SIR WILLIAM SCOTT in *Horner v. Horner* (1). He was dealing there with the question whether the consent of the putative father of an illegitimate infant was required to her marriage, but what he said can, I think, well be applied, *mutatis mutandis*, to the question of guardians appointed by a putative father under s. 5 (1) of the Act of 1925 if, in truth, it extends to putative fathers. He said (1 Hag. Con. at p. 355):

- F "If the illegitimate father is to be considered as capable of giving a valid consent, is it every illegitimate father? Certainly not; because in many cases no satisfactory evidence can be given of paternity. What evidence is to be required to establish that point? Not his own testimony; because a man cannot be allowed, upon his own claim and assertion only, to make his consent necessary to the marriage of another person. Or is it to be proved by the filiation, in the manner directed by the Act of Parliament, for the special purpose of ascertaining the settlement of the child? Supposing that this evidence which the law has provided for the special purpose of exonerating the parish, and for that purpose only, as far as appears, is to be borrowed and applied to this purpose, it will not answer the exigencies of many cases; it would not in the present case, where no such filiation has been proved, or, I presume, can be proved. But, supposing such filiation, what sort of paternity is acquired by it? In the language of the statutes, he is styled the putative father, he is still recognised only as a father by mere reputation. Is it then to be asserted that this right of giving consent belongs to every father who is so merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to serve as the foundation of a right of this nature? In what manner, and on what proof is the licence [to marry] to be granted, if it is not to be granted to every such father? In what way is it to be shown at the time of granting that licence that he has that popular repute in the requisite degree? Is the acknowledgment of the party, the maintenance and education of the child, to be called in aid? If the mere affidavit of the father is not sufficient for the purpose, in what way is that evidence to be obtained?"

This was an ecclesiastical case, not a chancery case, and the reference to an

affidavit was a reference to the affidavit used in ecclesiastical courts. SIR A WILLIAM SCOTT went on to say (*ibid.*):

“ Or is a licence to be granted, leaving the question of the validity of the marriage open to future discussion, and to the chance that if any dispute arises, evidence may be obtained to prove the acknowledgment, the maintenance and education, and the general reputation ? Can such a licence with propriety be granted ? ”

Rather than be involved in difficulties of that sort, I feel compelled to hold that the *prima facie* meaning of the terms “ mother ” and “ father ” is not to be departed from unless a compelling reason can be found in the statute for doing so. It seems to me that there is such a compelling reason in the case of the mother in one particular regard, namely in s. 5 (2) of the Guardianship of Infants Act, 1925, and, for my part, I see no escape from the decision of BENNETT, J., in *Re A.* (7) but I find—although this is, perhaps, not strictly relevant—no compelling reason in the case of “ mother ” anywhere else in the Act. I have indicated the difficulty which I feel in believing that s. 5 of the Guardianship of Infants Act, 1886, as amended, can possibly have been intended to extend to a mother of an illegitimate child, having regard to the conflict to which that would give rise between the provisions of that section and the provisions of the Bastardy Acts. However that may be, my conclusion is that nowhere in the Guardianship of Infants Act, 1886, is there any compelling reason for extending the term “ father ” from a *de jure* father to a putative father, and that, so far as the word “ father ” is concerned, there are compelling reasons (which I have enumerated) for thinking that what is the *prima facie* meaning is intended to be the meaning throughout the Guardianship of Infants Acts, 1886 and 1925. Accordingly, when at long last, by s. 16 of the Administration of Justice Act, 1928, the father was allowed to make an application under s. 5 of the Act of 1886 (which is still in force with its various additional clothing), I am satisfied that the word “ father ” must be construed as meaning legitimate father and does not extend to a putative father.

I should not like to close this part of my judgment without making some reference to *Re M. (an infant)* (8) ([1955] 2 All E.R. 911). The vital words in that case—which arose under the Adoption Act, 1950, s. 2 (4) (a), were

“ except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant.”

No affiliation order had been made against the respondent, who was the putative father of the child, and he had never entered into any agreement to contribute to the maintenance of the infant, so that his consent would be necessary only if he were a “ parent ” of the infant. DENNING, L.J., said (*ibid.*, at p. 912):

“ In my opinion the word ‘ parent ’ in an Act of Parliament does not include the father of an illegitimate child, unless the context otherwise requires. This is implied in the decision in *Butler v. Gregory* (9) ((1902), 18 T.L.R. 370) with which I agree. The reason is that the law of England has from time immemorial looked on a bastard as the child of nobody, i.e., as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognisance of him, except that it will make him pay for the child’s maintenance if it can find out who he is. The law recognises no rights in him in regard to the child, whereas the mother has several rights. She has the right to the custody of it during her lifetime until it is fourteen years of age (*Humphrys v. Polak* (10), [1901] 2 K.B. 385)

- A whereas the natural father has no right to the custody of it, either during her lifetime (*R. v. Soper* (11) (1793), 5 Term. Rep. 278) or after her death (*Ex p. St. Mary Abbotts Guardians* (12) (1887), 51 J.P.Jo. 740). (I may say that there are observations in some Irish cases such as *Re Kerr* (13) ((1889), 24 L.R.Ir. at p. 62) and *Re Connor* (14) ([1919] 1 I.R. at p. 390), which seem to suggest that, after the mother's death, the natural father has the legal right to the custody, but I do not agree with those observations.)
- B The mother has a right by deed or will to appoint a guardian for the child after her death (*Re A., S. v. A.* (7) (1940), 164 L.T. 230): but the natural father has no such right (*Horner v. Horner* (1) (1799), 1 Hag. Con. at pp. 351, 355)."

C DENNING, L.J., made no reference to the possibility that the father could do it under s. 5 (1) of the Guardianship of Infants Act, 1925, and, therefore, I must assume that DENNING, L.J., thought that he could not, and with that view I respectfully agree.

DENNING, L.J., continued ([1955] 2 All E.R. at p. 912):

- "The mother has the right to give or withhold consent to the marriage of the child whilst under twenty-one, but the natural father has no such right either during the mother's life or after her death (see the Marriage Act, 1949, s. 3 (1) and Sch. 2). The natural father has no right at law to succeed on intestacy. He has no rights at all, so far as I can see, though no doubt he can apply for the child to be made a ward of court just as anyone else can."

E There, again, I certainly assume that DENNING, L.J., who is familiar with the Guardianship of Infants Acts, took the same view of s. 5 which I take, namely, that it does not apply to an illegitimate child. Then he continued (*ibid.*): "The truth is that the law does not recognise the natural father at all."

In the same case, ROMER, L.J., said (*ibid.*, at p. 917):

- "The mother of an illegitimate child has both rights and obligations towards it (see, e.g., *Barnardo v. McHugh* (2) and *Humphrys v. Polak* (10)), and it therefore follows that she should not be subjected unheard to the operation of s. 10 (1) [of the Adoption Act, 1950]. The father of a bastard, however, has under our law no rights in respect of it at all and to the best of my belief he never has had."

G After quoting the dictum of COCKBURN, C.J., in *R. v. Brighton (Inhabitants)* (5) ((1861), 1 B. & S. at p. 451), which I have already cited, ROMER, L.J., went on to say ([1955] 2 All E.R. at p. 917):

- "It was suggested by counsel for the respondent that, even assuming that such a father has no rights at common law, he is possessed of rights which would be recognised in the exercise of the equitable jurisdiction over wards of court. In my opinion this is not so. If the natural child of a man were to become a ward, the court would certainly permit the father to express his views and wishes on matters affecting the welfare of the child, and would give effect to them if it thought they were best calculated to promote the interests of its ward. He has no right of audience, however, in these matters which gives him precedence over other people, and effect will certainly not be given to his wishes with regard to the infant merely because he is the child's natural father. Section 10 (1) of the Act of 1950 is concerned with 'rights', and in my opinion such locus standi as a man possesses with regard to any natural child of his who becomes a ward of the Chancery Division falls very far short of qualifying as a 'right'."

ROMER, L.J., before he became a member of the Court of Appeal, was the judge to whom appeals under the Guardianship of Infants Acts were assigned; in other words, he was my predecessor in the work which I am now doing and I derive some comfort from the reflection that, although he did this work for a

considerable number of years, it does not seem to have occurred to him that an illegitimate child might be the subject of proceedings under the Guardianship of Infants Acts. I do not wish to make too much of that kind of reflection and that is why I have left this part of my judgment to the last, but I thought that the point was worth mentioning to lead up to my conclusion on this part of the matter.

I am told that a number of justices is now giving effect to the view taken by the justices in this case, namely, that they have an apparently unrestricted jurisdiction over both custody and maintenance in respect of illegitimate children, and that many orders have already been made on that basis, although I would say that by no means all justices accept that view; in other words, it certainly has not become settled policy. The effect of this judgment will have an important and unhappy bearing on the orders which have been made by justices who have taken that view, but I feel that it is a good thing that no further delay should ensue before this practice is stopped for this reason: it may well be (and I am not in the least suggesting the contrary) that it is desirable that justices should have jurisdiction over custody and maintenance in the case of illegitimate children, but, if it is desirable, it is quite clear to me that considerable modifications ought to be made in the Guardianship of Infants Acts, 1886 and 1925, before the justices exercise that jurisdiction, and it is, of course, trite knowledge that such alterations cannot be made by judicial decision, and that they are solely within the province of Parliament.

It only remains for me to consider the submission of counsel for the appellant that, whatever s. 5 of the Guardianship of Infants Act, 1886, as amended, may allow, I can, and ought to, exercise an inherent jurisdiction. To this there appear to me to be two complete answers. First, I am today sitting pursuant to s. 7 (3) of the Act of 1925 to hear appeals in cases properly brought before the magistrates under the Guardianship of Infants Acts and not as a judge of first instance in the Chancery Division. Secondly, if I were sitting as judge of first instance in the Chancery Division, the conditions precedent to the exercise of my inherent jurisdiction have not been complied with. In this connection it will be sufficient to refer to the second part of my judgment in *Re E.* (15) ([1955] 3 All E.R. 174), where I declined to exercise my inherent jurisdiction even though sitting as a judge of the Chancery Division in proceedings initiated in the High Court, and I there gave my reasons in detail.* Accordingly, the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.*, agents for *John Copland & Son*, Sheerness (for the putative father); *Harold Kenwright & Cox* (for the mother).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

* In *Re E.* (15) ([1955] 3 All E.R. 174), ROXBURGH, J., held that, in the case of an infant who was not already a ward of the court, the inherent jurisdiction of the court over infants should not be exercised except on or after the infant being made a ward of court pursuant to s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949.

A

HUNT v. ALLIED BAKERIES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), October 8, 15, 22, 1956.]

Practice—Striking out pleading—Statement of claim—No cause of action—Whether order interlocutory for purposes of leave to appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (i)—R.S.C., Ord. 25, r. 4.

B

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1), it is provided that no appeal shall lie “(i) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge” except in certain circumstances.

C

The plaintiff's statement of claim (other than five paragraphs which had been heard and disposed of previously as a special point of law) was struck out under R.S.C., Ord. 25, r. 4, as disclosing no reasonable cause of action and all further proceedings in the action were stayed. On the question whether that order was an interlocutory order for which leave to appeal was required,

D

Held: as a general rule, an order for striking out a statement of claim whether on the ground that it disclosed no reasonable cause of action or was frivolous and vexatious, or both, was an interlocutory order, and accordingly no appeal lay without leave of the court.

Re Page ([1910] 1 Ch. 489) applied.

E

[As to interlocutory orders dismissing actions, see 19 HALSBURY'S LAWS (2nd Edn.) 208, para. 508, note (i); and for cases on the subject, see 30 DIGEST (Repl.) 158, 112-114.]

Cases referred to:

(1) *Price v. Phillips*, (1894), 11 T.L.R. 86; 32 Digest 468, 1328.

F

(2) *Hind v. Harrington (Marquis)*, (1890), 6 T.L.R. 267; 30 Digest (Repl.) 158, 119.

(3) *Re Page, Hill v. Fladgate*, [1910] 1 Ch. 489; 79 L.J.Ch. 482; 102 L.T. 388; 30 Digest (Repl.) 158, 112.

(4) *Stewart v. Royds*, (1904), 118 L.T. Jo. 176; 30 Digest (Repl.) 158, 114.

(5) *Arnot v. Amber Chemical, Ltd.* (May 19, 1953), “The Times” Newspaper.

G

Application.

The plaintiff, Kenneth Douglas Hunt, applied ex parte for leave to appeal from an order of UPJOHN, J., made on July 27, 1956, whereby it was ordered that paras. 6 to 24 inclusive with the relief relative thereto of the amended statement of claim delivered in the action be struck out as disclosing no reasonable cause of action, that the plaintiff should pay the defendants' costs and that all further proceedings in the action be stayed. Leave to appeal was refused by the judge. At the hearing of the application the Court of Appeal decided to deal first with the preliminary point whether the order was final or interlocutory, and whether leave to appeal was necessary.

H

The plaintiff appeared in person.

Cur. adv. vult.

I

Oct. 15. LORD EVERSHED, M.R.: The plaintiff desires to appeal against an order made by UPJOHN, J., on July 27, 1956. In the first five paragraphs of his statement of claim the plaintiff raised a question whether, at a general meeting of the defendant company, the chairman had acted rightly in taking certain steps in the conduct of the meeting, and prayed for a declaration that a ruling of the chairman at the meeting was wrong. The remainder of the statement of claim from para. 6 onwards, and the corresponding prayers, related to other allegations which the plaintiff had made against the company or its directors. At an early stage it was directed that the subject-matter of the first

five paragraphs should be set down for hearing as a special point of law. That was so dealt with, and on it the plaintiff succeeded. In the event, it may be that his victory was barren, but nevertheless he did succeed in establishing that the actions of the chairman were not in accordance with the regulations of the company, and an order was made in his favour in respect of the costs of that issue. The learned judge at the time thought that he could dispose of the whole of the action, but as a result of an order made by this court, that direction was set aside. The defendants then applied to have the remainder of the statement of claim and the remainder of the prayers struck out as disclosing no reasonable cause of action, and on July 27, 1956, UPJOHN, J., made the order that I have mentioned, striking out the whole of the rest of the statement of claim, and ordered that the plaintiff should pay the costs of the action save those occasioned by the issue raised in the first five paragraphs. The part of the prayer which was struck out included a claim for an injunction. The order concluded by directing that all further proceedings in the action be stayed. It is against that order that the plaintiff desires to appeal.

The first question is whether the order made in that form and in the circumstances which I have stated is interlocutory or final, since if it be the latter, then, of course, no leave to appeal is required. The plaintiff has invited us to express our view on that matter; and, after hearing his argument, we thought it right to adjourn before we gave our conclusion in order that we might make some inquiry as to the practice of the court, and also consult the other divisions of the Court of Appeal, since the decision in the case on that point will apply perhaps in a number of other cases in which litigants may find their statements of claim struck out as disclosing no reasonable cause of action. The power so to strike out a statement of claim, or part of a statement of claim, is to be found in R.S.C., Ord. 25, r. 4, which does not in terms indicate whether an order so made is interlocutory or final. As the plaintiff reminded us, the question, which is nowhere precisely defined, is in the last resort one which by s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, is left to the determination of the Court of Appeal.

In the ANNUAL PRACTICE, 1956, at p. 423 it is stated that an order to strike out or stay proceedings under this rule is interlocutory, and two cases are cited for that view*. It must, I think, be conceded that the two cases there cited are not entirely satisfactory; but our attention has since been drawn to another case, which I have no doubt the plaintiff also has seen. That is *Re Page, Hill v. Fladgate* (3) ([1910] 1 Ch. 489), a decision of this court. In that case, the statement of claim was struck out and the action dismissed, not in terms because it disclosed no reasonable cause of action, but because it was frivolous and vexatious. It will, however, be appreciated that R.S.C., Ord. 25, r. 4, covers both the case of a statement of claim disclosing no reasonable cause of action, and that of it being frivolous and vexatious. The plaintiff has, however, raised the point whether a distinction should be drawn between the two kinds of case. After consulting with the Chief Registrar and looking at the cases, and also after consultation with my colleagues, I am left in no doubt at all that, rightly or wrongly, orders dismissing actions—either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action—have for a very long time been treated as interlocutory. In *Re Page* (3), that is stated as already having been the fact in 1910; and since then, of course, another forty-six years have gone by. The judgment of BUCKLEY, L.J., on this matter is particularly worth reading because it is plain that he felt difficulty, at any rate in the logic of the matter, since beyond a peradventure, if the order stood, it was an end altogether of the case. BUCKLEY, L.J., said (*ibid.* at p. 494):

“To my mind it would be reasonable to say that that is a final order.”

* *Price v. Phillips* (1) (1894), 11 T.L.R. 86; *Hind v. Marquis of Hartington* (2) (1890), 6 T.L.R. 267.

A But then he defers to the view of his brethren, and says, in a passage which seems to me to be important (*ibid.*):

“I am not prepared to differ from the view taken by the other members of the court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order. A decision to that effect is certainly the more desirable, because if the order is reversed the action will have to go on and if it is to go on it ought to go on at once.”

That argument, I think, is of considerable force in considering this kind of case.

I have said that *Re Page* (3) was a case in which the statement of claim was struck out as being frivolous and vexatious. I observe, however, that SIR HERBERT COZENS-HARDY, M.R., in his judgment regarded as governing the case another decision referred to by him (*Stewart v. Royds* (4) (1904), 118 L.T. Jo. 176), where an order had been made for striking out the claim on the ground that an order for security for costs had not been complied with. Furthermore, on May 19, 1953, in *Arnot v. Amber Chemical, Ltd.* (5) this court (consisting of SINGLETON, JENKINS and MORRIS, L.JJ.), held that the same principle and the same rule applied in the case of an action dismissed for want of prosecution. When these matters are added together, and it is also recalled that R.S.C., Ord. 25, r. 4, covers both the case of dismissal for want of showing a reasonable cause of action and also for being frivolous and vexatious, it is to my mind perfectly plain that we are now bound to hold that this order was interlocutory, and that no question of the jurisdiction under s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, can assist, because we should have in any case to follow the decisions of the Court of Appeal to which I have already referred.

Finally I have only this to say. I am satisfied that the fact that in the prayer there was a claim for an injunction cannot affect the matter. This is not a case in which the court has refused to grant an injunction on the merits of the case, and in the exercise of the court's discretion. For these reasons (and this decision will now necessarily govern other cases) I hold that orders under R.S.C., Ord. 25, r. 4, striking out the whole or part of a claim on the ground that it discloses no reasonable cause of action, or is frivolous and vexatious, or both, and staying all further proceedings, must be treated as interlocutory. It is possible that there may be cases (though no example now occurs to me, and the present case is certainly not one) in which the facts would be of so special a character as to create an exception to the rule. The general rule, however, is as I have stated it.

G If that view is right, it remains, of course, for the plaintiff to contend that leave to appeal ought none the less to be given, and that we will hear. I have tried to avoid saying anything so far which reflects at all on the merits of the case because we have not heard argument on it.

H BIRKETT, L.J.: I agree with the decision that my Lord has just announced, and for the reasons given.

ROMER, L.J.: I also agree.

Oct. 22. After hearing arguments on the merits leave to appeal was refused.

Order accordingly.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re A SOLICITOR.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ashworth, J.J.),
October 4, 1956.]

Solicitor—Discipline—Conduct unbefitting a solicitor—Indecent assault—Solicitor's name ordered to be struck off roll—Appeal—Grounds for variation of order by Divisional Court—Solicitors Act, 1932 (22 & 23 Geo. 5 c. 37), s. 8—Solicitors (Disciplinary Appeals) Rules, 1942 (S.R. & O. 1942 No. 1832), r. 8.

A solicitor was convicted of two indecent assaults and was sentenced to three months' imprisonment. So far as the offence of indecent assault can be regarded as not serious, these offences were not serious, and, until these convictions, the solicitor had borne an excellent character not only as a solicitor but also as a man. In proceedings before the Disciplinary Committee the solicitor's convictions were proved and the committee ordered his name to be struck off the roll of solicitors. He appealed against the order of the committee on the ground that in the circumstances it was too severe.

Held: the punishment imposed was out of proportion to the misconduct proved, and the court ought to vary the order to one for the solicitor's suspension from practising for two years.

Per CURIAM: (i) if a matter were one of professional misconduct it would take a very strong case to induce the court to interfere with the sentence passed by the Disciplinary Committee but, the case not being one of professional misconduct, the court was bound to consider, as the Court of Criminal Appeal would have to do, whether the sentence was out of proportion to the misconduct proved (see p. 517, letter I, post).

(ii) when the appeal is concerned with a case of crime, but not of professional misconduct, the court should not leave the appellant to apply to the Master of the Rolls for reinstatement . . . but should give effect to its own opinion (see p. 518, letter H, post).

Appeal allowed.

[As to striking the name of a solicitor off the roll on the ground of a criminal offence, see 31 HALSBURY'S LAWS (2nd Edn.) 296, para. 319; and for cases on the subject, see 42 DIGEST 397, 398, 4469-4479.]

As to the discretion of the Divisional Court to reduce a punishment imposed by the Disciplinary Committee, see 31 HALSBURY'S LAWS (2nd Edn.) 303, para. 327; and for cases on the subject, see 42 DIGEST 407, 408, 4652-4658.

For the Solicitors Act, 1932, s. 8, see 24 HALSBURY'S STATUTES (2nd Edn.) 22.

For the Solicitors (Disciplinary Appeals) Rules, 1942, r. 8, see 20 HALSBURY'S STATUTORY INSTRUMENTS 171.]

Appeal.

This was an appeal by a solicitor against an order of the Disciplinary Committee of the Law Society dated June 8, 1956, that his name be struck off the roll of solicitors for conduct unbefitting a solicitor. The solicitor did not appeal against the finding that he was guilty of such conduct.

Before the committee it was proved or admitted that the solicitor was admitted in February, 1932, and at all material times practised alone in a certain town, that in January, 1956, he had been found guilty on two charges of indecent assault at quarter sessions and sentenced to three months' imprisonment, and that he did not appeal against this conviction. Before the committee it was submitted that the solicitor had been wrongly convicted, that the two complainants had agreed to make the charges, that no actual indecency had taken place, and that in any event the alleged offence had no connection with the solicitor in his practice. Seven affidavits, four by other solicitors practising in the town, and one each by the local M.P., the local district registrar, and the local

- A rector, that the solicitor had always borne a high character and desiring that he should continue in his practice, were read to the committee. The committee in their findings stated that they had given the greatest possible weight to the solicitor's submission but they could not ignore the fact that the solicitor was tried and found guilty by a jury and sentenced to imprisonment. There was no appeal and the committee could not go behind the conviction. They therefore
- B felt it was impossible for them to pass over an offence of this nature and that they must exercise their full disciplinary powers.

Elwyn Jones, Q.C., and N. J. Rutter for the solicitor.

J. R. Cumming-Bruce for the Law Society.

- LORD GODDARD, C.J.:** This is an appeal brought under the Solicitors Act, 1932, by a solicitor whose name has been struck off the roll of solicitors by order of the Disciplinary Committee. The order is a punishment and the law gives to a person who has been found guilty of professional misconduct or conduct unbecoming a solicitor and who has been punished by the Disciplinary Committee the right to appeal to this court*. If an appeal is brought to this court, the court cannot rid itself of the responsibility which is cast on it by the Act of
- D deciding for itself on the merits of the appeal both as regards conviction and sentence. There is no appeal here against the order finding the solicitor guilty of conduct unbecoming a solicitor.

- The solicitor had been in practice since 1932 and there had been no suggestion of misconduct either professionally or outside his profession against him. One evening in the month of June last year while travelling by train from the North of
- E England towards Birmingham, the solicitor indecently assaulted a young soldier who had gone to sleep in the compartment in which the solicitor was travelling. Then, when the soldier objected somewhat forcibly to the solicitor's conduct, the solicitor seems to have gone to another compartment where some conduct took place which a jury were satisfied amounted at any rate to an indecent assault on another soldier, though certainly that was not a serious case.

- F Any case of indecent assault on a male person by another male person is a detestable and serious matter. The court would merely observe in this case, having cognizance of such cases, as we all have to have in the course of travelling on assizes and in the Court of Criminal Appeal, that so far as this class of case can be regarded as not serious, this was not a serious case, nothing like as serious as many we have had before us. On each occasion it was an assault, not an attempt
- G at corruption.

The Disciplinary Committee, having had it proved to them that this man had been convicted by a jury on both counts and sentenced to three months' imprisonment, struck his name off the roll, and against that sentence he appeals.

- This court is always, and always has been, very loth to interfere with the findings of the Disciplinary Committee either on a matter of fact, because they
- H understand these matters so well, or with regard to penalty. If a matter were one of professional misconduct, it would take a very strong case to induce this court to interfere with the sentence passed by the Disciplinary Committee, because obviously the Disciplinary Committee are the best possible people for weighing the seriousness of professional misconduct. There is no suggestion of professional misconduct in this case. That being so, this court is bound to consider, as
- I the Court of Criminal Appeal would have to do, whether or not in its opinion the sentence is in proportion or out of proportion to the misconduct which has been proved. No one doubts it is serious misconduct.

Counsel for the Law Society is quite right in saying that in this class of case the Disciplinary Committee act to protect the honour of the profession and to

* The right of appeal is conferred by s. 8 of the Solicitors Act, 1932 (24 HALSBURY'S STATUTES (2nd Edn.) 22); the appeal is by way of re-hearing (Solicitors (Disciplinary Appeals) Rules, 1942 (S.R. & O. 1942 No. 1832), r. 8; 20 HALSBURY'S STATUTORY INSTRUMENTS 171).

maintain the confidence which it is desirable that the public should have in the solicitors whose advice they seek. So far as that is concerned, it is certainly remarkable in this case that the solicitor's professional brethren and others, who are acquainted with him and have had experience of his life and practice in the neighbourhood in which he does practise, have sent in a very large number of affidavits testifying to the excellent character he has hitherto borne not only as a solicitor but as a man, and all express their anxiety that he should still be able to practise among them and their willingness to meet and co-operate with him. So far as public confidence is concerned, it is only fair to say that it is not suggested it was more than an isolated occasion when he did these two things and I think that at any rate it may be said that, lamentable as was this lapse, it does not seem that the public confidence need be gravely shaken. It is necessary that the honour of the profession should be protected and that an offence of this sort should not be overlooked by the profession, but we have to consider whether in all the circumstances of the case the sentence passed is one which we feel is in proportion to the character of the offence. If there was any suggestion against the professional conduct of the solicitor we should only interfere in the most extreme case, but the court has carefully considered the representations on one side and another and, bearing in mind the finding of the committee that the solicitor was guilty of conduct unbecoming a solicitor, which of course is not appealed against, we have come to the conclusion that the order is one which is too severe considering the nature of the offence which was proved. It was a shocking offence from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and no better in a solicitor than in anybody else, and it is not an offence which can be passed over. We entirely agree with the committee in that, and we do not suppose that the committee were thinking that they were bound to pass this particular sentence. The expression that they used* was one very well known to judges and chairmen of quarter sessions, who very often say that they cannot overlook an offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking the solicitor's name off the roll and shall substitute therefor a sentence of suspension for two years.

I should have said one other thing. Counsel for the Law Society has made a strong point that it would have been open to the solicitor to go to the Master of the Rolls and apply to be reinstated†. That is perfectly true, and if it was a matter of professional misconduct, conduct in the profession, that I think would be a very appropriate remedy. I am not suggesting for a moment that in this case it would not be open to the solicitor to go to the Master of the Rolls. When, however, we are dealing with a case not of professional misconduct but of a crime having been committed, we do not think that we should shirk the duty cast on us and say we are going to leave it to the Master of the Rolls. If it had been a case of professional misconduct, it would have been a proper thing for this court to say that it was not going to interfere in a matter of professional misconduct in which the Disciplinary Committee were the best possible judges and that if there were to be mercy shown that should be left to the Master of the Rolls. In this case we are bound to give effect to our own opinion, and the appeal will be allowed to the extent that the order striking the solicitor's name off the roll will be set aside and a suspension for two years will be substituted.

HILBERY, J.: I agree.

* The findings of the committee are stated at p. 517, letter A, ante.

† The Solicitors Act, 1932, s. 13 (1), provides that: "The Master of the Rolls may, if he thinks fit, at any time order the registrar to replace on the roll the name of a solicitor whose name has been removed from, or struck off, the roll".

A ASHWORTH, J.: I also agree.

Appeal allowed; order varied to two years' suspension from June 8, 1956, the date of the Disciplinary Committee's order.

Solicitors: *Cartwright, Cunningham*, agents for *Martin Evans & Son* (for the solicitor); *Hempsons* (for the Law Society).

B [Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

G. L. BAKER, LTD. v. BARCLAYS BANK, LTD. AND OTHERS.

C [COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), October 8, 15, 1956.]

Judgment—Default of appearance—“Liquidated demand”—Claim for specific sum fraudulently converted—R.S.C., Ord. 13, r. 3.

Writ—Indorsement—Claim for liquidated demand, alternatively for a tracing order—Whether claim for “liquidated demand only”—R.S.C., Ord. 3, r. 7 (1).

D The plaintiffs by a generally indorsed writ claimed against two defendants the sums of £10,648 and £1,000 respectively as being the plaintiffs' property fraudulently converted by those defendants, alternatively that each sum being the property of the plaintiffs traceable in equity be repaid respectively by the defendants to the plaintiffs. The writ was not indorsed with a statement of the amount of costs, etc., under R.S.C., Ord. 3, r. 7 (1). The plaintiffs obtained judgment against both defendants in default of appearance. On motion by the defendants the judgment was set aside as being irregular on the ground (i) that a claim for conversion was not a liquidated demand within the meaning of R.S.C., Ord. 13, r. 3 and (ii) that if it was a liquidated demand, the plaintiffs' claim was a claim for a liquidated demand only, and the requirements of Ord. 3, r. 7, had not been observed. On appeal,

F **Held:** the judgment had been regularly obtained since (i) the writ was indorsed for a “liquidated demand” within the meaning of R.S.C., Ord. 13, r. 3, notwithstanding the addition of the words “fraudulently converted” and, on the other hand, (ii) the writ was not indorsed for a “liquidated demand only” within the meaning of R.S.C., Ord. 3, r. 7 (1), since there was in addition to the liquidated demand an alternative claim for a tracing order.

G Appeal allowed.

[As to the indorsement of a writ in the case of a liquidated claim, see 26 HALSBURY'S LAWS (2nd Edn.) 25, para. 30, note (m).]

As to obtaining judgment in default of appearance in case of a liquidated demand, see 19 HALSBURY'S LAWS (2nd Edn.) 218, para. 515, note (s); and for H cases on the subject, see DIGEST (Practice) 386, 924.]

Appeal Motion.

I On Oct. 2, 1956, UPJOHN, J., ordered that judgment signed on Sept. 24, 1956, by the plaintiffs, G. L. Baker, Ltd., against the third defendants, Sterling Moulding Materials, Ltd., in the sum of £10,648, and against the fourth defendants, Harrow Investment Trust, Ltd., in the sum of £1,000, be set aside, and that the plaintiff should pay to those defendants the costs of the motion. The judge refused to grant the plaintiffs leave to appeal and on Oct. 8, 1956, they applied ex parte to the Court of Appeal for leave to appeal. The Court of Appeal directed that notice of the application be given to the defendants. The matter now came again before the Court of Appeal and by consent of both parties the application was treated as the appeal against the order.

N. N. McKinnon for the plaintiffs.

T. M. Eastham for the third and fourth defendants.

LORD EVERSHERD, M.R.: This is an unusual case. On Sept. 13, 1956, A the plaintiffs issued a writ against five defendants, of which the first is Barclays Bank, Ltd., the third is Sterling Moulding Materials, Ltd., the fourth Harrow Investment Trust, Ltd., and the others are two companies which need not be mentioned. The claim indorsed on the writ, which was not specially indorsed, was as follows:

" (i) Against the first defendant for the sum of £38,705 16s. 3d., the B property of the plaintiffs, whereof the plaintiffs lawfully demanded the same by letter dated Aug. 10, 1956 . . . (iii) Against the third defendant for the sum of £10,648 the plaintiffs' property fraudulently converted by the third C defendant. (iv) Against the fourth defendant for the sum of £1,000 the plaintiffs' property fraudulently converted by the fourth defendant . . . (vi) Alternatively that each sum being the property of the plaintiffs traceable in equity be repaid respectively by the defendants to the plaintiffs. (vii) Further or other relief. (viii) Costs."

I have read the first paragraph and mentioned the first defendants for reasons which will presently appear. The third and fourth defendants who at all material times have appeared by the same solicitor, and appear before us by counsel, D unfortunately did not enter an appearance to this claim and on Sept. 24, 1956, the plaintiffs obtained, under the provisions of R.S.C., Ord. 13, r. 3, judgment for the sums which I have read out in default of appearance. It seems further that the plaintiffs shortly afterwards proceeded to levy execution on both these defendants. The appearance of the sheriff's officers stirred the two defendants into a not unnatural activity, and they proceeded then to apply to have the E judgments against them set aside. The applications were supported by an affidavit sworn by their solicitor who said that the fault was his; that although the writs had been forwarded to him by the two defendant companies, he had been busy doing various other things, and had omitted to take the necessary further steps to cause appearances to be entered.

The application came before UPJOHN, J., who on Oct. 2, 1956, made an order, F from which this present application stems, setting aside the two judgments; the order went on to direct that the plaintiffs should pay the costs of the motion to set aside the judgments and other costs appropriate thereto of both defendants. Counsel for the plaintiffs applied ex parte for leave to appeal against that order, the learned judge having himself refused leave to appeal. When the matter was mentioned in this court on Oct. 8, 1956, it seemed to us that there was some G substance in the application; and we, therefore, directed that the plaintiffs should give notice to the defendants and said that we might then consider the whole matter, and deal with the appeal if we thought that leave should in the circumstances be given; and counsel are content that we should do that.

The order which UPJOHN, J., made seems to be a strong one. As counsel for the defendants pointed out to us, it proceeded on three grounds. In the first H place, it was the learned judge's view that the judgment which had been obtained in default was irregular for reasons which I will come back to explain; secondly, that even if it was not irregular as being outside the scope of R.S.C., Ord. 13, r. 3, still the writ itself had failed to comply with the directions of R.S.C., Ord. 3, r. 7 (1). In a sense, the second point goes to the same general point as the first. I Thirdly, the learned judge—whether he was right or wrong on the first two points, or either of them—took apparently a strong view adverse to the behaviour of the plaintiffs, in that they had made this claim after a considerable delay when the statute of limitations might well have run against them; and they had issued the writ in the long vacation without giving any previous warning to either of the defendants, or their solicitors or advisers; and the judge felt that they had improved on that performance by similarly giving no notice of having obtained a judgment. So that, as I have said, the arrival of the sheriff's officers in due course came as a surprise and shock to the two defendants. The judge

- A thought that these actions were not creditable to the plaintiffs, acting against two companies who are, apparently, companies of standing and repute. In a matter of this kind the judge plainly has (and has always been conceded to have) a wide measure of discretion in the question of costs. If, however, this court were to come to the conclusion that, on the face of it, the judgment obtained by the plaintiffs was regular, it would to my mind be unjust (and I think UPJOHN, J., would agree) to make the plaintiffs pay the costs in circumstances such as those, merely because they had acted, to put it no higher, with a marked lack of courtesy and consideration. I must, therefore, look at the two matters of substance.
- B

- The foundation for the view that the judgment itself was irregular depends on whether, within the terms of R.S.C., Ord. 13, r. 3, this is a writ of summons indorsed for a liquidated demand. Counsel for the defendants argued that, as the writ had been indorsed, it was a claim founded on the tort of conversion; and that though, in the classic phrase, the plaintiffs might "godlike have waived the tort" and sued for money had and received, they did not do so; and consequently their proper relief was by way of damages. Further, although the sum claimed as damages might be, for all practical purposes, absolutely certain, nevertheless the claim was not one for a liquidated demand within the rule, but remained a claim for damages for which, in default of appearance, the remedy was an interlocutory judgment with an inquiry as to the amount of damages. I have come to the conclusion that it would not be right to give to the phrase "liquidated demand" so narrow and technical a significance. If I look at the writ, and take the case of the third defendants by way of illustration, it is plainly, according to the language and in its context, a claim to recover the sum of £10,648 exactly, that sum being, as the writ alleges, the plaintiffs' money or property which had been fraudulently converted by the third defendants. That view of the matter is supported, I think, by the reference to the first claim against Barclays Bank, Ltd., which I read: "Against the first defendant for the sum of £38,705 16s. 3d. the property of the plaintiffs". It is, of course, not suggested that Barclays Bank, Ltd., did any fraudulent conversion; that is a claim for money demanded and not paid. But the phrase "the property of the plaintiffs" is common to both; and I think it is inescapable, as a matter of English, that the claim against the third defendants is a claim for £10,648; and the addition of the words "fraudulently converted" does not prevent the sum claimed being a liquidated demand. I can find nothing in the rules (and no authority has been cited) which prevents me coming to that conclusion as a matter of common sense.
- E
- F
- G

- A difficult question, at first sight, arises under the second head of the matter as formulated by counsel for the defendants. The terms of R.S.C., Ord. 3, r. 7 (1), impose on a plaintiff, who makes a claim for a liquidated demand only, certain formal requirements. He must, for example, state the amount claimed for costs, and must add to the indorsement a statement that the defendant can pay the amount claimed and costs in one or other of the ways indicated in the rule. It is plain (and counsel did not argue to the contrary) that that rule applies only if the indorsement is for a liquidated demand only. It may seem at first sight a little capricious that if you add some other claim to the writ, not being a liquidated demand, then you are excused from the requirements I have mentioned; but I think that there are substantial reasons for what appears at first sight to be an anomaly. However, so the rules run, and the question, therefore, remains: Is this a claim for a liquidated demand only? That really turns on the presence in the indorsement of the sixth paragraph which I have already read, and which, taking the case of the third defendants by way of illustration, is an alternative claim to trace the £10,648 in equity into the assets of the third defendants. It is pointed out by counsel for the plaintiffs, in my judgment, rightly, that even though the sum asked for remains in the end the fixed amount, still the relief here invoked is the equitable relief of a tracing order which cannot properly be
- H
- I

described as a mere claim for a liquidated demand. It appears to me, therefore, that this indorsement has contrived successfully to sail between Scylla and Charybdis, represented by R.S.C., Ord. 3 and Ord. 13. It remains a writ for a liquidated demand without getting on the rocks of one indorsed for a liquidated demand only.

If that is so, then as I said at the beginning of my judgment, it would appear to me, with all respect to the learned judge, to be manifestly unjust that the plaintiffs should have to pay the whole of the costs of obtaining what I think was a perfectly regular judgment against each of these two defendants; and I do not think that the actions of the plaintiffs, which I have sufficiently narrated already, could fairly be regarded as justifying such an order as to costs. Indeed, I am satisfied that had the learned judge taken the view which I have of the rules, he would not have made the order which he did make as to costs. Since, however, these matters of costs are questions of discretion, and since plainly the judge did take (and I do not say without justification) a severe view of the conduct of the plaintiffs, I think that the justice of the case is met, and proper respect paid to the views of UPJOHN, J., if his order is varied to this extent only, that the costs which he ordered that the plaintiffs should pay should be costs in the action in both cases.

Counsel for the plaintiffs on the appeal, and in his notice of appeal, has not sought (and could not properly or fairly do so) to have the order wholly set aside so as to be able to stand on the judgments he has obtained. Both counsel now are willing that we should go further than merely give leave, and that we should deal with the appeal. I would therefore deal with it by substituting the order as to costs which I have indicated for the order which the learned judge in fact made.

BIRKETT, L.J.: I am of the same opinion. I confess that at first sight it does seem a strong order to make the plaintiffs pay the costs on a motion of this kind when they have sued for a specific sum, whatever the form in which they have stated their claim may be, and when judgment has been signed in default of appearance. Counsel for the plaintiffs put the matter clearly when he said that the plaintiffs were without blame, and that the learned judge himself had treated the proceedings on the basis that the judgment had been obtained irregularly. It is quite true that counsel for the defendants added a little more on the other side about the judge's view; but it seems to me fairly plain that without that first finding by the learned judge that this was an irregular judgment, the rest of the order would not have followed as it has done. Although counsel for the defendants conceded that we were dealing with technicalities, yet my own view is that this indorsement on the writ of the plaintiffs' claim as against the third and fourth defendants for the sums specified is a claim for a liquidated demand. I need not trouble now with the arguments which were put on the one side and the other; I merely state my conclusion.

Counsel for the defendants then frankly admitted that if that is right, that it is indeed a liquidated demand, then his only defence would be under R.S.C., Ord. 3, r. 7 (1), and that he relied on the use of the word "only" in the words "a liquidated demand only". Counsel for the plaintiffs, on the other hand, said that R.S.C., Ord. 13, r. 4, contained no mention of the word "only". He argued that para. (vi) in the indorsement on the writ,

"Alternatively that each sum being the property of the plaintiffs traceable in equity be repaid respectively by the defendants to the plaintiffs"

allowed him to say that the indorsement was not a claim for a liquidated demand only. I agree with that submission, and with the result declared by LORD EVERSHED, M.R., namely, that the order of UPJOHN, J., should be varied in the manner indicated.

A ROMER, L.J.: I also agree. The two points on which counsel for the defendants relied, and which he argued with such persuasiveness, are highly technical; but I have come to the conclusion that his argument ought not to prevail for the reasons given by LORD EVERSHED, M.R., which I completely adopt for myself, and I desire to add nothing further.

Appeal allowed.

B Solicitors: *Bell & Ackroyd* (for the plaintiffs); *Kingsley, Napley & Co.* (for the third and fourth defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

C

Re **SOMECH** (*deceased*).

WESTMINSTER BANK, LTD. v. PHILLIPS AND OTHERS.

D [CHANCERY DIVISION (Upjohn, J.), October 16, 17, 1956.]

Trust and Trustee—Duty of trustee—Beneficiary entitled to be paid on attaining the age of twenty-one years or marrying—Beneficiary marrying at the age of eighteen years—Whether beneficiary can demand payment.

Infant—Payment—Share of residuary estate—Payable on beneficiary's attaining twenty-one or marrying—Whether married infant entitled to receive share under terms of will—Whether trustee had discretion to withhold payment from beneficiary marrying under twenty-one.

E By his will dated May 7, 1937, a testator who died on Dec. 31, 1937, gave a share of his residuary estate on trust to accumulate the income thereof for the benefit of the children of his daughter Mrs. S. who should attain the age of twenty-one or marry. The testator further provided that "each child of my said daughter when he or she shall attain the age of twenty-one years or shall marry shall be entitled to be paid his or her share . . ." Mrs. S. had only one daughter who married on July 17, 1955, being then eighteen years of age. The question for the court was whether the infant, on her marriage, became absolutely entitled to the capital of her share of the residue so as to be able to demand immediate payment or transfer of it to her.

F **G** **Held:** notwithstanding that the infant could give a valid discharge for her share the trustee was not bound to pay it to her, but had a discretion to withhold payment until she attained the age of twenty-one years.

[As to the payment of legacies to infants, see 16 HALSBURY'S LAWS (3rd Edn.) 324, para. 628; 17 HALSBURY'S LAWS (2nd Edn.) 621, para. 1326, text and notes (s)-(b).]

H Cases referred to:

(1) *Cooper v. Thornton*, (1790), 3 Bro. C.C. 96; 29 E.R. 430; *on appeal*, 3 Bro. C.C. 186; 29 E.R. 479; 23 Digest 448, 5193.

(2) *Re Denekin, Peters v. Tanchereau*, (1895), 72 L.T. 220; 23 Digest 448, 5188.

(3) *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226; 72 L.J.Ch. 554; 88 L.T. 619; 23 Digest 402, 4731.

I **Adjourned Summons.**

This originating summons was taken out by Westminster Bank, Ltd., the trustee of the will of David Eliahoo Somech, for the determination of the question, among others, whether on the true construction of the will and having regard to the infancy of the defendant, Tanya Morgan, the plaintiff was bound to pay to the said infant on her sole receipt the share of the capital of the residuary trust fund which under the terms of the said will she became "entitled to be

paid" on her marriage, or whether the court had a discretion to authorise such payment or not. A

T. K. Wigan for the plaintiff, the trustee.

C. G. Allen for the defendants, the beneficiaries.

UPJOHN, J.: This summons raises an interesting point as to the right of an infant to receive a share of residue where there is a special direction under the will for that purpose. B

The question arises under the will dated May 7, 1937, of David Eliahoo Somech who died on Dec. 31 of that year. I need only refer to one clause in the will which deals with the disposition of his residuary estate. He gave half of a moiety of his residuary estate on trust to pay the income thereof to his daughter, the defendant, Vera Juliette Simberg, for life with remainder to her children and the remaining one half of that moiety he gave on trust to accumulate the income thereof for the benefit of the children of Vera Juliette Simberg who should attain the age of twenty-one years or marry. Now follow the important words: C

"And so that each child of my said daughter when he or she shall attain the age of twenty-one years or shall marry shall be entitled to be paid his or her share of the said moiety of the said share and of the accumulations of income thereof down to the date of payment." D

Mrs. Simberg has only had one daughter, the defendant, Tanya Morgan, who married on July 17, 1955. The share in question, i.e., the one half share of the moiety, amounts to about £13,000. E

On her marriage the trustee paid to her the accumulations of income, relying on the Law of Property Act, 1925, s. 21. The question is whether she, having married, is entitled to have the capital paid to her, notwithstanding that she will not attain the age of twenty-one years until Mar. 17, 1958.

The authorities and the text-books make clear that where a direction is given by a testator that a legacy or share of residue can be paid to a person under the age of twenty-one years, for example at a fixed age, such as seventeen, or on marriage, the trustees may quite properly comply with that direction, and will get a good discharge from the legatee or the person entitled to the residue notwithstanding infancy. That is clear from the ancient case of *Cooper v. Thornton* (1) ((1790), 3 Bro. C.C. 96), and *Re Denekin, Peters v. Tanchereau* (2) ((1895), 72 L.T. 220), a decision of NORTH, J. I think the law is accurately stated in one sentence in SIMPSON ON THE LAW OF INFANTS (4th Edn.), at p. 41: F

"An infant is incapable of giving a legal discharge for money paid to him, unless the instrument of donation specially provides that his receipt shall be a discharge, or directs payment (e.g., of a legacy) at an earlier age than twenty-one." G H

So that it is not in doubt that the trustee, the plaintiff in this case, could properly have made a transfer of this half of a moiety. It is equally not in doubt that I have a discretion to make an order, the trustee's discretion having been surrendered to this court.

The point with which I now have to deal is this: has an infant an absolute right to the transfer of her property on marriage—it is just as though she had attained twenty-one—or is there a discretion vested in the trustee and in the court to withhold payment until she is twenty-one, notwithstanding that a married infant can by the terms of the will give a discharge for the share of residue? On that matter the authorities and the text-books appear to be silent. I have been referred to *Re Hall, Foster v. Metcalfe* (3) ([1903] 2 Ch. 226), which went to the Court of Appeal. On looking at the argument one sees that I

- A the only question was whether the trustees or executors could make a valid appropriation of a contingent legacy of a certain amount, so that on the happening of the contingency, if the investment had depreciated (as it had in that case), nevertheless, the legatee must be satisfied with the investment, or whether the legatee was entitled to the full amount of the legacy. The latter was held to be the law. It is quite true that COZENS-HARDY, L.J., finished his judgment by saying
- B (*ibid.*, at p. 235):

“There must be a declaration that each of the three godchildren is entitled to receive £1,000 cash on attaining twenty-one, or if a female marrying under that age”,

- C those being, of course, the terms of the legacy. It was suggested that that passage showed that the Court of Appeal considered that on marriage a female would be absolutely entitled to that sum and could make a demand for it. I cannot so read that decision. The question of the right of the infant to give a receipt was not argued or discussed before the court. What the court decided was, that on the contingency happening, the legatees were each entitled to receive their £1,000 and not a security which had depreciated. The court was not in the least degree
- D concerned with the question whether a married infant could give a valid receipt or whether the money would have to be paid into court. Nor does a research into precedents in the books yield any light on the matter. Many precedents are to be found which provide for a married infant giving a good discharge; but that is not the point which I have to consider. This married infant is not a ward of court and the question really is whether this court has an inherent jurisdiction
- E with regard to the property of infants enabling it to inquire whether any proposed transaction is for the benefit of the infant or would be improvident. I think that this court has that jurisdiction. The trustee has a discretion and, as it has been surrendered to this court, it is now my duty to go into the question whether it would be for the benefit of the infant that this substantial sum should be paid to her now or in eighteen months' time when, on attaining the age of
- F twenty-one, she will have an absolute right to the payment of it.

[The matter was then adjourned into chambers; after the court had been reopened HIS LORDSHIP made an order, giving the trustee liberty to pay the whole capital sum to the infant on her sole receipt.]

Order accordingly.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re EDWARDS (*deceased*).
MACADAM *v.* WRIGHT AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), October 12, 1956.]

Equity—Election—Agreement, subsequent to will, to devise to sister property specified in will as part of residue—Specific performance of agreement granted to sister—Whether sister put to election—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24.

By her will dated Feb. 8, 1952, a testatrix, after giving specific and pecuniary legacies, provided: "I direct that 78, Albion Road, Hounslow, and the remainder of my estate and effects real and personal of which I may die possessed be sold and the proceeds divided equally amongst the following relatives who may survive me . . ." and she named seven relatives including her sister Mrs. W. In May, 1952, the testatrix entered into an oral agreement with Mrs. W. to devise No. 78, Albion Road, to Mrs. W. for valuable consideration (which was given). On July 30, 1952, the testatrix died without having altered her will, and by an order of court dated Oct. 2, 1953, and made at the suit of Mrs. W., the agreement of May, 1952, was declared valid and binding. Subsequently the house was conveyed to Mrs. W. On the question whether Mrs. W. was put to her election under the will of the testatrix so that if she desired to accept a benefit under the will she would be bound to renounce her right to 78, Albion Road, or whether the oral agreement, being subsequent to the will, was an ademption of the devise of 78, Albion Road,

Held: Mrs. W. was put to her election because, since the operation of the Wills Act, 1837, s. 24, it was immaterial that the will was made before the date of the agreement; and by obtaining the order of the court dated Oct. 2, 1953, Mrs. W. had made her election to take under the oral agreement and against the will.

Dictum of LORD HATHERLEY in *Cooper v. Cooper* ((1874), L.R. 7 H.L. at p. 70) applied.

Plowden v. Hyde ((1852), 2 Sim. N.S. 171) explained.

[As to the doctrine of election, see 14 HALSBURY'S LAWS (3rd Edn.) 588, para. 1091; and for cases on the subject, see 20 DIGEST 403-408, 1411-1439.]

Cases referred to:

- (1) *Cooper v. Cooper*, (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 23 Digest 468, 5375.
- (2) *Plowden v. Hyde*, (1852), 2 Sim. N.S. 171; 61 E.R. 305; *on appeal* 2 De G.M. & G. 684; 21 L.J.Ch. 796; 20 L.T.O.S. 18; 42 E.R. 1040; 44 Digest 413, 2437.

Adjourned Summons.

The plaintiff, Thomas Sebastian Macadam, the executor of the will of the testatrix, Henrietta Phoebe Edwards, applied to the court by originating summons for the determination of the question, among others, whether the defendant Elsie Mary Wright was bound to elect between the one-seventh share of the property No. 78, Albion Road, Hounslow, together with the residue of the estate of the testatrix bequeathed to her by the said will, and the said property No. 78, Albion Road, or whether she was entitled both to the said property and to a full one-seventh share of the residue. The facts and the provisions of the will are stated in the judgment.

Raymond Walton for the plaintiff.

S. W. Templeman for the first defendant, Mrs. Wright.

T. A. Jones for the remaining defendants, the other residuary legatees.

A UPJOHN, J.: This summons raises an interesting question whether the first defendant, Elsie Mary Wright, is put to her election in taking certain benefits under the will of her sister, Henrietta Phoebe Edwards. The circumstances in which the problem arises, are these. By her will dated Feb. 8, 1952, the testatrix after giving certain specific and pecuniary legacies provided:

B "I direct that 78, Albion Road, Hounslow, and the remainder of my estate and effects real and personal of which I may die possessed be sold and the proceeds divided equally amongst the following relatives who may survive me . . . "

C She names seven relatives, including her sister, Mrs. Wright. The doctrine of election cannot arise in respect of a true residuary gift, but it is conceded on Mrs. Wright's behalf that the express mention of No. 78, Albion Road, brings it within the doctrine, although it is submitted on her behalf that the doctrine is not applicable in the circumstances of this case.

D In 1952 the testatrix and her sister struck a bargain. There has been some controversy before me as to when the bargain was struck, but the inference which I draw from the pleadings in an action to which I must refer in a moment, is that the bargain was struck some time after the will of the testatrix and not before it. The bargain that was struck was simply this. There was an oral agreement made between the sisters whereby Mrs. Wright agreed to give up her occupation of a house and premises where she was then living, and to move herself and her furniture into two rooms in No. 78, Albion Road, where her sister was then living. She was to have the right to occupy those two rooms in that

E house rent free during the joint lives of herself and the testatrix. The testatrix undertook orally to devise the whole of the premises No. 78, Albion Road, to Mrs. Wright by will. The consideration for that was that Mrs. Wright was to reside on the premises and cook the testatrix's meals and to assist in looking after the house. That was the arrangement which was made, as I infer, very probably in May, 1952.

F On June 1, 1952, pursuant to that agreement Mrs. Wright went into occupation of these two rooms and carried out her part of the bargain for the rest of the life of the testatrix who died on July 30, 1952. Mrs. Wright then made a claim against the executor of the testatrix's will to enforce the agreement. In due course an action was begun by her in the Chancery Division of the High Court based on the agreement which I have mentioned. The action came to trial

G and by an order of this court of Oct. 2, 1953, it was declared

"that there was a valid and binding contract whereby Henrietta Phoebe Edwards deceased [the testatrix] agreed to devise to the plaintiff the dwelling-house yard garages outbuildings and premises situate and known as No. 78, Albion Road, Hounslow in the county of Middlesex in the pleadings mentioned And this court doth declare that the defendant as executor of the will of the said Henrietta Phoebe Edwards holds the said property on trust for the plaintiff absolutely."

H

Pursuant to that order a conveyance was executed by the executor in favour of Mrs. Wright.

I It is said that in those circumstances Mrs. Wright is put to her election under the will of the testatrix. It is said that she can either claim against the will and keep the premises, No. 78, or bring them into account and then participate in the residue treating that house as a part of the estate of the testatrix. The value of the house is about £2,000 and the value of the residue exclusive of the house is something over £5,000: so it is perfectly clear and not in dispute that if a case of election arises, Mrs. Wright will elect against the will and will take nothing under it. It is indeed probable that by her action she has in fact already elected against the will.

Counsel for Mrs. Wright admits that, if the will had been executed after the agreement between the sisters, a perfect case of election would arise, but he contends that, as the will is dated before the agreement it is not a case of election, but that there has been an ademption of the gift as a result of the agreement, and that, therefore, Mrs. Wright is entitled to participate in the residue without any election. He submits that the effect is as though the testatrix had changed her mind and had revoked the gift of No. 78, Albion Road, by some codicil, and he submits that ademption is only another form of revocation. As a matter of history it is noteworthy that the testatrix did in fact by a codicil purport to carry out her part of the bargain with her sister and leave her No. 78, but the codicil did not comply with the Wills Act, 1837, and, therefore, could not be admitted to probate.

The doctrine of election is not in doubt and I think it will be sufficient for my purpose if I quote from JARMAN ON WILLS (8th Edn.), Vol. I, at p. 545. These words apparently appeared in the first edition, and, according to a footnote, have received judicial approval:

"The doctrine of election" says MR. JARMAN "may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

On p. 546 there is this paragraph:

"It must, however, be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived."

The footnote cites *Cooper v. Cooper* (1) ((1874), L.R. 7 H.L. 53) as the authority for that statement. In my judgment that is a perfectly accurate statement of the law as expounded in a passage in a speech of LORD HATHERLEY in that case (*ibid.*, at p. 70):

"The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this,—the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies, with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really

- A does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavoured to dispose of his property, then he must give effect to that intention, though founded in error, and give
- B it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator."

- C On the other hand, counsel for Mrs. Wright says that the principle is one founded on the highest principles of equity and he refers me to a statement in the speech of LORD CAIRNS, L.C., in the same case, where he says (L.R. 7 H.L. at p. 67):

- "The rule, as was said during the argument at the Bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will."

- Counsel submits that where, as here, you have a transaction for value after the will there is no ground for admitting this doctrine for no principle of equity requires it to be admitted. Indeed, there is a hardship to the person for Mrs. Wright has in the eyes of the law given full value for the property which she has
- E acquired, and there is, therefore, no reason to exclude her from participation in the remainder of the estate. Counsel for Mrs. Wright points out that in *Cooper v. Cooper* (1), unlike the present case, the will followed the disposition and it is the cardinal point that in this case the will precedes the disposition. He also referred me to the earlier case of *Plowden v. Hyde* (2) ((1852), 2 Sim. N.S. 171) which he submitted supported his contention that no case of election arises where the will preceded the other disposition. I do not propose to delve
- F into the complicated case of *Plowden v. Hyde* (2) for two reasons. First of all, the main basis on which the case proceeded which involved the construction of a will was overruled by the Court of Appeal. Secondly, the whole case depended on the law then in force which was before the Wills Act, 1837, s. 24*, namely that
- G under the pre-1837 law the will spoke as at its date and not at the date of the death. Shortly, what KINDERSLEY, V.-C., seems to have decided was that under the law as it stood the testator had acquired a new title to the property subsequent to the will by the mere reconveyance of some mortgage. The case amounted, in the view of KINDERSLEY, V.-C., to this, that the will was not intended to operate on the subsequent estate acquired by the testator and therefore it was
- H undisposed of and passed to the heir at law. That being the construction that he adopted (erroneously, as the Court of Appeal held) there was no room for the application of the doctrine of election. I do not think that that case assists me.

- Counsel for Mrs. Wright also relied on a passage to be found in JARMAN ON WILLS (8th Edn.), Vol. 2, at p. 1,137, where there is a discussion as to the distinction between satisfaction and ademption. The passage is this:

- I "Thus in cases of satisfaction the will is subsequent to the settlement or debt; the intention to satisfy is to be found in, or presumed to be found in, the will; a case of election must arise; and the objects of the covenant or creditors must be the legatees. In cases of ademption, on the other hand, the

* Section 24 of the Wills Act, 1837, provides: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

will is prior to the settlement; the intention to revoke the gift cannot be found in the will, but must be found in some act subsequent to the will; election cannot arise; and the objects of the covenant and of the bequest need not be the same."

The phrase "election cannot arise" at one time troubled me a little, but I do not think that in that passage Mr. JARMAN or the learned editor had in mind a case where the person taking property previously given by the will by some transaction with the testator (for value or not) subsequent to the will is also entitled to some completely different property under the provisions of that prior will. Where that conjunction of circumstances is present then in my judgment a question of election may arise.

I return to the principle which I need not restate. Here we have a will which, by virtue of s. 24 of the Wills Act, 1837, speaks of the property comprised in it at the death. By that will the testatrix has expressed the clearest possible intention to dispose of No. 78, Albion Road. Accordingly, applying the principle, if the sister, Mrs. Wright, desires to accept a benefit in respect of some quite different property under that will, she must be prepared to adopt the whole contents of the instrument, conform to all its provisions, and renounce every right inconsistent with them. In my judgment, the speech of LORD HATHERLEY which I have already quoted, makes it quite clear that the question whether the will or other act or disposition comes first, does not matter in the least degree. Since the Wills Act, 1837, one has only to find the disposition of the property of another who receives other benefits under the will. Accordingly, I must declare that the defendant, Elsie Mary Wright, is bound to elect between the property, No. 78, Albion Road, and the residue of the estate and did so elect by obtaining judgment in the action.

Declaration accordingly.

Solicitors: *Anthony Gane & Co.*, Richmond (for the plaintiff and for the defendants other than the first defendant); *Charles Robinson & Son*, Hounslow (for the first defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

COLE v. SOMERSET COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Donovan, JJ.), October 15, 1956.]

B

Town and Country Planning—Development—Revocation of permission to develop—Direction that development of permitted class inexpedient—Whether direction valid in relation to development already carried out—Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950 No. 728), art. 4 (1).

C

In 1950 land which had been part of a golf course began to be used as a caravan site for the purposes of recreation. This development was permitted under the terms of art. 3 of the Town and Country Planning General Development Order, 1950*. In 1953 the Minister approved a direction made by the local planning authority under art. 4 of the Order of 1950* directing that the permission granted under art. 3 should not apply to the land. The direction was served on the appellant in 1954. In 1956 the local planning authority served on the appellant an enforcement notice in respect of the use of the site. The appellant applied that the enforcement notice should be quashed on the ground that the direction was invalid as the development had taken place before the direction was made.

D

Held: the direction was invalid since the power under art. 4 (1) to direct that development permission should not apply enabled a direction to be given only in relation to development not yet carried out.

E

Per LORD GODDARD, C.J.: if a landowner had not acted on the development permission granted under art. 3, perhaps the local planning authority could have revoked the permission or attached conditions to it (see p. 534, letter B, post).

Appeal allowed.

F

[For the Town and Country Planning Act, 1947, s. 12, s. 23, s. 25, s. 26, s. 27, see 25 HALSBURY'S STATUTES (2nd Edn.) 506, 524, 528-532.

For the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, arts. 3, 4 and Sch. 1, Class 5, see 21 HALSBURY'S STATUTORY INSTRUMENTS 146, 147, 158.]

G

Case Stated.

This was a Case Stated by justices for the County of Somerset in respect of their adjudication as a magistrates' court at Burnham-on-Sea.

H

On Mar. 9, 1956, a complaint was preferred by the appellant, Christine Helen Cole, against the respondents, the Somerset County Council, that in purported exercise of powers contained in the Town and Country Planning Act, 1947, they did serve an enforcement notice dated Feb. 6, 1956, on the appellant as owner of land in the district of Burnham-on-Sea requiring her to discontinue the use of the land as a caravan site, to remove the caravans therefrom and to restore the land to its condition before the alleged development took place. The appellant applied to the justices for an order quashing or varying the enforcement notice pursuant to s. 23 (4) of the Town and Country Planning Act, 1947. The appellant was the owner of the land which during the war had formed part of a ladies' golf course. In 1950 the land began to be used as a caravan site for members of the Caravan Club of Great Britain and Ireland for purposes of recreation and had continued to be so used since then. The club held a certificate of exemption granted by the Minister of Health under s. 269

I

* The relevant terms of art. 3 and art. 4 of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, are printed at p. 533, letters E and G, post.

of the Public Health Act, 1936*. On July 23, 1953, the Minister of Housing and Local Government approved with modifications a direction made by the respondents under art. 4† of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, that the permission granted by art. 3‡ of the order should not apply to development on the appellant's land in respect of

"use for camping and the erection or placing of tents, caravans or movable structures for the purposes of that use, being development comprised in classes 4 and 5 of Sch. 1 to the Town and Country Planning General Development Order, 1950, and not being development of any other class."

This direction was served on the appellant on Apr. 24, 1954, and pursuant to art. 4 (4) of the order came into force on that date. On Feb. 9, 1956, the respondents served an enforcement notice dated Feb. 6, 1956, under s. 23 of the Town and Country Planning Act, 1947, on the appellant in respect of the use of the land as a caravan site.

It was contended by the appellant: (a) that, as respects the use of the land for caravans for members of the caravan club permission had been granted under Part 3 of the Town and Country Planning Act, 1947, for the development to which the enforcement notice related within the meaning of s. 23 (4) (a) of the Act in that the use was development which took place in 1950 with permission granted by art. 3 and class 5 of Sch. 1 to the Town and Country Planning General Development Order, 1950; (b) that the direction made under art. 4 of the Order of 1950 did not render unauthorised development carried out before it came into force but that the effect of the order was only to require permission to be obtained for development of the classes specified in the direction when carried out after the direction had come into force. It was contended for the respondents that the use of the land for caravans was development which had been carried out without the grant of permission under Part 3 of the Town and Country Planning Act, 1947, in that the direction made under art. 4 of the Order of 1950 required permission to be obtained for development of the classes specified in that direction whether carried out before or after the direction came into force. The justices found that the contention of the respondents was right and directed that the enforcement notice should come into effect subject to an alteration which is not relevant to this report.

Roy Wilson, Q.C., and D. G. Widdicombe for the appellant.

John Stephenson and N. R. King for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by justices for the County of Somerset, to whom the appellant applied to quash or vary an enforcement notice served under s. 23 (4) of the Town and Country Planning Act, 1947. That is a notice which is served by a local planning authority if they allege that a person is doing something in contravention of planning permission and by which they require the discontinuance or even removal of what is said to be contrary to the permission granted.

In 1950 some land which had hitherto formed part of a ladies' golf course at Burnham-on-Sea began to be used as a caravan site for the purposes of recreation and has continued to be so used ever since.

A result of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, was that land could be

* Under this section a local authority has power to control and regulate the use of movable dwellings.

† See p. 533, letter G, post for the relevant part of art. 4.

‡ See p. 533, letter E, post for the relevant part of art. 3.

A developed for certain purposes as set out in the order. There is no doubt that the order did permit land which had not previously been used for this purpose, to be used by putting caravans on the land for the purposes of recreation. The description of development which was allowed [by class 5 of Sch. 1 to and art. 3 of the Order of 1950] was

B “The use of land, other than buildings and not within the curtilage of a dwelling-house, for the purposes of recreation or instruction by members of an organisation which holds a certificate of exemption granted by the Minister of Health under s. 269 of the Public Health Act, 1936, and the erection or placing of tents or caravans on the land for the purposes of that use.”

C In view of that, it is quite obvious that the use of this land for a caravan site was permitted by that order.

I turn to s. 12 of the Town and Country Planning Act, 1947, to find what development means; it reads:

D “(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day*. (2) In this Act, except where the context otherwise requires, the expression ‘development’ means . . . the making of any material change in the use of any buildings or other land.”

E The material change made here, which was permitted by the order, was a change from a ladies’ golf course to a caravan site.

I now turn to arts. 3 and 4 of the order which gave permission for this development. Article 3 (1) provides:

F “Subject to the subsequent provisions of this order, development of any class specified in Sch. 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or the Minister”:

It is not disputed that that order enabled the owner of the land to change its use to a caravan site being used for the purpose of recreation.

Then art. 4 (1) which, to my mind, is the material article in this case, says:

G “If either the Minister or the local planning authority is satisfied that it is expedient that development of any of the classes specified in Sch. 1 to this order should not be carried out in any particular area, or that any particular development of any of those classes should not be carried out, unless permission is granted on an application in that behalf, the Minister or the local planning authority may direct that the permission granted by art. 3 of this order shall not apply to:—(a) all or any development of all or any of those classes in any particular area specified in the direction, or (b) any particular development, specified in the direction, falling within any of those classes.”

H
I It seems to me that it really is unarguable that that applies to something to be done in the future. It does not apply to something which has been done under the permission which the Minister has granted. The Minister has provided that anybody may develop their land for the purposes specified in the order, among them making caravan sites for the purpose of recreation. Then he could provide under this article that at a particular place, whether it is Burnham-on-Sea, Skegness, Colwyn Bay or anywhere else, such development should not be permitted. He can limit the application of this very wide permission to any

* The appointed day was July 1, 1948; see the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (S.I. 1948 No. 213).

particular area, or he can provide that some particular development shall not be carried out at some place; but, where permission has been given and somebody has acted on it, it does not seem that the permission can be withdrawn altogether. What was done here was done under the terms of the general planning permission which made it a perfectly lawful change of use, and therefore a perfectly lawful development. Under this article neither the local planning authority nor the Minister had any power to withdraw that permission which had been given and had been acted on. Perhaps, if it had not been acted on with regard to the whole of the land the local planning authority could have revoked the permission or attached certain conditions to it, but I am quite sure that where a change in the use of the land has occurred lawfully, this article does not permit the Minister to withdraw that permission *ex post facto*. I am confining myself entirely to the question that is raised in this case, and that is whether this enforcement order is or is not a valid order. In my opinion, it clearly is not. I express no opinion whether what the local planning authority seek to do can be done in some other manner. I am not going to be led in this case into any discussion of s. 21 and s. 22 of the Act of 1947 because, in my opinion, they do not arise. It is simply a question whether the words "should not be carried out" [in art. 4 (1)] refer to the carrying out of work in the future, as in my opinion they clearly do, or whether they refer to work that ought not to have been carried out, which I think they do not.

For these reasons, I think the justices came to a wrong decision and therefore this appeal will be allowed.

HALLETT, J.: I agree and I desire to add very little, but I should like to emphasise what I think is the necessary distinction for present purposes between development and use. What we have been considering in this case is whether a development is permitted and not whether a use after development is permitted. In s. 12 of the Town and Country Planning Act, 1947, to which my Lord has already referred, in addition to the words which he read there are a few more words which help in that connection. The full words are as follows [s. 12 (2)]:

"In this Act . . . the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

It seems to me that development is something that is done, and when it has been done the question of that which has been brought into existence by the development arises. There are other provisions in this Act which deal with user, for instance, s. 25, which is headed: "Agreements regulating development or use of land". Then in s. 26 and s. 27 there are certain provisions for dealing with the use of land. Like my Lord I do not desire to say anything as to what could have been done here. All I do desire to point out is that here what is being dealt with under arts. 3 and 4 is development and not use. It seems to me that confronted with these difficult questions there may be confusion between prohibition of development and interference with a use after development. In my judgment, those two things are separate things dealt with by separate provisions, and in this case the restriction on development is not one which could be imposed after development had taken place.

For these reasons, I agree that the decision of the justices was wrong as regards the land connected with the caravan site.

DONOVAN, J.: Like the other members of the court, I think that the words in art. 4 of the Town and Country Planning General Development Order etc., 1950, namely, "that development of any of the classes specified . . . or . . . any particular development of any of those classes should not be

A carried out", refer to development which has not yet begun or, if begun has not yet been carried out in the sense of being completed. That construction is reinforced by the substitution of the words "should not be carried out" in art. 4 (1) of the Order of 1950, for the narrower words "should not be undertaken" in art. 4 of the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958). It is also reinforced by the existence of s. 26 and s. 27 in the Act of 1947 which give power to order the discontinuance of development already completed, and the respondents here are not able to give any reason why they have not put that power into effect in this case. If art. 4 on its true construction has no reference to development already permitted or completed, then it has no reference to the present case and the respondents were not entitled to invoke it. I entirely agree with the other members of the court.

Appeal allowed. Enforcement order quashed.

Solicitors: *Arbeid & Co.* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *E. S. Richards*, Taunton (for the respondents).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

R. v. COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF FLINT COUNTY COUNCIL, *Ex parte* BARRETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Donovan, JJ.), October 17, 1956.]

Theatre—Licence for the performance of stage plays—Renewal—Condition attached prohibiting theatre from selling intoxicating liquor or tobacco—Rules for ensuring order and decency—Proximity to theatre of a licensed house—Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 9.

The manager of a theatre, who for a number of years had held a licence for the performance of stage plays and the sale of intoxicating liquor and tobacco at the theatre, applied to the licensing committee for the renewal of the licence. At the same time another applicant applied to the committee for a similar unrestricted licence for another theatre in respect of which a restricted licence had been held for some years, viz., a licence subject to general rules made under s. 9 of the Theatres Act, 1843, including among those rules a rule prohibiting the sale of intoxicating liquor and tobacco in the theatre. The committee granted to the second theatre a restricted licence on the ground that there were adequate licensed premises nearby. On the application by the manager of the first theatre the committee decided that, although an unrestricted licence had been granted in the past, the grounds on which they had granted a restricted licence to the second theatre applied to the first theatre with even greater force, since a large hotel with a number of bars adjoined the first theatre. Accordingly they granted only a similar restricted licence in respect of the first theatre. On motion by the manager of the first theatre for mandamus to the committee to grant a licence which did not prohibit the sale of intoxicating liquor and tobacco,

Held: the motion must be dismissed since the proximity of licensed premises to the theatre was a consideration which the committee were entitled to take into account in determining the application to them for a renewal of the licence.

R. v. West Riding of Yorkshire County Council ([1896] 2 Q.B. 386) followed; *R. v. Sheerness Urban District Council* ((1898), 62 J.P. 563) considered.

Per LORD GODDARD, C.J.: exactly the same considerations may be taken into account on an application for renewal as on an application for a licence for the first time (see p. 539, letter B, post).

Semble: a rule prohibiting the sale of tobacco is no longer a "suitable rule for ensuring order and decency" in a theatre within s. 9 of the Theatres Act, 1843, in the absence of some particular good reason (see p. 541, letters B to D).

[**Editorial Note.** The terms of s. 5 of the Theatres Act, 1843, do not expressly enable conditions to be imposed on the grant or renewal of a licence to perform stage plays, but by s. 9 of the Act rules "suitable for ensuring order and decency" may be made and a copy of the rules must be annexed to the licence. The rules are general rules, applicable to all theatres in the area (cf. p. 539, letter F, post), but the existence of a rule such as that in the present case does not prevent a committee from determining an application for a licence free of restriction on its merits (*R. v. Sheerness Urban District Council* (1898), 62 J.P. 563). In this latter case the rule also restricted the sale of tobacco and was held not to be ultra vires.

As to the granting of retail licences to sell intoxicating liquor in theatres, see 19 HALSBURY'S LAWS (2nd Edn.) 123, para. 291; and for cases on the subject, see 30 DIGEST (Repl.) 83, 636-640.

For the Theatres Act, 1843, s. 5, s. 9, see 25 HALSBURY'S STATUTES (2nd Edn.) 21, 24.]

Cases referred to:

- (1) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 30 Digest (Repl.) 12, 51.
- (2) *R. v. West Riding of Yorkshire County Council*, [1896] 2 Q.B. 386; 65 L.J.M.C. 136; 75 L.T. 252; 60 J.P. 550; 30 Digest (Repl.) 83, 638.
- (3) *R. v. Sheerness Urban District Council*, (1898), 14 T.L.R. 533; 62 J.P. 563; 30 Digest (Repl.) 83, 640.
- (4) *R. v. Sylvester*, (1862), 2 B. & S. 322; 31 L.J.M.C. 93; 5 L.T. 794; 26 J.P. 151; 121 E.R. 1093; 30 Digest (Repl.) 30, 197.

Motion for an order of mandamus.

The applicant, Thomas Wesley Barrett, was accountant and secretary of Rhyl Entertainments, Ltd., a company carrying on business as, inter alia, proprietor of the Queen's Theatre, Rhyl, and was the manager of the theatre. On Feb. 11, 1956, he applied to the respondents, the County Licensing (Stage Plays) Committee of Flint County Council, for the renewal of the theatrical licence in respect of the Queen's Theatre on the same terms and conditions as for the previous year, namely, with the deletion of r. 3 of the committee's Theatrical Licences Rules (which provided that "no spirituous liquors, wine, ale, beer, porter, cider, perry or tobacco shall be sold or disposed of in the theatre") and permission to give performances on Good Friday and Christmas Day if required. An unrestricted licence had been held on behalf of the theatre for a large number of years. On Mar. 9, 1956, the day of the hearing of the application, another applicant applied for renewal of the restricted licence then held in respect of the Pavilion Theatre, Rhyl, but for its renewal as an unrestricted licence, free from r. 3 of the conditions. The committee first considered the application of the Pavilion Theatre and granted a restricted licence since they were of the opinion that there were already adequate drinking facilities provided at nearby licensed premises. In considering the application for the Queen's Theatre, the committee were of opinion that although this theatre had hitherto been granted unrestricted licences, their discretion was not fettered, and that the grounds on which the committee had refused to grant an unrestricted licence to the Pavilion Theatre applied with even greater force to the Queen's Theatre, since a large hotel with a number of bars adjoined the Queen's Theatre with access by a narrow covered arcade. Accordingly

A the committee granted to the applicant a licence for 1956-57 in respect of the Queen's Theatre subject to compliance with r. 3.

The applicant now sought an order of mandamus directed to the committee commanding them to hear and determine according to law the application for the renewal of the licence in respect of the Queen's Theatre under the same terms and conditions as before or alternatively commanding the committee to

B delete r. 3 from the conditions of the licence.

D. J. Brabin, Q.C., and R. G. Waterhouse for the applicant.

The respondents did not appear and were not represented.

LORD GODDARD, C.J.: Counsel for the applicant moves in this case for mandamus directed to the Licensing Committee for Stage Plays for the County of Flint who, on an application by the Queen's Theatre, Rhyl, for an unrestricted licence to enable them to sell intoxicating liquor in the theatre have imposed a condition which prohibits them from selling intoxicating liquor or tobacco—I will say a word about tobacco in a moment—the circumstances being that this theatre has had an unrestricted licence for a great number of years to perform stage plays and to sell tobacco and intoxicating liquor in the bars. At the meeting D which was held this year a renewal was asked for, and at the same time a licence was asked for by another theatre which also had held a licence for some time but which had always held a restricted licence, and the committee granted licences but in each case imposed the condition to which I have referred. The case is one, I do not hesitate to say, of considerable importance, and it is, perhaps, unfortunate that we have not had an argument on both sides. Counsel for the E applicant has argued this case not only with perfect clarity and ability but has called our attention to the material cases which seem to the court to show that, whatever opinion we might have come to in this court, we are hampered by previous decisions.

I will read, first of all, the affidavit of the chairman of the committee, and let me say I welcome this as it is the first time it has happened for a considerable F time that the committee have taken advantage of the Review of Justices Decisions Act, 1872, s. 2, which enables them, without making them parties to the litigation, to put in an affidavit and to file it without stamp or fee, stating the reasons for their decision. The chairman of the committee has filed an affidavit which is helpful because he has made it perfectly clear what was the reason for the committee's decision. He says:

G “7. The committee then retired to consider the aforesaid applications, and upon retiring, we were advised by the clerk of the committee that we should consider each application separately and on its own merits; that we had a discretion to allow or refuse the applications to delete the said r. 3 from the conditions attaching to the grant of a theatrical licence in either or H both cases; but that our discretion must be exercised properly in a judicial and reasoned way.

“8. The committee first considered the application relating to the Pavilion Theatre aforesaid and most of the members of the committee were of the opinion that it was unnecessary and undesirable to provide drinking facilities at this theatre because there were adequate facilities already provided at nearby licensed premises. It was decided by a substantial I majority that this application be granted but that the said r. 3 should not be deleted from the conditions attached to the theatrical licence for this theatre.

“9. The committee thereupon considered the applicant's application and the view was expressed that the grounds upon which the committee had refused to delete the said r. 3 from the conditions attaching to the theatrical licence for the Pavilion Theatre aforesaid (which is situated a short distance from the Queen's Theatre aforesaid) applied with even

greater force to the Queen's Theatre in that it was known to members of the committee that a large hotel with a number of bars adjoined the Queen's Theatre and that patrons of this theatre could obtain access thereto by crossing a narrow covered arcade. It was pointed out by me and the clerk of the committee that the Queen's Theatre had hitherto been granted theatrical licences with r. 3 deleted from the conditions attached thereto, but it was felt by members of the committee that this did not fetter their discretion in considering the present application. Members expressed the view that, whatever had been done in the past, it was their duty to consider the present application on its merits as they saw them and that their decisions must be consistent if justice was to be done between applicants. It was unanimously agreed that the applicant's application to delete the said r. 3 from the conditions attaching to the grant of a theatrical licence should be refused and that a theatrical licence for the year 1956-57 should be granted in respect of this theatre, subject, inter alia, to compliance with the said r. 3."

That makes it perfectly clear that, in considering these two applications, the committee took into account the fact that the theatre was very close to licensed premises, and they considered that the facilities for drinking afforded by the licensed premises were enough, and, therefore, they resolved to keep in r. 3 which would prohibit the sale of intoxicating liquor in the theatres.

Mandamus would only lie if this court considered that the committee had not heard and determined according to law; that is what mandamus orders them to do. If they have heard and determined according to law, that is to say, if they have applied their minds to the right considerations and have not taken into account considerations which have no bearing on the matter, or substituted their own prejudices for a determination on the merits, this court cannot interfere; it can only interfere if the committee have taken into account matters which they were not entitled to take into account or have not applied their minds to the proper considerations.

Counsel has argued very strenuously that there ought to be a complete distinction between the Queen's Theatre and the Pavilion Theatre because the Queen's Theatre was asking for the renewal of a licence they had always had, whereas the Pavilion Theatre was not in the same position, as they had, except for a very short time some years ago, been an unlicensed theatre. Counsel argues that there is all the difference in the world between applying for a new licence for a theatre and a renewal. I feel great difficulty in giving effect to that argument except to this extent, that no doubt the fact that the theatre always had a licence could fairly and properly be taken into account by the committee, and in this case they did so because the chairman says he pointed out this fact to the committee. But I cannot agree as a matter of law that there is any difference between granting a new licence and renewing a licence because, in effect, it is in each case the grant of a licence for a particular year. We need not go into all the matters which relate to the granting of renewals under the various Licensing Acts, but it is worth while to refer to a case which is very often cited, *Sharp v. Wakefield* (1) ([1891] A.C. 173), where LORD HERSCHELL said (ibid., at p. 185):

"... the sole question for decision in this case is, whether where a licence is applied for, by way of renewal, by one who already holds a licence for the sale of intoxicating liquors, the licensing authorities are entitled to take into consideration the wants of the neighbourhood and the remoteness of the premises from police supervision, or whether their inquiry must be limited to the character and conduct of the applicant, and they can only refuse the applicant on the ground of his personal unfitness."

A LORD MACNAGHTEN said (*ibid.*, at p. 187):

" . . . I also am of opinion that it is clear beyond the possibility of doubt or question that [the Alehouse Act, 1828] conferred upon the licensing justices the same discretion in the case of an application for what is now termed a renewal, as in the case of a person applying for a licence for the first time . . . "

B In other words, when applying for a licence which is an annual licence, whether it is called a renewal or a new licence, the same considerations apply; and exactly the same considerations may be taken into account on an application for renewal, which is an application to be allowed to carry on the same business, as on an application for a licence for the first time.

C The difficulty which arises in this case is that the Theatres Act, 1843, s. 9, provides:

" The said justices of the peace* at a special licensing session, or at some adjournment thereof, shall make suitable rules for ensuring order and decency at the several theatres licensed by them within their jurisdiction, and for regulating the times during which they shall severally be allowed to be open . . . "

D So their jurisdiction to make rules and attach the rules to the grant of the licence is that they are to ensure order and decency. I suppose no one could doubt that the committee could say in any particular case: " To ensure order and decency we are not going to allow intoxicating liquor to be sold on the premises ". In this particular case it was admitted that no complaint had ever been made against order and decency in the conduct of this theatre, and counsel has argued, with a good deal of force that, in attaching a condition to this licence prohibiting the sale of intoxicating liquor, it cannot be said they were doing that for the purpose of ensuring order and decency at the theatre. The Act gives power to the committee to make suitable rules for order and decency*. That obviously means that the committee can make rules which might be applicable to all theatres. Whether they should apply the rules to the particular theatre or not is another matter. Section 9 appears to contemplate that general rules may be laid down, because it provides that " a copy of all rules which shall be in force for the time being shall be annexed to every such licence ". At any rate, it is quite clear that what the section contemplates is making rules for ensuring order and decency at the several theatres within their jurisdiction. I do not suppose

E it could be denied that a rule forbidding the sale of intoxicating liquor in a theatre could be made by the committee for the purpose of ensuring order and decency. What is said is that no question of order and decency arises here, and the reason which the committee have given, namely, that people can if they wish get drink outside, is not a rule directed to order and decency; it is a consideration simply with regard to the drinking facilities in the neighbourhood and not one with

F regard to the proper conduct of the particular theatre. I think there is a great deal to be said for that argument and it appeals to me very much, but at the same time there are authorities which seem to me to prevent this court giving effect to that argument whatever we might think of it.

G The first case to which I would refer is *R. v. West Riding of Yorkshire County Council* (2) ([1896] 2 Q.B. 386). There this court held that the justices were

H entitled to take into account the proximity of licensed premises to the theatre and to say there were adequate drinking facilities. CAVE, J., who delivered the first judgment, said (*ibid.*, at p. 388):

" In this case it has been left to the committee to have regard to the circumstances of each particular case which comes before them. They had

* The power conferred on justices by s. 9 of the Theatres Act, 1843, was transferred to the county council by the Local Government Act, 1888, s. 7, and may be delegated to a committee of the county council under s. 85 (1) of the Local Government Act, 1933.

here to consider a variety of circumstances. The propriety of allowing the sale of liquor in a theatre may vary very much according to the locality in which the theatre is situate, or the character of the theatre itself. It is a matter which might very properly be taken into consideration that there was a place where liquor could be obtained within a few yards of this very theatre."

That is exactly what has happened here; within a few yards of this theatre there is an hotel and full facilities for obtaining intoxicating liquor. WILLS, J., said (*ibid.*, at p. 389):

"One of the grounds upon which it is well recognised that justices may fairly refuse a licence to a public-house is that there are already too many public-houses in the immediate neighbourhood: There is already a public-house within twenty yards of this theatre. If, then, an unconditional licence were granted to the theatre, the effect would be to multiply facilities for drinking, and it is a neighbourhood in which it is not desirable to do so. If that is not a good ground for the exercise of their discretion by the committee in the way they have done, I cannot conceive what is."

In that case the court was distinctly laying down that the presence of licensed premises in the immediate neighbourhood of the theatre is a ground for imposing this restriction. I ought to mention that if the theatre has an unrestricted licence, that is, a licence to perform stage plays without this condition, then without any further justices' licence they can obtain an excise licence. They do not have to go to the justices to get a licence; as long as they have a licence to perform stage plays they can get an excise licence for liquor unless there is a condition that they shall not.

The case to which I have referred was quoted to the Court of Appeal in *R. v. Sheerness Urban District Council* (3) ((1898), 14 T.L.R. 533; 62 J.P. 563). There it was argued that the rule was ultra vires, but the court held that it was not ultra vires and the justices could impose the condition. It is true that that case was decided on a different ground, simply that the rule was intra vires and that the justices had applied their minds to the proper considerations. A. L. SMITH, L.J., in giving judgment said (62 J.P. at p. 564):

"I do not think it necessary for this decision to discuss *R. v. West Riding of Yorkshire County Council* (2), and, furthermore, I am of opinion that the case of *R. v. Sylvester* (4) ((1862), 31 L.J.M.C. 93) has no application to this case, as there the justices refused to hear any application unless the rules had been conformed with."

In the Times Law Reports it is reported that he said (14 T.L.R. at p. 533):

"As regards the case of *R. v. West Riding of Yorkshire County Council* (2), he was inclined to think that that decision was right, but it was not necessary to express any opinion upon it."

In these circumstances, I suppose it would be still open to the Court of Appeal and, ex hypothesi, the House of Lords, to hold that the rule is ultra vires. I should doubt if they could possibly hold that part of the rule was ultra vires with regard to supplying intoxicating liquor, but it might be argued in another court that the committee must not consider the presence of nearby licensed premises as one of the grounds on which they can base their decision because that does not go to any question about order and decency in the theatre itself. That, in view of the *West Riding* case (2), is not open to this court, because of the definite decision by the Divisional Court in the year 1896 that the proximity of a licensed house is a material matter which the committee may take into account. The presence of

A licensed premises nearby is the point which has weighed with the committee. That is a point to which the case to which I have referred says the committee may pay attention, and, therefore, it is shown that they have heard and determined this matter without taking into account matters that they were not entitled to consider. That is a sufficient answer to the motion for mandamus.

There is one other matter, however, to which I should like to call attention and that is that this rule, which is apparently a standard rule which applies not only in the County of Flint but in other parts of the country as well and which was approved by the Secretary of State, actually deals with the sale of tobacco. How prohibition of the sale of tobacco has anything to do, at any rate in these days, with decency and order, I confess that I fail to see, and if the committee had been asked at the hearing to delete the words "and tobacco" they might have done so. I should think that originally these words "and tobacco" were put in probably as a precaution against fire. Everybody knows that at the present time cigarette ends are a frequent cause of fire, but I do not think that could be the object nowadays of putting in the words "and tobacco", and it may be the committee will consider in the future whether they will not delete the words "and tobacco". If the committee had been asked to delete those words while leaving in the rest, and they had refused, the court might have asked them to re-consider their refusal, unless they had given good reasons for it, but they were not asked to delete the words. Therefore, it is difficult for us to say that the committee might have retained r. 3 except the words "and tobacco", and, as a matter of discretion, the court will not order the case to go back for that point to be considered.

E For these reasons, I think that mandamus must be refused.

HALLETT, J.: I agree. Whether this court, if it had been in the position of the committee, would have considered r. 3 to be a suitable rule for ensuring order and decency at the theatre in question seems to me to be entirely beside the point. It seems clear from the decisions which have been referred to that this court ought not to interfere in the matter by way of mandamus unless it can clearly see that the committee have exercised the discretion entrusted to them improperly, in the sense that they have allowed considerations to influence their decision which ought not to have influenced it. Having regard to the cases to which my Lord has already referred, it seems to me impossible to say that the consideration of the proximity of other facilities for drinking was a consideration which the committee ought not to have taken into account. What effect should be given to that consideration, if it was a proper consideration, is a matter for them and not for this court.

I should like to add that I share the feeling my Lord has expressed as to the difficulty of understanding why a prohibition on selling tobacco as distinct from smoking should now be attributed to the preservation of good order and decency. However, that is a matter which, as my Lord has explained, cannot be canvassed on this occasion.

DONOVAN, J.: I agree with much regret. Speaking for myself, I cannot see how order and decency are preserved or advanced by telling the patrons of this theatre that they can drink next door instead of in the theatre itself. It is to preserve order and decency alone at the theatre that a restriction on the sale of liquor inside the theatre can be imposed; that comes from s. 9 of the Theatres Act, 1843. But it has already been held by decisions binding this court and referred to by the Lord Chief Justice that the existence of neighbouring drinking facilities is a relevant consideration to be taken into account by a committee under that section. Counsel strenuously contended that those decisions are so old and deal with such a different state of society that they ought not to be followed. I wish I could accede to that argument, but I do not feel able to do so.

It might, indeed, be argued with equal plausibility that the considerations apply with even more force today than they did in the nineties. The result is that the committee were entitled in law to take into account the drinking facilities next door, though, speaking for myself, I feel it was a very harsh decision to do so in this particular case in view of the fine record this theatre had enjoyed for over fifty years, during which time order and decency had been preserved to everybody's satisfaction; but that is not a matter for this court. A

It is also, as has been pointed out by the Lord Chief Justice, another result of the committee's decision that no tobacco can be sold inside the theatre. A man may take his own pipe and cigarettes in and smoke them, but must not buy them inside the theatre. That is a wholly unreal and unnecessary distinction and the committee do not say otherwise; they do not mention it at all. But the application was to delete r. 3 as a whole, and, that being so, and since the application was, in my view, properly dealt with by the committee, it is not possible to single out tobacco and grant relief in respect of that alone. For the rest, I agree entirely with what has fallen from the other members of the court. B

Motion dismissed.

Solicitors: *George Thatcher & Son*, agents for *J. Kerfoot-Roberts, Son & Griffiths Holywell* (for the applicant). C

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.] D

COLES v. COLES. E

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), July 30, 1956.]

Divorce—Maintenance of wife—Enforcement of order against husband—Sequestration—Bankruptcy of husband after writ of sequestration—Wife's claim for maintenance not provable in bankruptcy—Husband continuing in contempt of court—Writ of sequestration not discharged—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 62 (1). F

Execution—Sequestration—Writ issued by wife in respect of husband's failure to pay under maintenance order—Husband's subsequent bankruptcy—Husband continuing in contempt of court—Wife's claim not provable in bankruptcy—Writ of sequestration not discharged. G

Bankruptcy—Execution—Writ of sequestration—Writ issued to enforce order for permanent maintenance on divorce—Husband's subsequent bankruptcy—Property of husband passing into trustee's hands subject to sequestration—Wife's debt not provable in bankruptcy—Husband in contempt of court—Writ of sequestration not discharged. H

In January, 1953, the wife was granted a decree nisi of divorce which was made absolute on Apr. 8, 1953. On Apr. 15, 1953, she obtained an interim order for maintenance at £10 a week. Subsequently, a writ of sequestration was issued in respect of the husband's failure to carry out that order. In September, 1954, the writ was registered as a land charge in respect of property owned by the husband. In November, 1954, and on subsequent occasions the registrar gave liberty to the sequestrators to pay to the wife money collected under the writ. In January, 1955, a suspended committal order was made against the husband in respect of his interference with the sequestrators. In March, 1955, the husband committed an act of bankruptcy and a bankruptcy petition was presented. On Apr. 1, 1955, the wife's application for a committal order came again before the judge and the judge suspended the order on the husband granting legal charges on certain of his property as security for the wife; further, I

A the husband undertook not to apply for discharge of the writ of sequestration until the provision of proper security. In June, 1955, the registrar gave leave to the sequestrators to pay money collected and to be collected to the wife until the writ was discharged or further order. On July 19, 1955, the receiving order was made against the husband and on Aug. 15, 1955, he was adjudicated bankrupt. The trustee in bankruptcy now applied

B to be joined as a party to the cause; for an order discharging the writ and directing the sequestrators to account for their recoveries under it; and for an order discharging so much of the order of Apr. 1, 1955, as touched the writ of sequestration and the sequestrators. The husband had paid nothing under the maintenance order since June, 1955, and had personal pecuniary receipts to which the writ could attach.

C **Held:** (i) there was no objection to the trustee being joined as a party to the cause and an order would be made accordingly.

(ii) the trustee had failed to show good cause why the writ should be discharged since (a) the writ of sequestration was a process of contempt and the husband was still in contempt; (b) the writ was an appropriate remedy to enforce an order for alimony or maintenance (*Capron v. Capron*, [1927] P. 243 applied) and there was property to which it could attach; (c) the writ was issued before the act of bankruptcy and it was in that "plight" that the husband's property had passed into the hands of the trustee (observations of ROMER, L.J., in *Bendall v. McWhirter*, [1952] 1 All E.R. at p. 1316 applied); and (d) the writ was issued in respect of the husband's failure to comply with an order for payment in respect of which the wife could not prove in the bankruptcy (*Re Hastings, Ex p. Brown* (1892), 61 L.J.Q.B. 654 distinguished).

(iii) the order of Apr. 1, 1955, suspending the committal order on the husband's undertakings to create charges on his property, had been made by the judge with full knowledge of the facts as they existed at that date and there was no ground for interfering with it.

F [As to sequestration as a remedy for non-payment of alimony or maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 470, para. 1052, note (i); and for cases on the subject, see 27 DIGEST (Repl.) 679, 6480-6482.]

As to the effect of a writ of sequestration, see 16 HALSBURY'S LAWS (3rd Edn.) 71, para. 107, note (u); and for cases on the subject, see 21 DIGEST 591, 592, 1720-1724.

G As to power of bankruptcy court to stay sequestration proceedings, see 2 HALSBURY'S LAWS (3rd Edn.) 322, para. 615, note (u); and for cases on the subject, see 4 DIGEST 360, 3358.

For the Matrimonial Causes Rules, 1950, r. 62 (1), see 10 HALSBURY'S STATUTORY INSTRUMENTS 225.]

H Cases referred to:

- (1) *Re Browne, Ex p. Hughes*, (1871), L.R. 12 Eq. 137; 40 L.J.Bey. 46; 5 Digest 835, 7068.
- (2) *Re Hastings, Ex p. Brown*, (1892), 61 L.J.Q.B. 654; 67 L.T. 234; 4 Digest 360, 3358.
- (3) *Re Pollard, Ex p. Pollard*, [1903] 2 K.B. 41; 72 L.J.K.B. 509; 88 L.T. 652; 4 Digest 360, 3359.
- (4) *Hulbert & Crowe v. Cathcart*, [1894] 1 Q.B. 244; 63 L.J.Q.B. 121; 70 L.T. 558; 16 Digest 181, 865.
- (5) *Pratt v. Inman*, (1889), 43 Ch.D. 175; 59 L.J.Ch. 274; 61 L.T. 760; 4 Digest 504, 4544.
- (6) *Linton v. Linton*, (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; sub nom. *Re Linton, Ex p. Linton*, 52 L.T. 782; 49 J.P. 597; 27 Digest (Repl.) 675, 6436.

- (7) *Re Hawkins, Ex p. Hawkins*, [1894] 1 Q.B. 25; 69 L.T. 769; 4 Digest A 300, 2810.
- (8) *Kerr v. Kerr*, [1897] 2 Q.B. 439; 66 L.J.Q.B. 828; 77 L.T. 29; 27 Digest (Repl.) 675, 6437.
- (9) *Capron v. Capron*, [1927] P. 243; 96 L.J.P. 151; 137 L.T. 568; 27 Digest (Repl.) 679, 6482.
- (10) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd B Digest Supp.
- (11) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.

Summons.

The trustee in bankruptcy of the husband, against whom a decree absolute of divorce had been made on Apr. 8, 1953, now applied (i) to be joined as a party to the cause to such extent and for such purposes as might be just and expedient; (ii) for an order discharging so much of an order made by KARMINSKI, J., dated Apr. 1, 1955, as touched a writ of sequestration of the property of the husband dated Aug. 31, 1954, and as touched the four sequestrators appointed under the writ; (iii) for an order discharging the writ of sequestration, and the four sequestrators appointed thereunder, and directing them to account to the trustee in bankruptcy, or otherwise as the court should appoint, for their recoveries under the writ.

The summons was adjourned into open court for judgment. The facts appear in the judgment.

Muir Hunter for the trustee in bankruptcy.

H. J. Phillimore, Q.C., G. H. Crispin and C. D. Lush for the wife.

Cur. adv. vult.

July 30. **COLLINGWOOD, J.:** The facts which led up to the issue of the writ of sequestration are as follows. On Dec. 21, 1951, the wife filed a petition for judicial separation on the grounds of cruelty and adultery; she also asked for alimony pending suit and for maintenance. On Feb. 25, 1952, an order for alimony was made at the rate of £6 a week less tax. On Mar. 5, 1952, by his answer the husband denied the cruelty and adultery (alternatively alleging connivance by the wife) and there was a cross-prayer for relief on the ground of the wife's cruelty. On Apr. 1, 1952, a writ of sequestration was issued in respect of money due under the alimony order. On Apr. 8 this writ was discharged. On June 18, 1952, the order for alimony was varied, as from Apr. 25, to £10 weekly less tax. On Jan. 22 and 23, 1953, the cause was heard before KARMINSKI, J. In the course of the hearing the petition was amended, by leave, to one for dissolution, the husband electing not to proceed with his answer. He gave undertakings to provide secured maintenance of not less than £250 per annum, and a decree nisi was granted to the wife. On Apr. 8, 1953, this decree was made absolute. On Apr. 15 an interim order was made by the registrar for maintenance at £10 a week as from decree absolute. The registrar also ordered an affidavit of documents; that order was not complied with. On Mar. 3, 1954, an application was made to commit the husband before KARMINSKI, J. At the hearing the husband gave undertakings to the court (i) to bring payments under the interim order up to date within seven days; (ii) to provide the wife's solicitors with certificates of deduction of income tax in respect of all the past payments; and (iii) to provide similar certificates in respect of each future payment. Further, as to the secured provision for £250 per annum, he undertook within forty-two days to grant to trustees a second mortgage on his interest in No. 46, Egerton Gardens; within a further hundred and fifty days to grant a first mortgage thereon; and, finally, on an extended or

A substituted lease being granted by the freeholder to substitute for the first mortgage a first mortgage thereon. On July 8, 1954, a further writ of sequestration was issued in respect of failure to carry out the order of Apr. 15, 1953. On June 4 this was discharged by Mr. Registrar COMPTON MILLER. On July 14, 1954, another writ of sequestration was issued on the same grounds. On July 28 this was discharged by the same registrar. On Aug. 31, 1954, yet another writ of sequestration was issued in respect of the same order, namely, the order of Apr. 15, 1953.

The sequence of events thereafter was as follows: on Nov. 29, 1954, Mr. Registrar LONG gave liberty to the sequestrators to pay money collected under the writ to the wife. On Dec. 17, 1954, another similar order was made. In the meantime, on Oct. 11, an order had been made by the registrar to pay £135 6s. 3d. costs within seven days, and on Nov. 8, another order was made by Mr. Registrar FORBES for the payment of a further £1,099 1s. 8d. in respect of costs. On Sept. 2, 1954, the writ was registered at the Land Registry pursuant to s. 6 of the Land Charges Act, 1925*, in respect of three properties in which the husband had an interest, namely, 46, Egerton Gardens, 169, Old Brompton Road, and 7, Belgrove Street, which has remained effective as to the first named only, that is 46, Egerton Gardens, having been removed in respect of the other two. On Dec. 10, 1954, summonses came before WILLMER, J., asking for committal of the husband and two women who managed the properties 46, Egerton Gardens and 7, Belgrove Street, both of whom had been served with copies of the writ. These summonses were in respect of interference with the sequestrators, and the matter was adjourned by WILLMER, J., to be heard by KARMINSKI, J., on the husband's undertaking not to impede the sequestrators by himself or his agents.

On Jan. 21, 1955, the matter came before KARMINSKI, J., together with an application by the husband to discharge the writ. This latter was refused. On the summons by the wife to commit him for contempt in failing to carry out his undertakings of Mar. 3, 1954, KARMINSKI, J., committed him, directing that the order should lie in the registry for seven days to enable him (i) to bring maintenance payments under the interim order up to date; (ii) to provide the certificates of deduction of tax in respect of past payments; (iii) to give an undertaking as to future payments in this respect; and (iv) to carry out the undertakings as to secured provision given to the court on Mar. 3, 1954. From this order the husband appealed, and on Mar. 25, 1955, the Court of Appeal dismissed the husband's appeal from committal by KARMINSKI, J., but directed that the writ should not issue for seven days to enable application to be made to the judge on terms agreed.

Meanwhile, on Mar. 9, 1955, there had been an act of bankruptcy on the part of the husband, namely, non-compliance with a bankruptcy notice. On Mar. 25 the bankruptcy petition was presented. On Apr. 1, 1955, the matter came before KARMINSKI, J., again. The learned judge suspended the enforcement of the order of committal made on Jan. 21, 1955, until further order on certain terms. These were: (i) the husband having granted a legal charge on 169, Old Brompton Road, to secure £1,000 and undertaking to accept an offer of £7,300, the wife undertaking to remove her caution on the premises; the £1,000 to be payable on completion and to be applied to reduction of costs due by the husband to the legal aid fund; (ii) the respondent having granted a second charge of £5,000 on 7, Belgrove Street, such charge not to be in substitution of the secured provision of £250 undertaken to be provided by the husband but a temporary measure to secure the wife in anticipation of the provision of proper security within three months. These charges were executed in the judge's presence on that day. Further, there were undertakings by the husband not to apply for discharge of the writ of sequestration until provision for such proper security,

* See 20 HALSBURY'S STATUTES (2nd Edn.) 1071.

and the wife to concur in the sale of Old Brompton Road property; the husband undertaking for himself and his agents not to interfere with the sequestrators; and the husband undertaking forthwith to produce to the wife's accountant all books and documents required and to give all information required. Further, the husband undertook to allow their accountants to attend forthwith at each of his hotels to see all accounts and to collect rents and account to the sequestrators, and further undertook to authorise payment of the accountants' fees by the sequestrators out of money coming into their hands; the husband undertaking that the costs of the mortgage granted by him to be paid by him on demand, and in default, by the sequestrators out of money coming into their hands. A

On Apr. 25, 1955, a further authority was given by the registrar to the sequestrators to pay money in their hands to the wife; a similar authority was given on June 1, and on June 10 a similar authority together with authority for any future collections to be paid to the wife without any further authority from the court until the writ was discharged or until further order. On July 19, 1955, the receiving order was made. On July 25, 1955, KARMINSKI, J., dismissed the application of the husband to vary the undertakings given on Apr. 1; also he made no order on an application to attach the manageress of one of the properties for interference with the sequestrators. On July 28, 1955, KARMINSKI, J., made an order for committal of the husband, this on the ground of interference with the sequestrators, and on the same day the Court of Appeal dismissed the husband's application to suspend this committal. The husband remained in prison until Aug. 19, 1955, when McNAIR, J., on his affidavit discharged him from Her Majesty's Prison at Brixton. B

On Aug. 15, 1955, the husband was adjudicated bankrupt. On behalf of the trustee in bankruptcy it was contended that the effect of the adjudication was to vest all property of the debtor in the trustee for division among his creditors generally and that the trustee's title related back to the act of bankruptcy, that is to say that on and after Mar. 9, 1955, the property over which the sequestrators had been exercising powers ceased to be the property of the husband and became the property of the trustee in bankruptcy and divisible among the creditors generally. It was contended that the writ of sequestration operated as a clog on the disposal of this property, 46, Egerton Gardens, and that the trustee was therefore entitled to the discharge of the writ; that it created, by itself, no charge or security in respect of the property of the debtor but merely substituted the sequestrators' hands for those of the debtor in its distribution and could not hold as against the trustee in bankruptcy. Further, that the learned judge, KARMINSKI, J., made the order of Apr. 1, 1955, in defiance of the Bankruptcy Act, knowing as he did of the act of bankruptcy (if not indeed of the presentation of the petition) when he allowed the charges to be executed. In passing I would point out that this court is not asked on the present summons to deal with these charges specifically; the application is merely to discharge so much of the learned judge's order of Apr. 1, 1955, as touches the writ of sequestration and the sequestrators, and to discharge the writ itself. C D E F G H

A sequestration does not give the person issuing the writ any charge over the property concerned. This is clear from *Re Browne, Ex p. Hughes* (1) ((1871), L.R. 12 Eq. 137) and *Re Hastings, Ex p. Brown* (2) ((1892), 61 L.J.Q.B. 654); and this is so even after payment of the money seized into court to the account of the sequestrator. In *Re Pollard, Ex p. Pollard* (3) ([1903] 2 K.B. 41), ROMER, L.J., says (at p. 47): I

"... when the sequestration issues and the sequestrators seize under it property of the debtor, what result follows? I need scarcely point out that the seizure by the sequestrators does not convert the property seized into the property of the creditor. The next question is, Does the mere seizure by the sequestrators give the creditor a charge upon each part of the property of the debtor which has been seized? The answer must be, Clearly it does

- A not. It does nothing of the kind. In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property."

B On the other hand sequestration is a process of contempt; the writ is available only where the person against whom it is issued is in contempt of court. Thus in *Hulbert & Crowe v. Cathcart* (4) ([1894] 1 Q.B. 244) WILLS, J., said (at p. 246):

"... it is quite contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt."

- C Similarly, in *Pratt v. Inman* (5) ((1889), 43 Ch.D. 175), CHITTY, J. (at p. 179) said: "Sequestration unquestionably was and is a process of contempt", and he held that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued, and proceedings may therefore be continued against his legal personal representative. The requisites for a discharge of the writ are quoted from DANIELL'S CHANCERY PRACTICE (at p. 804) in the ANNUAL PRACTICE, 1956 (at p. 793) as follows:

E "Where the person whose property has been sequestered has purged his contempt, an order may be obtained on motion or summons for the discharge of the sequestration, and directing the sequestrators to withdraw from possession, and to pass their final accounts, and, after retaining their costs, charges and expenses, and any payments properly made by them, to pay the balance to him, and for the discharge therefrom of the sequestrators from all liability in respect of their office."

- F It was urged on behalf of the wife that the husband in the present case had done nothing towards purging his contempt, or even submitting himself to the court. He is over £500 in arrears under the order, nothing whatever having been paid since June, 1955. He is also in contempt in respect of a series of undertakings given by him to the court. No evidence has been put before the court as to his inability to pay the amount (as to which there has been no summons to vary); on the contrary all the evidence goes to show that he is, and has been throughout, deliberately contumacious. The writ was issued long before the act of bankruptcy, to which the trustee's title relates back, and, as I have already stated, it is the writ which is the subject of the present application and not the charges executed in the presence of the court subsequent to the bankruptcy petition. It was further contended on behalf of the wife that proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by the making of a receiving order; and a wife's claim for alimony or maintenance is clearly not a debt provable in bankruptcy: *Linton v. Linton* (6) ((1885), 15 Q.B.D. 239), *Re Hawkins, Ex p. Hawkins* (7) ([1894] 1 Q.B. 25), *Kerr v. Kerr* (8) ([1897] 2 Q.B. 439). Orders for payment of arrears of maintenance may be made and enforced irrespective of the existence of a receiving order and whether the arrears fell due before or after the making of that order.

- I Counsel for the trustee placed great reliance on *Re Hastings, Ex p. Brown* (2). There the debtor having failed to comply with an order made in the Chancery Division to pay money into court, a writ of sequestration was issued to enforce the order under which the commissioners seized the debtor's house and goods. Shortly afterwards a bankruptcy petition was presented against the debtor in the county court, and an interim injunction was granted by that court restraining further proceedings under the writ, pending the hearing of the petition. A receiving order having been made, the injunction was made perpetual, and the

judge refused an application to discharge the restraining order. On appeal, A
the Divisional Court held that the plaintiffs in the Chancery action were creditors
within the Bankruptcy Act, 1883, s. 9 (now s. 7 of the Bankruptcy Act, 1914), but
were not secured creditors within sub-s. (2), and that the county court judge
was right in refusing to discharge the order. In that case, however, as in *Re*
Pollard (3), the creditor was in a position to prove in the bankruptcy, and s. 9 of
the Bankruptcy Act, 1883, covered his claim. The wife in the present case is not B
in a position to prove, and if she is (as she clearly is) entitled to enforce her claim
by committal, there seems no good reason why she should not also be entitled to
enforce it by a writ of sequestration, there being no question that that is an
appropriate remedy to enforce an order for alimony or maintenance: *Capron v.*
Capron (9) ([1927] P. 243), and Matrimonial Causes Rules, 1950, r. 62.

I was also referred by counsel for the wife to *Bendall v. McWhirter* (10) ([1952] C
1 All E.R. 1307), and in particular to the judgment of ROMER, L.J. (*ibid.*, at
p. 1316). That was the case of a deserted wife of a bankrupt in occupation
of the matrimonial home, and the question was the right of the trustee to posses-
sion. ROMER, L.J., said (*ibid.*, at p. 1316):

"The debtor's right of dealing with the property was subject to the
clog or fetter that the house had an occupant whom he could not, of his
own volition, eject, and there was, accordingly, to this extent a restriction
on his beneficial ownership of the property. If the trustee after the bank-
ruptcy could sue the wife for possession it could only be on the footing that
the property vested in him free from this restriction, and it would follow
from this that he acquired a larger beneficial interest in the property than
that which the debtor had previously enjoyed. It would also follow that a
third person automatically lost a special feature attaching to a licence which
the debtor had granted for value and was relegated to the position of an
ordinary licensee, and that the deterioration of that person's position and the
improvement of the trustee's would be commensurate in relation to each
other.

"Counsel for the plaintiff argued that these were the necessary and natural
results of the bankruptcy law. What is vested in the trustee, he said, was
the freehold of the property, and (apart from the mortgagee) nobody but
the debtor had any legal or equitable interest in that property. The wife's
licence depended on her husband's ownership of the property and could not
survive the vesting thereof in the trustee. This vesting carried with it
(under s. 22 (2) of the Bankruptcy Act, 1914) the right to possession and
the passing of that right was destructive of licences that had been granted
by the debtor previously. In this connection counsel relied on a principle
which has been recognised in *Brown v. Draper* (11) ([1944] 1 All E.R. 246)
and other cases, namely, that a wife cannot claim the benefit of her hus-
band's statutory tenancy after his interest as statutory tenant has been
validly determined. That, of course, is true. Every subordinate interest
must perish with the superior interest on which it is dependent. The
argument, however, does not appear to me to be convincing. The superior
interest in the present case was the ownership of the house and that has not
been extinguished. It is still alive and is vested in the trustee. The real
point, as I see it, is whether it became so vested subject to or free from a
particular incident which was attached to it in the debtor's hands prior
to the vesting. If it is now free from the bankrupt's disability to sue the wife
for possession, the plaintiff's action must succeed.

"This view, however, seems to me to involve a departure from the general
rule, to which I have already referred, that a trustee takes no better title
to property than the bankrupt had. This rule is fully, and (I think)
accurately, stated in 2 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 209,

- A as follows: 'The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is released by some express provision of the bankruptcy law'."
- B

- The position, therefore, may be summarised as follows: The writ of sequestration was issued before the act of bankruptcy in respect of the husband's contempt of court. It was in that "plight" therefore (to use the words quoted with approval by ROMER, L.J.) that the husband's property passed into the hands of the trustee. Under the writ a number of orders have been made authorising payment over by the sequestrators to the wife, the last one giving general authority to make such future payments out of funds in their hands without the necessity for further order by the court. There is admittedly property to which the writ can attach, indeed it was intimated on behalf of the trustee that there was no objection to the writ remaining in existence if its operation was restricted to what counsel called the husband's "personal pay packet". Since the issue of the writ the husband has given a number of undertakings to the court in respect of it, in proceedings for his committal to prison. The husband is still in contempt. Apart from the fact that the contemnor has been adjudicated bankrupt, which formed the ground for the present application, no evidence has been adduced which could possibly form the basis of an application to discharge the writ. Finally, the writ was issued in respect of failure to comply with an order for payment in respect of which the wife cannot prove in the bankruptcy.
- C
- D
- E

- In these circumstances the trustee has not, in my opinion, shown good cause why the writ of sequestration should be discharged by this court. Nor do I think that there is ground for me to interfere in any way with the order made by KARMINSKI, J., on Apr. 1, 1955, an order made, as it unquestionably was, with full knowledge of the facts as they existed at that date. As to the remaining part of the summons, asking that the trustee in bankruptcy of the husband be joined as a party to the cause, to such extent and for such purposes as may be just and expedient, this was not resisted by counsel for the wife, and I see no objection to it, and accede to it accordingly.
- F

- Order accordingly.
- G Solicitors: *W. Wallace Harden* (for the trustee in bankruptcy); *Evan Davies & Co.* (for the wife).

* [Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

WALTER WILSON & SON, LTD. v. SUMMERFIELD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Donovan, JJ.),
October 18, 19, 1956.]

Dock—Safe means of access—Ladder provided instead of gangway—Onus of proof whether gangway available—Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 9, reg. 50.

A ship, which was separated from the quay by a dumb barge, was being unloaded at a dock. A gangway was provided by the owners of the ship as a means of access between the ship and the quay but the gangway became unserviceable and was removed. In its place the owners provided a wooden ladder, which was of sound material and was properly secured to prevent slipping. The wooden ladder was the only means of access between the quay and the ship. Notwithstanding that the appellants, who were master stevedores and whose employees were engaged in unloading the ship, were requested to provide another gangway, they took no steps to do so. The appellants were charged with contravening reg. 9 of the Docks Regulations, 1934, which prescribes (by para. (a)), so far as is relevant, that where reasonably practicable the means of access shall be a gangway and (by para. (b)) that in other cases the means of access may be a ladder. The appellants called no evidence that it was not practicable for them to provide a gangway. On appeal against conviction,

Held: the appellants had been rightly convicted because the onus of proving that it was not reasonably practicable to comply with reg. 9 (a) was on them, and they had not discharged it.

Dictum of LORD TUCKER in *Marshall v. Gotham Co., Ltd.* ([1954] 1 All E.R. at p. 943) and dictum of SCOTT, L.J., in *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* ([1944] 1 All E.R. at p. 527) considered.

Appeal dismissed.

[For the Factories Act, 1937, ss. 105 and 130, see 9 HALSBURY'S STATUTES (2nd Edn.) 1082 and 1104.

For the Docks Regulations, 1934, regs. 9 and 50, see 8 HALSBURY'S STATUTORY INSTRUMENTS 165 and 173.]

Cases referred to:

- (1) *O'Brien v. Granford (Owners)*, [1951] 1 Lloyd's Rep. 414.
- (2) *Callaghan v. Fred Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525; [1944] K.B. 560; 113 L.J.K.B. 381; 170 L.T. 368; 2nd Digest Supp.
- (3) *McCarthy v. Coldair, Ltd.*, [1951] 2 T.L.R. 1226; 2nd Digest Supp.
- (4) *Marshall v. Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; 3rd Digest Supp.

Case Stated.

This was a Case Stated by a metropolitan stipendiary magistrate, in respect of his adjudication at Tower Bridge Magistrates' Court.

On Mar. 8, 1956, an information was preferred by the respondent, Allen Leslie Summerfield, an inspector of factories, against the appellants, Walter Wilson & Son, Ltd., for that they on Feb. 16, 1956, at Canada Dock, Surrey Commercial Docks, were employers of employed persons carrying on processes to which s. 105 of the Factories Act, 1937, and the Docks Regulations, 1934, applied, to wit, unloading the s.s. Torun at Canada Dock, that on the said date there was not safe means of access as required by reg. 9* of the said regulations and that they failed to carry out their duty under reg. 50† of the said regulations, whereby

* See p. 552, letter F, post for the relevant part of reg. 9.

† See page 552, letter H, post for the relevant part of reg. 50.

- A they were guilty of an offence contrary to s. 130 (1) of the Factories Act, 1937. The appellants were master stevedores and were engaged in unloading a cargo of timber from the s.s. Torun and were employing workmen for that purpose. They had started to unload on Monday, Feb. 13, 1956. The ship was lying alongside a dumb barge for the purpose of unloading, the barge having been inserted between the ship and the quay after the ship was moored to the quay.
- B From the start of unloading until some time between 8.30 a.m. and 9.30 a.m. on Thursday, Feb. 16, 1956, there was a safe means of access to and from the s.s. Torun, namely, a gangway provided by the owner, master or officer in charge of the ship which complied with reg. 9 (a) of the Docks Regulations, 1934. At some time between 8.30 a.m. and 9.30 a.m. on Feb. 16 the gangway became fractured and was no longer safe to use. The gangway was then taken away
- C and at 11.00 a.m. on that day the sole means of access was a wooden ladder twenty inches wide. The ladder was of sound material and adequate length. Thereafter until the unloading was finished on Feb. 18 the sole means of access to and from the said ship was the ladder. At about 11.30 a.m. on Feb. 16 the ladder was properly secured to prevent slipping.

- D At about 11 a.m. on Feb. 16 the respondent visited the ship and requested the appellants to provide another gangway. The appellants reasonably believed that they would finish unloading the ship on Feb. 16 or the following day. The appellants did not possess a gangway or a ship's accommodation ladder of their own and they took no steps to provide one on Feb. 16 or at any time before unloading was completed on Feb. 18. After the gangway had broken the workmen employed by the appellants used the wooden ladder. Evidence was given by
- E a witness called by the appellants before the magistrate that the appellants could have taken steps on the morning of Feb. 16 to obtain a gangway.

- It was contended for the appellants that the ship was not lying at a wharf or quay but alongside another ship, vessel or boat and that reg. 9 did not apply: that it was for the respondent to prove that the owner, master or officer in charge of the ship had failed to comply with reg. 9 and that he had failed to discharge
- F the onus on him in that a safe means of access had been provided which complied with reg. 9 (b) and that there was no evidence before the court to show that it was reasonably practicable for the said owner, master or officer to provide another gangway or accommodation ladder which complied with reg. 9 (a): that it was for the respondent to prove that the appellants had failed to comply with reg. 9 within the shortest time reasonably practicable after the said owner, master or
- G officer had failed to do so and that he had failed to discharge the onus on him in that there was no evidence before the court to show (a) when (if at all) the owner, master or officer had failed to comply with the regulation, or (b) what was the shortest time reasonably practicable thereafter for the appellants to comply with the said regulation: that since a safe means of access had been provided which complied with reg. 9 (b) it was for the respondent to prove that it was reasonably
- H practicable for the appellants to provide on Feb. 16 another gangway or accommodation ladder which complied with reg. 9 (a) and that he had failed to discharge the onus on him in that there was no evidence before the court to show that it was reasonably practicable for the appellants to provide a gangway or accom-
- Imodation ladder which complied with reg. 9 (a) on Feb. 16 or at all. Alternatively, that if the onus of proving that it was not reasonably practicable for them to provide such a gangway or accommodation ladder was on the appellants there was evidence to show this in that until the unloading was finished on Feb. 18 the means of access to the ship was a ladder provided by the owner, master or officer in charge of the ship which was of sound material and properly secured to prevent slipping: that the appellants believed that they would finish unloading on Feb. 16 or on the following day: that the appellants did not know if it was possible to obtain a gangway or accommodation ladder or if it was how long it would take to obtain one and that the test whether or not it was reasonably practicable

depended on all the circumstances at the time. It was contended for the respondent that the ship was lying at a wharf or quay within the meaning of reg. 9: that there was a failure of the owner or master to comply with reg. 9 (a): that it then became the duty of the appellants to provide a gangway or ship's accommodation ladder and put it into position within the shortest time reasonably practicable: that it would have been reasonably practicable for the appellants to provide a gangway or ship's accommodation ladder and put it into position during the course of that day [Feb. 16]: that the onus was on the appellants to show that it was not reasonably practicable so to do and that the appellants had not discharged the onus of proof and further that the appellants had made no attempt whatever to provide a gangway or ship's accommodation ladder. The magistrate convicted the appellants and imposed a fine.

Victor Durand for the appellants.

W. Gumbel for the respondent.

LORD GODDARD, C.J., referred to the charge and conviction and continued: This ship was lying alongside the quay at Canada Dock and was moored to the quay. It is true that there was a dumb barge lying between the side of the ship and the quay but, in the opinion of the court, that does not prevent the ship being a ship lying at a wharf or quay for the purposes of unloading. It was unloading a cargo of timber. The appellants in this case are the stevedores who were employed in unloading the ship. The ship's gangway, which had been used for the means of access for the dockers to get on to the ship, broke during the course of unloading and when the inspector came on the scene on Feb. 16, the break having occurred before that, he found that the means of access provided for the dockers was a ladder. The whole question is whether the ladder was properly secured to prevent slipping and whether there was a breach of the Docks Regulations, 1934.

Regulation 9 of the Docks Regulations, 1934, is a regulation for the protection of the dockers or stevedores who are employed in loading or unloading, and it provides:

"If a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling, there shall be safe means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship as follows:—(a) Where reasonably practicable the ship's accommodation ladder or a gangway or a similar construction . . . (b) In other cases a ladder of sound material and adequate length which shall be properly secured to prevent slipping."

The ladder, therefore, is to be provided only if it is not reasonably practicable for a ship's accommodation ladder or a gangway of the specified dimensions to be provided.

Regulation 50 provides:

"If the persons whose duty it is to comply with regs. 9, 10 and 12 fail so to do, then it shall also be the duty of the employers of the persons employed for whose use the means of access and the lights are required, to comply with the said regulations within the shortest time reasonably practicable after such failure."

I quite agree with counsel for the appellants' argument that the primary duty is on the [owner, master or officer in charge of the ship*, referred to hereinafter as "the shipowners"] to provide an accommodation ladder or gangway for the

* The duty is imposed on these persons by para. (b) of the head "Duties" in the Docks Regulations, 1934; 8 HALSBURY'S STATUTORY INSTRUMENTS 163.

A purpose of unloading where it is reasonably practicable to provide it. If the shipowners do not provide that, the burden is shifted on to the employers of the dock labourers or stevedores, as the case may be, to provide the means of access themselves. On the plain construction of reg. 9, a ladder can only be used in cases where it is not reasonably practicable to provide an accommodation ladder or a gangway. Therefore, if the inspector finds that a ladder is provided, he is

B entitled to ask why an accommodation ladder or a gangway was not provided. If the answer is that it was not practicable to do so, then clearly the onus is on the shipowners in the first instance to show that it was not practicable. The shipowners know the facts. They can say whether they had another one, or some gangway on board, or whether they could have got a gangway. If they have not provided one, *prima facie* they are in default, unless they can show that

C it was not reasonably practicable to provide one. If they are in default, the employers of the stevedores or labourers have to step into their shoes, and there is a duty on them to provide an accommodation ladder or gangway because they can only use the ladder where it is not reasonably practicable for the ship's accommodation gangway to be used. The learned magistrate was perfectly right in holding that there was a default on the part of the shipowners and that

D default had to be filled by the appellants.

I do not think that it is necessary to go through a great many cases, but in *O'Brien v. Granford (Owners)* (1) ([1951] 1 Lloyd's Rep. 414) this very point arose. The trial judge in that case was DONOVAN, J., and he held

E "that the onus was on defendants to prove that it was not reasonably practicable to provide a gangway and that they had failed to discharge it."

That was an action against the owners of the steamship. If the onus was on the steamship owners, it follows for the reasons that I have given that the onus would be on the employers of the workpeople who were at work in discharging the goods. The case went to the Court of Appeal where the judgment was upheld on different grounds, and there ASQUITH, L.J., said ([1951] 1 Lloyd's Rep. at p. 417):

F "I might say in passing that, if it had been necessary to decide the first point—that is, on whom the onus lies—I should have found myself that it lay on the defendants . . ."

He quoted the dictum of SCOTT, L.J., in *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (2) ([1944] 1 All E.R. 525 at p. 527) in which, delivering the judgment of the Court of Appeal, SCOTT, L.J., said:

G "If it were necessary to decide the question of onus, the obvious fact that the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their workpeople, makes us disposed to hold that it is for the defence, whether in a prosecution

H or an action, to establish the proposition of fact involved in the words of limitation of the section."

DENNING, L.J., said much the same thing in *McCarthy v. Coldair, Ltd.* (3) ([1951] 2 T.L.R. 1226 at p. 1228). It is true, however, that LORD TUCKER in *Marshall v. Gotham Co., Ltd.* (4) ([1954] 1 All E.R. 937) preferred to put the matter

I on the question of the construction of the regulations, and said (*ibid.*, at p. 943):

"I do not consider that the fact that 'the difficulty or ease of doing what is necessary to maintain safety is so much more within the knowledge of the management than of their workpeople' . . . is, in itself, a sufficient justification for shifting an onus which normally lies on a plaintiff."

Be it so, but on the construction of the regulations the noble and learned Lord then held that the onus was on the defendants.

I feel no difficulty at all in holding that in a case such as this the onus must be on the appellants because they are entitled to use a ladder only if it is not reasonably practicable to use a gangway. I cannot see that anyone can prove whether it was reasonably practicable for a gangway to be used or not except the appellants. In this case I think the magistrate was quite justified in his findings, which were these:

"That after the said gangway broke and before 11 a.m. on Feb. 16 [that was when the inspector arrived] there was prima facie a failure of the owner, master or officer in charge to comply with reg. 9 (a) of the said regulations [because the ship had not provided a gangway] that before the men finished work on Feb. 16 there was prima facie a failure on the part of the appellants to comply with reg. 50 [that is because, on the failure of the shipowners, the duty fell on the appellants] that it was not for the respondent to prove that a gangway or accommodation ladder was available to the appellants and that the onus was on the appellants to prove that it was not reasonably practicable for them to comply with reg. 9 (a). That, having taken no steps whatever to provide a gangway or ship's accommodation ladder, and having failed to call any evidence that it was not possible to obtain a gangway or accommodation ladder on Feb. 16, the appellants had failed to answer a prima facie case of failure to comply with reg. 50 and had failed to discharge the said onus of proof."

I agree with those conclusions of the learned magistrate because it seems to me that the appellants could justify the use of the ladder only if they showed that it was not reasonably practicable for the ship's accommodation ladder to be provided. I do not think that they were justified on the proper construction of the regulations in using the ladder. I think that the learned magistrate came to a right decision, and this appeal fails.

HALLETT, J.: I agree with the result proposed by my Lord, and I only desire to add a few words. It seems to me that the dictum of SCOTT, L.J., at the conclusion of his judgment in *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (2) ([1944] 1 All E.R. at p. 527), is capable of having very widespread results if it be applied generally, and I observe that in *O'Brien v. Granford (Owners)* (1) ([1951] 1 Lloyd's Rep. 414) DONOVAN, J., based himself on that dictum, and so, it appears, did ASQUITH, L.J., in the Court of Appeal. Again, in the case of *McCarthy v. Coldair, Ltd.* (3) ([1951] 2 T.L.R. 1226), DENNING, L.J., was basing himself on the dictum of SCOTT, L.J. That being so, for my own part, I would prefer rather to decide this case in the light of the suggestion made by LORD TUCKER in the later case of *Marshall v. Gotham Co., Ltd.* (4) ([1954] 1 All E.R. 937), which was in 1954, the other two cases having been in July and December, 1951. Applying what LORD TUCKER said, and considering merely the construction of the regulations, I entirely agree that the three words "in other cases" which introduce reg. 9 (b) of the Docks Regulations, 1934, make it plain that there is an exception within which the person on whom the duty of providing a safe means of access must come if he is to escape liability. For these reasons, I agree with the conclusion proposed.

DONOVAN, J.: I agree, and in deference to the argument of counsel for the appellants, I would like to add a few words. If, as I apparently held in 1951, it is for the shipowners to prove that it was not reasonably practicable to provide a gangway or ship's accommodation ladder, then here there was prima facie a failure on their part to comply with reg. 9, that is, with the whole regulation. A default by the shipowners having prima facie been established in this case, the duty of complying with reg. 9 devolved also on the employers of the persons employed, the appellants in the present case. They must therefore show that in the circumstances of the case the provision of a gangway or ship's ladder by

A them was not reasonably practicable. That they failed to do and the magistrate, in my opinion, was justified in convicting them.

Appeal dismissed.

Solicitors: *Chalton Hubbard & Co.* (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

C

DUNCAN v. HAY.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), October 3, 4, 1956.]

Rent Restriction—Possession—House required by landlord—House let in consequence of employment—House acquired by new landlord—Tenant continuing in changed employment with former landlord—No right of possession for new landlord's employee—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5 c. 32), Sch. 1 (g).

D

Hospital authorities let a cottage on their farm to their farm foreman as tenant in consequence of his employment. The cottage was subject to the Rent Restrictions Acts. The hospital authorities subsequently decided to give up possession of the farm and gave the tenant of the cottage notice to quit, but they employed him in a new capacity as laundry machine operator in the hospital. The new landlord of the farm brought an action for possession of the cottage against the tenant under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (g)* on the ground that he required it for occupation as a residence by a whole-time employee.

E

Held (DENNING, L.J., dissenting): the landlord was not entitled to possession since the tenant had not ceased to be in the employment of the former landlords of the cottage within the meaning of para. (g) of Sch. 1, "employment" for this purpose connoting the relationship of employer and employed and not the particular employment in consequence of which the cottage was first let to the tenant.

F

Dictum of TUCKER, L.J., in *Munro v. Daw* ([1947] 2 All E.R. at p. 362) applied.

G

Appeal dismissed.

[For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1 (g), see 13 HALSBURY'S STATUTES (2nd Edn.) 1060.]

H

Case referred to:

(1) *Munro v. Daw*, [1947] 2 All E.R. 360; [1948] 1 K.B. 125; [1948] L.J.R. 96; 177 L.T. 481; 31 Digest (Repl.) 704, 7934.

Appeal.

The landlord appealed against an order of His Honour JUDGE RICE-JONES made in Croydon County Court on May 31, 1956, refusing an order for possession of a cottage at 1, Fairchildes Cottages, Fairchildes Farm, on the borders of Surrey and Kent, to which the Rent Restrictions Acts applied for, occupation by the landlord's employee. The ground of the decision was that, although the cottage was let to the tenant in consequence of his employment by the former landlords, he had not ceased to be in that employment within the meaning of para. (g) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The landlord contended that the tenant had ceased to be in that employment

I

* The relevant terms of para. (g) are printed at p. 556, letter [G, post.

because he had ceased to be engaged in the employment of farm foreman in consequence of which the cottage had originally been let to him and had been employed instead as a laundry machine operator of the same employers. A

V. G. Wellings for the landlord.

J. E. Williams for the tenant.

DENNING, L.J.: This case concerns a farm on the borders of Surrey and Kent known as Fairchildes Farm. It was farmed for some years by the Warlingham Park Hospital. The hospital authorities were themselves tenants of the farm and of the cottages that went with it. They employed the tenant for many years as farm foreman and they sub-let one of the farm cottages, No. 1, Fairchildes Cottages, to him. They sub-let it to him as a farm cottage so as to enable him to do his work as a farm foreman. In 1955 the hospital authorities determined to give up the farm and the cottages going with it. They gave the tenant a valid notice to quit which expired on Sept. 29, 1955, and they themselves gave up their tenancy of the farm and cottages on the same day, Sept. 29, 1955. The superior landlord then let the farm and the cottages (including this cottage) to a new tenant farmer, the plaintiff landlord. The plaintiff landlord took over the farm cottages as from Sept. 29, 1955, and offered to take the tenant into his employment, but the tenant declined. He refused the offer to work on the farm for the landlord. The landlord now wants the cottage for a man who will work on the farm. He wants it for a cowman. He has got a married man—a cowman—with eight children waiting to go into it. It is very reasonable that he should have it—the judge has so found; but the tenant refuses to go. He says he is entitled under the Rent Restrictions Acts to remain there, although he has no longer anything to do with the farm. He has changed his work altogether. He has gone into the Warlingham Hospital to work a laundry machine. He appeared in the books of the hospital authorities as a farm foreman until November, 1955, but from that time onwards he appears as a laundry machine operator. If he had gone to work for any other employer, he would clearly not be entitled to stay in the cottage, but it is said that, because he is still in the employment of the hospital authorities, he is protected in his occupation of the cottage, although the hospital authorities have no longer anything to do with the farm or the cottages. D E F

The contest is the familiar one between a literal interpretation of the Act and a liberal interpretation of it. It arises under para. (g) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides that, where the court considers it reasonable to make an order for possession, it can be made if G

“the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . . and (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment.” H

The first part of this provision is satisfied here. The county court judge has found that it would be reasonable to make an order in favour of the new farmer, the landlord, but he has refused to make it because he holds that the tenant has not “ceased to be in that employment”, in that he has been in the employment of the hospital all the time and he is still in that employment; he has never ceased to be in that employment; and therefore an order cannot be made. I

The case depends on the meaning of the phrase “he has ceased to be in that employment”. Apart from authority, I should have thought the words “that employment” meant the relevant employment, i.e., the employment in consequence of which the house was let to the tenant, viz., his employment by the hospital authorities as a farm foreman. That employment has ceased and the

- A farmer should be entitled to possession. The judge has held in effect, however, that the words "that employment" include the employment of a former landlord: and that, so long as the tenant remains in the employment of a former landlord, he is protected. I do not think that that is correct. The case of *Munro v. Daw* (1) ([1947] 2 All E.R. 360) is no authority for that proposition. That case was concerned with the question whether a house was "let in consequence of that employment", i.e., let at the beginning of the tenancy. It was there held that in such a case one must consider whether the house was let to the servant because he was a servant, not whether it was let to him because of his work. That concerned the beginning of the tenancy, not the end of it. It seems to me very different when you consider whether the servant has "ceased to be in that employment".
- To test the matter, let me put this instance: Suppose the hospital authorities, in addition to giving notice to quit the cottage, had given proper notice to the tenant to terminate his employment as a farm foreman (as they may well have done, for aught I know), that then he was out of work for a few days, and, not getting employment elsewhere, and that he then entered the employment of the hospital again, but this time as a laundry machine operator. I should have thought that he clearly would have "ceased to be in that employment" for the purposes of the sub-section. He would have ceased to be in the relevant employment (i.e., in the employment in consequence of which the house was let to him), and would have entered into a new employment altogether. Applying that illustration, the only difference here is that, so far as we know, the hospital authorities did not give the tenant notice to terminate his farm employment, he was not out of work at all, but was taken on straightway as a laundry machine operator. But I do not think that makes any difference in law. What happened was equivalent to it. There must have been an agreement, express or implied, whereby the tenant's employment as farm foreman was terminated, and he was taken on as a laundry machine operator, with a moment of time in between. It was not a mere variation of his existing employment. It was a rescission or termination of the old employment and a substitution of a new one. As a farm foreman he could be directed to do farm work, but he could not be directed to do laundry machine operating. The contract of a farm worker is governed by many statutory regulations and is very different from that of a laundry machine operator. It often includes a farm cottage at 6s. a week. I see no reason why he should retain the cottage at that rent when he has ceased to work on the farm at all. It seems to me that an entirely new relationship must have been created by a voluntary determination of the old farm employment and the creation of a new employment as a laundry machine operator. He has ceased to be in the employment in consequence of which the house was let to him. In this situation I would have held that the sub-section is satisfied and that the landlord, the farmer, is entitled to possession, which the county court judge has held it is reasonable for him to have. I would have allowed the appeal accordingly.

HODSON, L.J.: This is an appeal from an order of His Honour JUDGE RICE-JONES sitting at Croydon County Court on May 31, 1956, whereby he refused an order for possession which the landlord had asked for. The landlord had claimed possession of the cottage, 1, Fairchildes Cottages, Fairchildes Farm, in the county of Surrey or Kent, he being a tenant-farmer. The county court judge was satisfied that it was reasonable to make an order provided the provisions of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, were satisfied, the particular provision in question being para. (g), that

"the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment or in the whole-time employment of some tenant from him or with whom, conditional on housing accommodation being provided, a contract for such

employment has been entered into, and . . . (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment."

No question arises but that the dwelling-house was reasonably required by the landlord for a person engaged in his whole-time employment. The question which has arisen in this case is whether the landlord has been able to show that the tenant he desires to eject

"was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment."

So far as the first part of that provision is concerned, it is satisfied, but there remains the sole short question, whether the tenant in question has ceased to be in the employment of (in this case) the former landlord.

The tenant, on Feb. 17, 1944, became employed by Warlingham Park Hospital as a tractor driver. In September, 1944, the hospital took over Fairchildes Farm, and on Sept. 25, 1951, the hospital let this cottage, No. 1, Fairchildes Cottages, to the tenant. He was then employed by the hospital as a farm labourer. He was served with notice to quit by the hospital on Jan. 5, 1955, which took effect on Sept. 29, 1955. It appears that, although he has remained continuously in the employment of the hospital, his farm work as foreman ceased to have any practical use between Sept. 29 and Nov. 16, 1955, because there was no work of a farming nature for him to do, and that on Nov. 16, 1955, he was working for the hospital as a laundry machine operator.

The question as I see it is simply and solely whether he has ceased to be in the employment of the Warlingham Park Hospital. This matter is not entirely free from authority, because the word "employment" in this Schedule has been considered in this court in *Munro v. Daw* (1) ([1947] 2 All E.R. 360). The first part of the headnote is:

"The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1 (g) (i), gives the court power to make an order for the possession of a dwelling-house within the Rent Restrictions Acts if the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment, and the tenant was in the employment of the landlord or a former landlord and the dwelling-house was let to him 'in consequence of that employment' and he has ceased to be in that employment. The words 'in consequence of that employment' refer solely to the relationship of employer and employed, and do not require that the letting should have been in consequence of the particular employment of the tenant."

During the course of the argument, TUCKER, L.J., asked counsel this question: "Are you submitting that the paragraph should be read as if it said 'in consequence of the nature of the employment'?" Counsel answered "Yes". In his judgment, TUCKER, L.J., answered the question in this way (*ibid.*, at p. 362):

"It is sufficient for me to say that I think the natural meaning of the words in Sch. 1 is the relationship of employer and employed, and that there is nothing in the language of the Schedule to suggest that what was intended was a requirement in consequence of the nature of the particular employment of the tenant. I think it would be straining the language used to put such an interpretation on the words."

That case had to do with the entering of the employment and this case has to do with the cessation of employment, but I can see no valid distinction between

A the two cases. In this case the tenant has never ceased to be in the employment of the former landlords. The former landlords referred to in para. (g) (i) are the Warlingham Park Hospital, and the tenant has not ceased to be in that employment. Although he has changed the nature of the work that he has been doing for his employers, it cannot, in any true sense of the word, in my view, be said that he has ceased to be in the employment of the hospital. The county court judge answered the question put before him in the same way, and I agree with him. His judgment is quite short.

C “In this case the house was let to the tenant in consequence of his employment with the landlord’s predecessor, namely, the hospital, but, as he is still in that employment, the landlord has failed to prove that the conditions shown in Sch. 1 (g) have been fulfilled.”

D I agree that, on the face of it, this is a hardship on the landlord, who wants the cottage for his cowman and it would be very reasonable that he should have the cottage for this purpose; but Parliament has prescribed, in my view in plain language, that in these circumstances he cannot have the cottage because the occupying tenant has not ceased to be in the employment of the former landlord. In my judgment, therefore, this appeal ought to be dismissed.

E **MORRIS, L.J.:** It is common ground in this appeal that the only question which arises relates to the application to the admitted facts of para. (g) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The relevant words are the words:

“the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment.”

F The words that must more particularly be considered are the words “that employment”.

G The tenant is Mr. Hay, and he was in the employment of former landlords, the hospital. So the words, when applied in relation to the facts, read: “Mr. Hay was in the employment of the hospital and the dwelling-house was let to him in consequence of that employment.” Pausing there, it seems to me that the words “that employment” must refer to the fact of his having been in the employment of the hospital. The words of the section continue:—“and he has ceased to be in that employment.” Again, I think that in the present case the words “that employment” must mean the employment of the hospital. I find myself in agreement with the judgment of the learned county court judge when he decided that, on the facts, the tenant had not ceased to be in the employment of the former landlords, the hospital.

H It is common ground that the dwelling-house was let to the tenant in consequence of his being employed by the hospital and that he is still employed by the hospital; that was the evidence. I agree that there is some merit in the claim made by the landlord, but it seems to me that the wording of the Act of Parliament does not permit any result other than that reached by the learned county court judge.

I In *Munro v. Daw* (1) ([1947] 2 All E.R. 360) the words “in consequence of” were more particularly under review, but I think it is quite clear that the court expressed its opinion on the meaning of the words with which we are directly concerned. SOMERVELL and EVERSLED, L.J.J., agreed with the judgment of TUCKER, L.J., who said ([1947] 2 All E.R. at p. 362):

“... the natural meaning of the words in Sch. 1 is the relationship of employer and employed, and ... there is nothing in the language of the

Schedule to suggest that what was intended was a requirement in consequence of the nature of the particular employment of the tenant."

It might or might not have been a good thing if there had been some such provision. That is not a matter for us. The argument submitted for the landlord here involves reading into the paragraph words which are not there. It involves making the opening words of the paragraph read "the tenant was in the employment of the landlord or a former landlord in a particular capacity", and making the concluding words read "and he has ceased to be employed in that capacity". It seems to me that the words "that employment" refer to the employment of the landlord or a former landlord, and refer to the fact of the relationship of employer and employed. The tenant here has never ceased to be in the employment of the former landlords, namely, the hospital. I therefore find myself in agreement with the judgment of the learned county court judge and think that this appeal should fail.

Appeal dismissed.

Solicitors: *F. Miller Parris & Mitchell*, Croydon (for the landlord); *Copley Singleton & Billson*, Croydon (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BRYERS v. CANADIAN PACIFIC STEAMSHIPS, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 5, 10, 11, 12, 1956.]

Dock—Dry dock—Ship under repair—Employee of shipowners injured—Several repairers engaged on work on ship at same time—Liability of shipowners—Notional occupier—Civil right of action where injury to person employed—Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), preamble, reg. 10—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 60, as amended by Factories Act, 1948 (11 & 12 Geo. 6 c. 55), s. 12 (1) and Sch. 1.

Statutory Instrument—Subsequent legislation replacing enactment under which instrument made—Subsequent legislation amended—Statutory instrument not modified in terms—Whether class of persons intended to be protected by instrument ascertained by reference to terms of repealed or subsisting legislation—Shipbuilding Regulations, 1931 (S.R. & O. 1931 No. 133), preamble, reg. 10—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 60, as amended by Factories Act, 1948 (11 & 12 Geo. 6 c. 55), s. 12 (1) and Sch. 1.

On Dec. 8, 1954, a ship owned by the defendants was in public dry dock undergoing annual repairs by general repairers and also by seventeen specialist contractors all of whom were engaged under direct contract with the shipowners. The shipowners retained the general control of the ship apart from the work of repair. The plaintiff, an able seaman serving as a carpenter, employed by the shipowners, was instructed by them to clear the scuppers on F deck and the bilges in the well. While looking for a light cluster on F deck for the purpose of doing the clearing of the scuppers, the plaintiff fell into an unprotected well forming one of the holds of the ship and was injured. In an action brought by him against the shipowners for damages for breach of statutory duty under reg. 10* of the Shipbuilding

* The relevant terms of reg. 10 are printed at p. 563, letter E, post, and the terms of the proviso to the head "Duties" are printed at p. 563, letter I, post.

A Regulations, 1931, by not securely protecting the well, the plaintiff contended that the duty of providing the protection was imposed on the shipowners by para. (b) following the proviso to the head "Duties" in the regulations and that the plaintiff was within the category of persons (viz., "persons employed" within s. 60 of the Factories Act, 1937, as amended) on whom the regulations conferred a civil right of action.

B **Held:** the plaintiff was entitled to recover damages from the shipowners for breach of statutory duty under reg. 10 of the Shipbuilding Regulations, 1931, for the following reasons—

C (i) paragraph (b) following the proviso to the head "Duties" in the regulations imposed on the shipowners the duty of carrying out reg. 10, notwithstanding that, as there were many repairers and not solely one person contracting to repair the ship, the proviso, to which para. (b) was expressed as an exception, did not apply to the facts of the present case (*Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50, followed) and

D (ii) the enactment under which the regulation had originally been made (viz., s. 79 of the Factory and Workshop Act, 1901) enabled regulations to be made without any express limit of the category of persons working in a shipbuilding yard who were to have the benefit of the regulations and, as there was no ground for excluding the plaintiff from the category of persons to be benefited, he was entitled to sue for breach of duty under reg. 10, although he had been present on the ship as a member of the crew and not as a person employed in repairing the ship.

E Per JENKINS, L.J.: I agree with SINGLETON, L.J., that s. 12 of the Factories Act, 1948, cannot have affected the construction of the Shipbuilding Regulations, 1931 (see p. 574, letter E, post, and cf. p. 570, letter A, post).

Decision of DIPLOCK, J. (ante p. 242), affirmed.

F [**Editorial Note.** The view that the construction of the regulations made under the Act of 1901 is not affected by their continuance in force under the Factories Act, 1937, or by the amendment of the relevant section of that Act by the Factories Act, 1948, accords with a view of the construction and scope of the regulations expressed by ATKINSON, J., in *Garcia v. Harland & Wolff, Ltd.* ([1943] 2 All E.R. at p. 482) and preferred by TUCKER, J., in *Lovell v. Blundells & T. A. Crompton & Co., Ltd.* ([1944] 2 All E.R. at pp. 57-59).

G For the Factories Act, 1937, s. 60, as amended, see 9 HALSBURY'S STATUTES (2nd Edn.) 1046.

For the Shipbuilding Regulations, 1931, preamble "Duties", reg. 10, see 8 HALSBURY'S STATUTORY INSTRUMENTS 142, 144.]

Cases referred to:

- H (1) *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.
- (2) *Smith v. Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 2nd Digest Supp.
- (3) *Hartwell v. Grayson Rollo & Clover Docks, Ltd.*, [1947] K.B. 901; [1947] L.J.R. 1038; 2nd Digest Supp.
- I (4) *Donovan v. Cammell Laird & Co.*, [1949] 2 All E.R. 82; 2nd Digest Supp.
- (5) *Royster v. Cavey*, [1946] 2 All E.R. 642; [1947] K.B. 204; [1947] L.J.R. 149; 176 L.T. 16; 2nd Digest Supp.
- (6) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 30 Digest (Repl.) 225, 691.
- (7) *Hartley v. Mayoh & Co.*, [1954] 1 All E.R. 375; [1954] 1 Q.B. 383; 118 J.P. 178; 3rd Digest Supp.

- (8) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 682; 79 L.T. 284; 24 Digest 911, 80.
- (9) *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper*, [1956] 2 All E.R. 722.
- (10) *Wingrove v. Prestige & Co., Ltd.*, [1954] 1 All E.R. 576; 3rd Digest Supp.

Appeal.

The defendant shipowners appealed against the decision of DIPLOCK, J., dated June 27, 1956, and reported ante at p. 242, that they were liable in damages for breach of the Shipbuilding Regulations, 1931, to the plaintiff, a member of the crew who fell through an uncovered hatchway in the defendants' ship while it was under repair by several repairers in public dry dock. The facts appear in the judgment of SINGLETON, L.J.

J. S. Watson, Q.C., and *Melville Kennan* for the defendants, the shipowners.
Rose Heilbron, Q.C., and *H. L. Lachs* for the plaintiff, the seaman.

SINGLETON, L.J.: This is an appeal by the defendant shipowners from a judgment of DIPLOCK, J., given at Liverpool Assizes on June 27 this year. There is also a cross-appeal on behalf of the plaintiff.

The plaintiff, James Bryers, was employed by the defendants, Canadian Pacific Steamships, Ltd., on their ship, the *Empress of Scotland*. In the early part of December, 1954, the ship was in the Gladstone dry dock at Liverpool. She had arrived at Liverpool some little time earlier, and she had carried (among other things) a considerable quantity of grain. She had discharged her cargo, and a day or two before Dec. 8 she went into the Gladstone dry dock for general overhaul and so that certain repairs could be done to her. The plaintiff was a yeoman carpenter. One of his duties was to remove the covering cement from the scuppers on F deck, and the wood boards and burlap from the bilge openings in the well. The cement had been placed there because the ship was to carry grain. The plaintiff's duty took him to the lower part of the ship, and he found, on Dec. 8, that he required a cluster of lights for the purpose of enabling him to see clearly the place, or places, at which he had to work. He could not find one at first. He went down from E deck to F deck. There were hatch covers on, and he obtained the help of someone there to move one of the covers so that he could get down the ladder to F deck. On F deck there is an opening which ought to be covered at all times when it is not in use. The opening in F deck is some five or six feet from the ladder leading down from E deck to F deck, down which the plaintiff went. Having got on to F deck, he walked around looking for a cluster of lights. He had a torch: he had all the light which he required to make his search. He did not find the cluster of lights on F deck, though he had expected to do so. He therefore thought (so he said) that he would look down the opening down from F deck below and would shine his torch so as to enable him to see down there. He said that he slipped and fell down the open space which ought to have been covered. He sustained injuries to his feet, or to his heels. One of his heels was more seriously injured than the other; but it was not a very serious injury. He brought this action against the shipowners claiming damages for negligence under the common law, and also for damages for breach of statutory duty. DIPLOCK, J., awarded him damages in respect of the shipowners' breach of statutory duty, to wit, breach of reg. 10 of the Shipbuilding Regulations, 1931. In respect of his other claims, at common law and under other regulations*, the claim failed. The judge further held that the plaintiff himself was guilty of contributory negligence and that in the circumstances he ought only to receive half the damages which he otherwise would have received, and the total damages payable to the plaintiff by the shipowners were assessed accordingly at the sum of £196 13s. 3d.

* Regulation 1 of the Shipbuilding Regulations, 1931, which relates to safe means of access, and reg. 42 (b) and (c) thereof, which relate to the provision of efficient lighting.

A The part of the case which has led to considerable argument arises on reg. 10, and on the question as to whose duty, if anyone's, it was to comply with the duty laid down by reg. 10. It is a question which has been considered more than once in recent years. I shall have to refer to some of the authorities. At the same time, I wish to keep my judgment as short as possible, for there has been much discussion in the courts on this subject and I do not wish to add more than I must to that which those who have to advise on such cases have to consider.

B The regulation to which I have directed attention is one of those made by the Secretary of State in the year 1931 in pursuance of s. 79 of the Factory and Workshop Act, 1901. The right of the Secretary of State to make the regulations of the year 1931 is not questioned: he was following the power given to him by the statute. Regulation 10 reads:

C "All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable."

It is unnecessary to read further. The question is who, if anyone, is responsible, if that regulation is not complied with. That must depend on the earlier part of the regulations. There is no doubt that the Gladstone dry dock was, on Dec. 8, 1954, a "public dry dock" within the meaning of that term in the regulations.

D The regulations lay down duties. "It shall be the duty of the occupier to comply with Parts 1 to 8 of the regulations"—Part 1 is the part which covers reg. 10. That is followed by a proviso, after a fullstop. The proviso is:

E "Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts 1 to 8 and it shall be his duty to comply with the said parts, except as follows."

F It is on these last words that the question arises; but I must look for a moment at the words I have read. *Prima facie*, it is the duty of "the occupier" to comply with the parts of the regulations with which we are immediately concerned. "The occupier" is the occupier of the dry dock. I am not sure who is "the occupier" if there are two ships in the dry dock, having regard to the proviso—

G "Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship . . . shall be deemed to be the occupier for the purposes of Parts 1 to 8 . . ."

If there is one ship only in the dock, and if there are a number of repairers each of whom has a separate contract with the shipowner, *prima facie* the proviso would not apply, for the proviso deals with "the person who contracts with the owner of the ship . . . to execute the work of repair."

H The proviso ends with the words "except as follows"; and there follow three heads, (a), (b) and (c). It is said that this case, as against the shipowners, falls under head (b), and it is said, and correctly said, that that is an exception to a proviso. That is where one of the difficulties arises. Exceptions (a) and (c) deal with lighting: I shall have to come back to them in a moment. Exception

I (b) (on which this case depends) is:

"Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable."

The covers which ought to have been on, but which were not on or covering the opening but were placed at one side, were to protect an opening which was not required to be used for the purposes of the repairs. It is claimed on behalf of the plaintiff, under the terms of exception (b), that it was the duty of the shipowners to provide the protection in reg. 10, that they did not do so, and that, by reason of his failure to comply with the regulation, the plaintiff met with his injury. *DRPLOCK, J.*, so found. It is against that finding that the shipowners, Canadian Pacific Steamships, Ltd., appeal to this court. A
B

It is not easy to put into a few words the view I form of this part of the regulations, consisting, as it does, of exceptions to a proviso. The view which I hold is that though (a), (b) and (c) appear in the form that I have stated as exceptions to a proviso, they are general principles stated to be observed by the parties mentioned whether there be one repairer, or whether there be ten repairers under different contracts with the shipowner. C

In the first place "the occupier" is charged with duties. The proviso follows, stating that someone other than "the occupier" of the yard may be "the occupier" for certain purposes, "except as follows". "Except as follows" means except under these three heads of general liability, which contain certain rules which must be observed. For example head (b) provides: D

"Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner . . . to provide the protection specified in reg. 10."

It is said on behalf of the shipowners that no part of (a), (b) or (c) can apply in this case, because they follow a provision E

"that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship . . . shall be deemed to be the occupier for the purposes of Parts 1 to 8."

Here, it is said, there was no such person: there was a number of repairers: therefore the proviso does not apply, and therefore the exceptions to the proviso cannot apply. F

I agree that, as has been said more than once, the regulations appear to be unfortunately drafted. I cannot get out of my mind, however, the fact that (a), (b) and (c) are intended to be three general rules in which particular application of duties are laid down. Someone ought to be responsible for the duty of complying with reg. 10. It is agreed that someone is if there is but one repairer under contract with the shipowners; but it is said that if there are more repairers than one the duty mentioned under (b) does not arise. It would make havoc of the regulations if that is right. Why should the shipowner be responsible if there is only one repairer on the ship and yet not responsible if he has contracted with ten people to do different repairs on the ship, he himself retaining control of the ship? I cannot find any reason for that; and I am not quite clear in my mind whether, in such circumstances, the argument of counsel for the shipowners is that no one is responsible or that, in the circumstances of this case, the Mersey Docks and Harbour Board, the occupiers of the dry dock, are responsible. If it be the latter, again I wholly fail to see why the board should be responsible for hatch covers on the ship, inside the ship, if there are a number of repairers under contract with the shipowner, and the shipowner should be responsible if there is only one repairer. I cannot think that that is at the back of the regulations. There is good reason for saying that the shipowner shall be responsible for hatch covers and the like if he retains control of the ship, whether he has contracted with one repairer or whether he has contracts for the repairs with a dozen repairers. G
H
I

The first case to which I should refer is *Wilkinson v. Rea, Ltd.* (1) ([1941] 2 All E.R. 50), a decision of this court, *SCOTT, MACKINNON and LUXMOORE*,

A L.J.J. There was a number of defendants. A ship was lying in public dry dock while coal was being delivered by coal merchants for use in the galley, which involved having a hatch in the galley open. Trifling repairs were also being done in the galley and elsewhere in the ship by a company (called the "repairing company"). While the coal was being delivered the electric lighting in the galley was temporarily extinguished at the request of a Lloyd's surveyor who was testing the electric lighting equipment.

B The surveyor had been accompanied by an employee of the repairing company who communicated the surveyor's wishes to the ship's engineer and he extinguished the lights. The plaintiff Wilkinson, an employee of the repairing company, entered the galley to fetch his tools while the electric lights were out and he fell down the hatch and was injured in spite of an attempted warning by an employee of the coal merchants. The plaintiff,

C therefore, brought an action claiming damages for personal injuries against the coal merchants, the shipowners and the repairing company. The coal merchants were Rea, Ltd., the shipowners were Lamport & Holt, Ltd., and the repairing company was A. & R. Brown, Ltd. As against the coal merchants the action succeeded, but as against the shipowners and the repairing company the action was dismissed and the plaintiff was ordered to pay their costs.

D On appeal by the coal merchants and the plaintiff, it was held (holding (iii) being the important one from the point of view of the present appeal): (i) that the appeal of the coal merchants failed; (ii) that the repairing company were not, by reason of their being employed to carry out some small repairs in the ship, the "occupier" within the meaning of the provision headed "Duties" in the Shipbuilding Regulations, 1931, and had not had imposed on them the duty under

E reg. 42 (a) of keeping all parts of the ship efficiently lighted when work was being done, and consequently that they were not liable for breach of the regulation, and had not been guilty of any negligence; (iii) that the shipowners who, under exception (c) to the proviso under the heading "Duties", were responsible for complying with reg. 42 (b), which required that all approaches to places to which an employee might be required to proceed in the course of his employment should

F be adequately lighted, had, in allowing the lights to be put out while work was being done without giving any warning, been guilty of the breach of a statutory duty which was absolute. The plaintiff had to pay the costs of those against whom he did not succeed.

In *Wilkinson v. Rea, Ltd.* (1) the point which is now before the court might have been taken, and it is as clear as anything can be that the groundwork was there

G if such a point could be raised. In the course of the argument on behalf of the plaintiff, MACKINNON, L.J., asked ([1941] 1 K.B. at p. 692) "Were there other firms carrying out repairs in the ship?", to which counsel answered:

"Yes, but the 'occupier' should be given the meaning of the repairer at the particular part of the ship. Further, the shipowners were responsible for a breach of reg. 42 (b): see exception (c) under 'Duties'. Regulation 42 (b)

H provides for the adequate lighting of all approaches to places to which a person may be required to proceed in the course of his employment and in particular for the lighting of dangerous openings. The shipowners committed a statutory breach of this regulation, for the places to which a workman is 'required to proceed' includes a place where a workman goes to get his tools."

I Mr. Clothier and Mr. Scholefield Allen appeared for the shipowners in that case, and supported the judgment of STABLE, J., in the court of first instance, that there was in fact no breach of the regulation in that a proper lighting system had been provided and it had merely been cut off at the time and that was not a breach. This court did not accept that argument, and allowed the appeal against the shipowners. Mr. Clothier's argument dealt with the regulations in full, and so far as I know, there could be no difference in this respect between

(a), (b) and (c) of the regulation. It was held that there was a duty on the shipowners, in the circumstances of the case, to comply with reg. 42 (b). A

SCOTT, L.J., having said that he did not agree altogether with the finding of the learned judge on the facts, said ([1941] 2 All E.R. at p. 54):

“ Upon the plaintiff’s claims against both these defendants on the ground of common law negligence, the judge held that the plaintiff had not established his case against either ”; B

and with SCOTT, L.J., agreed. He continued:

“ The shipowners were in fact providing the lighting on board the ship, and undoubtedly had expressly or impliedly undertaken with Brown & Co., their contractors for repairs, to make that provision, so as to bring them within exception (c) of the proviso about ‘ Duties ’, and that undertaking must clearly have meant that the lighting would be continuous throughout the daily period of the contractors’ work.” C

SCOTT, L.J., stated the facts generally and continued:

“ If the duty was absolute, switching off the section was, in the circumstances proved in evidence, a breach. It was obviously the duty of the shipowners to have the illumination on at all material times, and, as the facts of the case show, it was potentially most dangerous suddenly to shut off the lights without warning. It made the means of access to the galley unsafe within reg. 1, which provides as follows: ‘ Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment ’. It rendered futile reg. 10, which provides as follows: ‘ All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable ’. In my opinion, reg. 42 (b) is plainly absolute. The principles of construction which lead to such an interpretation were explained very clearly by LORD ATKIN in *Smith v. Cammell Laird & Co., Ltd.* (2) ([1939] 4 All E.R. at pp. 390, 391) and apply to reg. 42 (b). The cross-appeal on statutory liability must, therefore, be allowed against Lamport & Holt, and judgment must be entered for the plaintiff against them with costs here and below.” D E F

MACKINNON, L.J., agreed; and so did LUXMOORE, L.J., who said (at p. 59): G

“ With regard to the action against the owners, it will be convenient to consider first whether or not they were under any statutory duty towards Wilkinson under the regulations. The regulations do not contemplate that the owners could be occupiers under the words ‘ It shall be the duty of the occupier to comply with Parts 1 to 8 of these regulations ’, for it has been held in *Smith v. Cammell Laird & Co., Ltd.* (2) that, on the true construction of the regulations, the subject-matter of the occupation is a shipbuilding yard. By the definition already referred to, a shipbuilding yard includes a dry dock where repairs are being done. It was not argued, however, that the owners were liable as occupiers of the dry dock. It was contended that they were liable under the express words of reg. 42 (b) . . . The duty under this regulation is imposed on the owners by sub-cl. (c) of the proviso to the clauses contained in that part of the regulations included under the heading ‘ Duties ’ . . . I can see no reason for not giving the words of reg. 42 (b) their ordinary meaning.” H I

I may add that I see no reason for not giving reg. 10 its ordinary meaning; nor do I see any reason why it should not apply to the circumstances of this case. The decision of this court in *Wilkinson v. Rea, Ltd.* (1) appears to me to be

A conclusive of this case. I believe it was binding on DIPLOCK, J. He followed it —though he was not quite sure that it was binding on him. In my opinion it is binding on this court. I have already indicated that if the matter had been free from authority I should have formed the same view myself, in order that some effect can be given to the regulations.

B In *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3) ([1947] K.B. 901), it was held that one of several repairers is not the notional “occupier” for the purpose of the regulations. I do not read the argument: it is fully set out in the report. The part which is of importance is at p. 910. LORD OAKSEY, L.J., said (at p. 912):

C “In my opinion it is not possible to read the regulations as making one of several repairers the notional occupier of the dry dock within the regulations; nor does it make any difference that the repairer in question is doing repairs which can only be done in a public dry dock or that he hired the public dry dock. The words in the proviso under the heading of ‘Duties’ ‘when a ship is being repaired’ relate to time, and the words ‘the work of repair’ relate to the repair which is, in fact, being carried out in the dry dock. The only authority expressly in point is *Wilkinson v. Rea, Ltd.* (1). STABLE, J., adopted the view I have expressed. LUXMOORE, L.J., with whom MACKINNON, L.J., agreed appears to have taken the same view. He said: ‘In the present case A. & R. Brown, Ltd., had not agreed with the owners to repair the motor vessel Linnell, in the Bidston dry dock. They had only agreed to do certain parts of the repair work which was being carried out on the ship while in that dock. It is, therefore, impossible in my judgment to hold that A. & R. Brown, Ltd., were to be deemed to be the occupiers of the dry dock at the time the accident occurred, and they cannot, therefore, have been under any statutory duty to the plaintiff. It follows that, in my judgment, STABLE, J., was right in dismissing the action against A. & R. Brown, Ltd. . . . As to the shipowners, I am of opinion that in all the circumstances of this case they were not liable, either under the Shipbuilding Regulations, 1931, or at common law. I have already held that the second defendants were not notional occupiers under the regulations, and, in my opinion, paras. (b) and (c) of the proviso have no application. It is unnecessary to consider how far the Court of Appeal decided in *Wilkinson v. Rea, Ltd.* (1) that paras. (b) and (c) apply where there is no notional occupier, since, in the present case, as the access hatch in question was required to be used for the purposes of repairs and the shipowners did not provide the lighting, the shipowners are not in breach of them.”

The court held that it was not necessary to consider the point which is raised in this case.

H Counsel on behalf of the shipowners had raised in argument that exceptions (a), (b) and (c) could not apply unless there was a single repairer contracting for the whole of the repairs. That was the first time, I think, that this point was raised. The court expressed no opinion on it. I am inclined to think that the Court of Appeal might then have said that *Wilkinson v. Rea, Ltd.* (1) at least was binding authority on the point which is now before us.

I The next case to which I desire to refer is *Donovan v. Cammell Laird & Co.* (4) ([1949] 2 All E.R. 82), which was heard at Liverpool Assizes on Feb. 14, 15, 16, 17, 18, 21 and 22, and in which judgment was given on Apr. 12—eight days. I need not go fully into the facts. When *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3) was before this court in 1947, the hearing occupied seven days; so that one sees the amount of time which has been spent by judges and by counsel and by others on points under these regulations; and it appears more clearly from a passage in the judgment of DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (4). The result of the latter case was that the plaintiff’s claim against the shipowner for breach of the regulation failed, in the circumstances of that case. I do not

think it necessary to read the facts: it would only add to the length of this judgment. The view of DEVLIN, J., on this part of the case is expressed at p. 89, where he said:

"I do not think that the shipowner's case on this point is as strong as the similar case of the dock board. There are in exception (b) words which, applied literally, impose liability on him, but where a fundamental assumption underlying the exception has been vitiated I cannot feel reasonably sure that a literal application of the words used would achieve the result intended. Indeed, I strongly suspect that they would not, for I can see no reason for making the shipowner responsible for the misdeeds of some repairers and not of others. Accordingly, I come to the conclusion that in relation to the shipowner's liability also there is ambiguity and that the liability alleged is not clear. That is sufficient for the third defendants*, and I think that the claim against them fails. I do not, therefore, need to inquire whether the willingness of these defendants to identify themselves with the shipowner is something on which I can safely act within the principle of *Royster v. Cavey* (5) ([1946] 2 All E.R. 642). I appreciate that this judgment, if it is right, means that in many, perhaps most, cases of ship-repairing work in dry docks, the regulations will be a dead letter. This is a result which follows from the application of the principle that legislation of this character to be effective must be clearly expressed, and I regard it as on the whole less disturbing than the prospect that workmen, shipowners, repairers and dock owners should have to elucidate piecemeal and at great expense from one court after another, as they have started to do in *Wilkinson v. Rea, Ltd.* (1) and *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3) the extent of their rights and liabilities. A simple alternative, and one which I hope will commend itself to the Secretary of State if he thinks it important in the public interest to regulate work in dry docks, is that he should employ somebody with some knowledge of the conditions under which that work is done to draft a more comprehensible section. Meanwhile, and unless and until that is done, it is satisfactory to reflect that workmen will continue to enjoy the not inconsiderable degree of protection which is given to them by the Factories Act, 1937, generally, and by the nature of an employer's duties at common law."

There was no appeal against that judgment. Perhaps it was unnecessary, for the plaintiff had obtained judgment against his employers for breach of duty at common law and had recovered damages of £4,500 against them. None the less, there were three defendants in that particular case: because of the uncertainty of the position the plaintiff had joined three defendants, and he had to pay the costs of those against whom he failed, which is somewhat of a burden in a case which lasts so long. In 1949 DEVLIN, J., suggested that new regulations might be made. I regret that his advice has not been followed. At the same time, I am inclined to think that DEVLIN, J., took a somewhat restricted view of the regulations. He assumed that the draftsman thought that repairs on a ship were always done by one company, or firm, of repairers. I do not think that any such assumption should be made. Regulations of this kind are not made without consultation with those who are to be affected by the regulations. One knows that if a statute is to be passed great care is taken to consult with the bodies concerned how it will affect different parts of industry; and I have no doubt that the Chamber of Shipping and employers of one kind and another, as well as representatives of dock boards and of trade unions, were consulted on the form of the Regulations of 1931. It appears to me quite likely that it was thought impossible to make regulations covering every case on a ship where there was a large number of repairers: you could not very well make one respon-

* The third defendants managed the ship on behalf of the shipowner.

A sible for another's misdeeds or omissions. It was much simpler to make regulations of certain kinds if you had only one repairer. It may well be that as the regulations stand there are cases in which no one is charged with the duty of carrying out a particular regulation. But the Regulations of 1931 state what I have called three general duties and apply them to the persons who are to be charged with them. They appear under exceptions*—

B “(a) It shall be the duty of the person having the general management or control of the public dry dock to comply with reg. 2 (b) and (c) and 11 (c) so far as they concern those gangways, uprights, thwarts and planks provided at the dock by such person; with reg. 42 (b) so far as it concerns the lighting of the quay round the dock; and with reg. 46: (b)—Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner . . . to provide the protection specified in reg. 10.”

C I am satisfied that that is intended to apply, whether there be one repairer or a dozen repairers, and that to look on the regulation in another way would deprive it of a great part of the effect which it is intended to have. Again,

D “(c) Where the shipowner provides the lighting on board the ship it shall be the duty of the shipowner, master, or officer in charge, to comply with reg. 42 (b) so far as regards the lighting on the ship which he has undertaken to provide.”

E That is a general duty where the shipowner provides the lighting on board. I do not think that that way of interpreting the regulations can be regarded or ought to be regarded as wrong: it gives some effect to them. We ought to give to the regulations, so far as we can, the intention which prima facie they bear. DIPLOCK, J., though not satisfied that he was bound by the decision in *Wilkinson v. Rea, Ltd.* (1) followed it. I think he was right in so doing. It has been argued in this court that the decision is not binding on us because the point now taken (and which was taken in *Donovan v. Cammell Laird & Co.* (4) ([1949] 2 All E.R. 82) was not argued before the court in *Wilkinson v. Rea, Ltd.* (1). The point was there, if it was to be taken. The circumstances of the case were considered: reg. 42 was applied by the Court of Appeal in a case in which there were different repairers. The case ought to be regarded as binding on the court in this case. It is no part of the duty of the court to look for a reason for not following a decision if the decision, on the face of it, covers the particular case. If the test laid down by LORD GREENE, M.R., in *Young v. Bristol Aeroplane Co., Ltd.* (6) ([1944] 2 All E.R. 293) is applied, it gives every warrant for the proposition made to us by counsel for the plaintiff that the decision in *Wilkinson v. Rea, Ltd.* (1) governs this case.

G One further point is raised by counsel for the shipowners. That is, that the plaintiff who was injured is not a person covered by the regulations and is not entitled to succeed in an action based on the regulations. This submission was based largely on the decision of this court in *Hartley v. Mayoh & Co.* (7) ([1954] 1 All E.R. 375). In that case a fireman had been killed, and BARRY, J., held that the second defendants† were liable both at common law and under the Electricity Supply Regulations, 1937. BARRY, J.'s judgment was upheld in this court; but it was added that the regulations did not apply to the circumstances of that case so as to enable the dependants of the man who was killed to succeed in an action for breach of the regulations because he, being a fireman, was not a person covered by the regulations or within the class for whose benefit they were made.

* I.e., exceptions to the proviso which is set out at p. 563, letter E, post.

† The second defendants were the occupiers of the factory to which the fire brigade of which the plaintiff was a member had been summoned.

When the position under the Shipbuilding Regulations, 1931, is considered, it is necessary to look at the regulations and to look at the enabling statute, which was the Factory and Workshop Act, 1901. There have been two changes in the statutory provisions since 1931, one made by s. 60 of the Factories Act, 1937, another made by s. 12 of the Factories Act, 1948. I do not propose to deal with them other than to say that by another provision* in the Act of 1937 the regulations made under the Act of 1901 are continued in force. I do not think that, apart from that, any good purpose would be served by considering the more recent legislation. The regulations are made under s. 79 of the Factory and Workshop Act, 1901, which provided that:

"Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

Under that power the Regulations of 1931 were made. They are general in their terms. Counsel for the shipowners submits that they should not apply to a man on a ship employed by the shipowners. I fail to see why they should not be applied in such a case. It may be that in some cases the shipowner (as I have said in this case) is liable, and I cannot see why he should not be as responsible for the protection of his own men working on the ship as for anyone else's men; nor do I see why, if there is a breach of one of these regulations which breach leads to injury to a man, the man on the ship should not have an action in respect of it for breach of that regulation—which, I think, was intended for the protection of people working within the "factory"†.

This kind of question was considered first in *Groves v. Lord Wimborne* (8) ([1898] 2 Q.B. 402). Certain passages from the judgment of the Court of Appeal in that case were read to the court and considered in *Hartley v. Mayoh & Co.* (7). The Act of 1901, under which the regulations were made included, in s. 10, a provision with regard to dangerous machinery—

"(c) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

The words used were, "every person employed or working in the factory"; and those words, or words to the same effect, were used in other parts of the Act. In s. 14, with regard to the provision of fire escape, the words were "for the persons employed therein"; and in the course of the argument yesterday reference was made to other sections in which an expression of that kind occurred. If there were made a requirement by the Act in s. 10 (c) that something should be safe for "every person employed or working in the factory", the provision was for the benefit of every person employed or working in the factory; and if the Secretary of State was given power to make regulations under s. 79 of the Act, why was he not able to make a regulation for the safety or protection of every person employed or working in the factory—as was the plaintiff in this case? The "factory" is the shipbuilding yard or dry dock†: that is part of the premises in which the ship was. There is nothing limiting that in the regulation itself.

For those reasons, it appears to me that the plaintiff is a person entitled to sue for breach of the statutory duty imposed by reg. 10 of the Shipbuilding Regulations, 1931. Consequently, the shipowners' appeal fails.

* Factories Act, 1937, s. 159 (1), proviso.

† See the Factories Act, 1937, s. 151 (1) (i).

A We heard yesterday counsel's submission, on behalf of the plaintiff, (a) that he was entitled to succeed for breach of a duty at common law and (b) that the general damages awarded to him were too low; and we indicated that we did not think there was any substance in either of those submissions. The cross-appeal should likewise be dismissed.

B JENKINS, L.J.: I agree; and there is very little that I can usefully add. DIPLOCK, J., held that the shipowners were in breach of reg. 10 of the Shipbuilding Regulations, 1931, in that they failed to provide the protection required by the regulation, over the opening in F deck down which the plaintiff fell. That finding was qualified by a decision to the effect that the plaintiff was fifty per cent. to blame—that is to say, that the accident was due in equal proportions to the shipowners' breach and the plaintiff's own negligence; and, accordingly, as C SINGLETON, L.J., has said, damages were awarded which, when reduced by fifty per cent. on account of the plaintiff's contributory negligence, amounted to £196 13s. 3d.

The shipowners now take the following points:—First, that on the true construction of the part of the regulations headed "Duties", considered in relation to the circumstances of the present case, the shipowners were not at the material time under any duty to observe reg. 10. Secondly, that even if reg. 10 was binding on the shipowners at the material time, the shipowners committed no breach of that regulation inasmuch as the covering over the opening in the deck had (in the words of reg. 10) been "necessarily removed in the course of work", and would have been "replaced as soon as practicable". D Thirdly, the shipowners submit that in any case the plaintiff (who, as SINGLETON, L.J., has said, E was a yeoman carpenter, a member of the crew of the vessel) was not a person who was entitled to sue for injury sustained by him by reason of a breach of these regulations.

As to the first point, I apologise for referring again to the part of the regulations headed "Duties", but I cannot avoid doing so for the purpose of making my F observations intelligible. This part of the regulations is in these terms: "It shall be the duty of the occupier to comply with Parts 1 to 8 of these regulations". Pausing there, it is settled by *Smith v. Cammell Laird & Co., Ltd.* (2) ([1939] 4 All E.R. 381) that the expression "occupier" in these regulations means the occupier of the shipbuilding yard. Having laid down that general principle, that it shall be the duty of the occupier to comply with the parts of the regulations there G specified, the "Duties" section of the regulations continues as follows:

"Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purposes of Parts 1 to 8 and it shall be his duty to comply with the said Parts, except as H follows . . ."

Then follow exceptions (a), (b) and (c), to which SINGLETON, L.J., has already referred, but for brevity I can confine myself to (b), which is the one exception actually in issue. Paragraph (b) reads:

I "(b) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable. [Then, passing over para. (c) come the words:] It shall be the duty of all persons employed to comply with Part 9 of these regulations."

Now the ship in this case was being repaired in a public dry dock at the time of the accident: there is no dispute about that. The work of repair was being done by a number of firms or contractors, as many, I think, as seventeen different firms, who were doing all kinds of different tasks. The case was not one of a single repairer undertaking the whole of the repairs, or of a single repairer doing, perhaps, the main part of them himself and sub-contracting for the rest. There was a number of independent contractors.

That being (very briefly) the state of the facts, the shipowners argue thus: "... the person who contracts with the owner of the ship or with his agent to execute the work of repair " must necessarily be one person, or one contractor or repairer, as distinct from a number of separate persons or contractors or repairers. Therefore (the argument proceeds) in the circumstances of the present case there was no person who, as the person contracting to execute the work of repair, could be deemed to be " the occupier " for the purposes of Parts 1 to 8: therefore (it is said) the proviso in this passage in the regulations never came into operation. It is said further that exceptions (a), (b) and (c), being exceptions on a proviso, could not come into operation unless the proviso itself came into operation; accordingly (so proceeds the argument) exception (b) never came into operation, so that the shipowners never had laid on them the duty to comply with reg. 10 imposed by exception (b) where applicable.

For my part, I find little assistance in general propositions or maxims of construction, such as the maxim, relied on here, that the exceptions in this part of the regulations are exceptions on a proviso, and therefore cannot be given any effect unless the proviso takes effect. It seems to me that such maxims, though they sound impressive, more often than not serve only to darken counsel, and for my part I prefer to look at the words themselves and to do my best to see what they mean according to the natural and ordinary meaning of the language used.

Looking at this part of the regulation from that point of view, and without any preconceived ideas about exceptions on provisos, I find that it first lays down a general rule under which the duty of complying with Parts 1 to 8 of the regulations is laid on " the occupier ". It then proceeds to make other provisions for compliance with the regulations in certain events, and the first event which is material is the repair of a ship " in public dry dock ": " when a ship is being repaired in public dry dock ", certain consequences are to follow by way of qualification on the general rule; and the consequences which are to ensue are that it shall be the duty of (to put it shortly) the person contracting to do the repairs (who is to be deemed to be the occupier) to comply with the said parts, with certain exceptions. Then follow the three exceptions. Each of them, as I read it, is in terms a substantive provision enjoining compliance with some specified regulation or regulations—(b), in particular, enjoining compliance with reg. 10. The first condition, " when a ship is being repaired in public dry dock ", was without doubt fulfilled. Therefore, as I understand the language of this passage, the attribution of duties provided for in that event came into operation and, with the three exceptions mentioned, the person who contracted with the owner of the ship or with his agent to execute the work of repair, was to be deemed to be the occupier and under the duty of complying with Parts 1 to 8; while, on the other hand, it became the duty of the shipowners to observe reg. 10, with the qualifications mentioned in exception (b); for it is not in dispute that, apart from the work of repair, the control of the ship did remain with the shipowners, so that the second condition for the application of exception (b) was satisfied.

Now, the attribution of duties being of that nature, the point arises that owing to the multiplicity of repairers there was in the result no person who could be deemed to be " the occupier " for the purposes of Parts 1 to 8. That circumstance may be a source of difficulty and embarrassment, but I can find nothing

A in the language of the clause, or in any theory that one may form as to the underlying assumptions of fact or of law on which it is based, which makes the lack of any one repairer who can be deemed to be the occupier displace the substantive and (as it seems to me) independent liability of the shipowner under exception (b).

B It is no doubt true that these provisions are not free from obscurity and may give rise to a number of difficulties in practice; but our task, as I see it, is to read the regulations and construe them as best we can with reference to the particular facts now before the court; and the view I have formed (in agreement with DIPLOCK, J.), is that, on the true construction of this part of the regulations, and in the circumstances of this case, the shipowners did become subject to a duty to observe reg. 10. Moreover, quite apart from any view of my own, I think the decision of this court in *Wilkinson v. Rea, Ltd.* (1) ([1941] 2 All E.R. 50) must be regarded as a binding authority to that effect. I should add that it was not contended that the offending opening was left unprotected for the purposes of the repairs: it was agreed that the opening of this hatch, or the leaving of it open, had nothing to do with the repairs. Accordingly, in my view, this first ground of appeal fails.

D Then there was the second ground, which can be disposed of very shortly. It was said that in any case reg. 10 was not broken because the protection was "necessarily removed in the course of work". It seems to me that this contention clearly breaks down on the facts. No good reason whatever was shown why this opening should not have been fully protected at the time when the plaintiff fell down it. The chief officer said this in the last answer in his cross-examination. He was asked about the hatch cover:

"Q.—If you had known, would you have ordered them to be put on?

A.—Yes. I had already, two days previously, given orders that all hatch-boards should be put on, and it was with some surprise that I found that the boards were off the well in No. 5."

F It seems to me obvious that, although it would be necessary for somebody at some time to go down to remove the plugs (if I may so describe them) which had been used when the ship was carrying a cargo of grain, it was quite unnecessary for the covers to be left off for anything like the period of time for which they were left off. Accordingly, I reject that ground also.

G There remains of the grounds of appeal the contention that the plaintiff was not a person entitled to sue for a breach of reg. 10 of the Shipbuilding Regulations, 1931. The question whether a given person, who has sustained an injury through some act or omission amounting to a breach of some statutory regulation, can recover damages from the person guilty of the breach, is a question which depends on the construction of the particular regulation relied on, and on the facts of the particular case. It would be idle to attempt to lay down any general

H rule. One has only to look at the various special regulations*which have been enacted or brought into operation under the Factories Act, 1937, and its predecessors, to see how entirely the matter depends on the construction of the particular regulation. We were referred to a number of passages in various sets of regulations which show that the class or category of persons who are given a right of action may differ from case to case. Thus, it was pointed out to us that

I in a number of sets of regulations (the Docks Regulations, the Heading of Yarn Regulations, the Enamelling Regulations, and the Woollen and Worsted Regulations) the expression "person employed" was defined so as to mean a person employed in the particular process or manufacture. Then in contrast to that, in the Aerated Water Regulations (for instance) occurs the phrase "any person employed in the works". Then there are cases in which the expression used is simply "person employed". In the present instance (as SINGLETON, L.J., has pointed out) the relevant enabling section is s. 79 of the Factory and Workshop

Act, 1901. That section enabled protective regulations to be made in the widest possible terms without any reference to "persons employed" or other express indication of the limits of the class or category of people entitled to sue for any breach of the regulations whereby they sustain injury; and reg. 10 of the Shipbuilding Regulations is itself in perfectly general terms which do not state or define the class of persons to be protected. There was thus ample power, under the enabling section, to make regulations in regard to shipbuilding—that is to say, the construction and repair of ships in shipbuilding yards—which would enure for the benefit of a person in the situation of the plaintiff: a member of the crew of a ship under repair whose duties as a member of the crew required him to be present on the ship during, I suppose, his usual working hours.

In my view, there is no ground whatever for excluding a person in the plaintiff's situation from the category of persons entitled to sue for a breach of the regulations whereby they are injured, on the principle of *Groves v. Lord Wimborne* (8) ([1898] 2 Q.B. 402); and I respectfully adopt the conclusion of DIPLOCK, J., who said (ante, at p. 248):

"I can see no reason why in the case of reg. 10, which is perfectly general in its terms, I should exclude the plaintiff from the benefit of the regulation on the construction of the regulation itself, nor do I think that on the *Groves v. Lord Wimborne* (8) principle the plaintiff fell outside that category of persons to whom Parliament intended to give a right of action for breach of the regulations."

I respectfully adopt that passage, and I have no comment to make on the way in which DIPLOCK, J., dealt with this aspect of the case, except to say that I agree with SINGLETON, L.J., in thinking that s. 12 of the Act of 1948 cannot have affected the construction of the Shipbuilding Regulations, 1931. I think the material section so far as the effect of those regulations is concerned must be the original enabling section, s. 79 of the Act of 1901. Section 159 of the Act of 1937 provided for the continuance in force of the regulations in question as if enacted in the Act of 1937 without altering their scope; and I do not think that these regulations were affected either by the use of the words "persons employed in connection therewith" in s. 60 (the enabling section) of the Act of 1937 or by the deletion from s. 60 of the words "in connection therewith" after the words "persons employed" effected by s. 12 of the Act of 1948. I need not therefore concern myself with the effect of that alteration, as, for the reasons I have stated, I do not think it affects the question that we now have to decide.

For these reasons (in which, I fear, I have added little or nothing to what SINGLETON, L.J., has already said, but which I have stated in deference to the able arguments which have been presented to us), I am of opinion that the appeal fails on all points. I further agree that there is no substance in any of the matters dealt with in the cross-appeal. Accordingly, in my view, both appeal and cross-appeal fail and should be dismissed.

PARKER, L.J.: I have also come to the conclusion that this appeal and the cross-appeal should be dismissed, and, save in one respect, for the reasons given by my Lords. Accordingly, the only points on which I desire to add a few words are two points taken by counsel for the shipowners: first, that the obligation put on shipowners by exception (c) in the section of the Shipbuilding Regulations headed "Duties" does not arise on the facts of this case; and, secondly, that in any event the plaintiff was not within the class of persons for the benefit of whom the regulations were made.

So far as the first point is concerned, I confess that apart from authority binding on this court, I should have come to the conclusion, though with diffidence having regard to the views expressed by my Lords, that counsel's contention was

A correct. I think that read literally the exceptions are, and can only be, exceptions from the duty imposed by the preceding words on someone who is not but who is deemed to be the occupier of the premises. His duty is to comply with Parts 1 to 8 of the regulations, except in certain respects in regard to which those obligations are put on others. If there is (as there is here) no such person, then, as it seems to me, there is nothing to except. In such a case the duty to
B comply with the regulation is either left with the actual occupier (who presumably in this case is the Mersey Docks and Harbour Board), a view which STABLE, J., took in *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3) ([1947] K.B. 901); or, if DEVLIN, J., is right in *Donovan v. Cammell Laird & Co.* (4) ([1949] 2 All E.R. 82) and the real occupier is removed from any responsibilities whenever the ship is being repaired in public dry dock, then no one is fixed with any of
C the duties under the regulations, and the obligations of all concerned fall to be determined solely under the common law.

It is, however, unnecessary in this case to express any opinion which of these views is correct. It is enough to say that in my opinion it is impossible to read exceptions (a), (b) and (c) as substantive obligations arising wherever a ship is being repaired in public dry dock: to do so would be to strain the language used,
D if not to re-write the proviso. Moreover, it is to be observed (and this is a point which appealed to DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (4)) that exception (b) itself contemplates that there will be an occupier with whom the shipowner would share the duty to comply with reg. 10. Whether or not, however, it is permissible so to strain the language used, I would find it impossible to do so unless thereby a sensible scheme, which must have been intended, would
E be produced. So far as the present case is concerned, however, to read the words in such a way would only make the shipowner liable to comply partially with regs. 10 and 42; whereas no one (unless, as I said, it be the Mersey Docks and Harbour Board, who have merely hired out the dock) is fixed with responsibility to comply with the great bulk of the regulations in Parts 1 to 8.

Left to myself, therefore, and apart from authority, I would have come to the
F same conclusion as DEVLIN, J., in *Donovan v. Cammell Laird & Co.* (4) and the view which I think appealed to LORD OAKSEY, L.J., in *Hartwell v. Grayson Rollo & Clover Docks, Ltd.* (3)—that, in the absence of a notional occupier, the shipowner's responsibilities under the exceptions do not arise. It may well be that it was thought impossible to apply the regulations when (as here) the ship is in a public dry dock and there are a mass of independent contractors, and there is a crew,
G or a skeleton crew, on board. It may well be, in those circumstances, that it was thought that the legal liabilities of all concerned should be determined solely under the common law. Be that as it may, I am satisfied, with my Lords, that the decision of this court in *Wilkinson v. Rea, Ltd.* (1) ([1941] 2 All E.R. 50) is binding on us, and that the decision in this case is concluded by that decision.

So far as the second point is concerned, it is necessary to look not only at the
H enabling section under which the regulation was made but at the regulation itself. So far as the enabling section is concerned, it seems to me that it matters not whether one looks at s. 79 of the original Act of 1901, or s. 60 of the Act of 1937, as amended by the Act of 1948, because in any event, one arrives at the conclusion that the class of person for whose benefit regulations can be made is all persons employed in the factory. As a matter of construction, I think that
I the reference in s. 60 of the Act of 1937 to "persons employed" there must mean persons employed in the factory—in this case, the shipbuilding yard. If one looks (as I am inclined to think is the right approach) at s. 79 of the Act of 1901, no such words as "persons employed" are used: the matter is at large. But it is clear that there must be some limit; and, reading through the Act of 1901 as a whole, I think it becomes clear that the Act is dealing with, and the Secretary of State can make regulations in respect of and affecting, persons employed in the factory or premises.

Counsel for the shipowners seeks to insert a further limitation—either persons employed in the factory by the occupier or persons employed in the factory by whomsoever, but in connection with the processes or manufacture. So far as the first suggested limitation is concerned, that was dealt with—true, in connection with sub-contractors—by the Divisional Court in *Massey-Harris-Ferguson (Manufacturing), Ltd. v. Piper* (9) ([1956] 2 All E.R. 722). It is sufficient for me to say that I agree with the decision in that case and with the view of *Hartley v. Mayoh & Co.* (7) ([1954] 1 All E.R. 375) expressed by LORD GODDARD, C.J., at p. 726:

“It seems to me that one cannot use that decision to say that the regulations apply only to the servants of the factory owner. The test is whether a person is employed in the factory, not whether he is employed by the occupier . . .”

STREATFIELD, J., at p. 727, said:

“I have come to the conclusion that they clearly do apply to any person who is employed in the factory, whether the direct servant of the occupier or a servant of an independent contractor, so long as he is employed on work in that factory, as the deceased was in this case.”

I agree entirely with the views there expressed; and further I see no reason for inserting the further limitation that it must be a person employed in the processes.

So much for the enabling power. When one comes to the regulations made under that power, of course it was open to the Secretary of State to cut down, though not to enlarge, that class of person: a further limitation might be introduced either expressly (as in certain regulations* to which we were referred, where the persons to be benefited were persons employed in the process) or impliedly—as I think was the case in *Wingrove v. Prestige & Co., Ltd.* (10) ([1954] 1 All E.R. 576), which was a decision of this court in relation to the Building (Safety, Health and Welfare) Regulations, 1948.

Looking at reg. 10 of the Shipbuilding Regulations, 1931, I can see no ground whatsoever for implying any limitation. It is true, as counsel for the shipowners has pointed out, that the plaintiff was a seaman going about his ordinary duties as if he had been at sea; but it must be remembered that in the circumstances of this case, with the ship being in dry dock with a mass of repairers on board, he is being subjected to a wholly different series of risks, and I see no ground for implying that he should be excluded from the class of persons to be benefited.

Accordingly, I would dismiss the appeal and the cross-appeal.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hill, Dickinson & Co.* (for the defendants, the shipowners); *Marvby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff, the seaman).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* I.e., the regulations referred to at p. 573, letter H, ante.

A

R. v. SPECIAL COMMISSIONERS OF INCOME TAX, *Ex parte*
LINSLEYS (ESTABLISHED 1894), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Donovan, JJ.),
October 16, 19, 1956.]

B

Surtax—Investment company—Directions and apportionments—Compellability of direction—Profits tax, if payable, exceeding actual income from all sources—Appeal against profits tax—Power of election relieving from profits tax—Power dependent on issue of surtax direction—Mandamus to commissioners to issue direction—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 262 (1)—Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 33), s. 68 (1)—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 31 (3).

C

An investment company, to which s. 245 of the Income Tax Act, 1952, applied, was assessed to the profits tax at a sum which, if it were payable, would result in the company having no income for surtax purposes in respect of the relevant period, since by s. 68 of the Finance Act, 1952*, the amount of the profits tax was deductible in computing the company's actual income for surtax purposes. The Special Commissioners of Income Tax refused to give a direction pursuant to s. 262 of the Income Tax Act, 1952†, viz., a direction that the company's income for the period should be deemed to be the income of its members and should be apportioned among them for surtax purposes, on the ground that the company had no income for the period to which the direction could apply. If a direction had been made, the company and such of its members as were not individuals would have been entitled to make an election under s. 31 (3) of the Finance Act, 1947, and the election would have had the consequence that the company would not be chargeable to the profits tax for the period. The company appealed against the assessment to the profits tax and applied for an order

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* Section 68 (1) of the Finance Act, 1952, so far as relevant, is as follows: "(1) Where for the purposes of . . . Chapter 3 of Part 9 of the Income Tax Act, 1952 . . . the actual income from all sources of a body corporate for a year or a period ending after the end of the year 1951 falls to be computed under . . . s. 255 (3) of the said Act of 1952, then, if any amount is payable by the body corporate by way of the profits tax . . . for any chargeable accounting period falling wholly or partly within that year or period, a deduction shall be allowed, in computing the said actual income, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment during which the said year or period ends, be equal to so much of the amount so payable by the body corporate as is apportionable to the said year or period . . ."

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Sections 245-262 of the Income Tax Act, 1952, are within Chapter 3 of Part 9 of that Act.

H

† The terms of s. 262 of the Income Tax Act, 1952, so far as relevant, are as follows: "(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which s. 245 of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said s. 245 in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income.

I

"(2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of sub-s. (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment: . . .

"(6) The preceding provisions of this section shall not, in the case of any company, apply in relation to any period after the time of the commencement of the winding-up thereof, and the period elapsing between the end of the last year of assessment and that time shall, for the purposes of sub-s. (1) of this section, be treated as if it were a year of assessment."

of mandamus requiring the commissioners to give a direction pursuant to s. 262 of the Act of 1952.

Held: an amount "payable" by way of the profits tax within the meaning of s. 68 (1) of the Finance Act, 1952, connoted a liability to pay which was ascertained and fixed, not an amount which was the subject of appeal and might not become payable at all if the company followed a course allowed to it by law; therefore, in the circumstances of the case, the company had an actual income for the relevant period which could be the subject of a direction pursuant to s. 262 (1), and, as the terms of that sub-section were mandatory, an order of mandamus must issue.

[For s. 245, s. 262 of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 252; for s. 68 of the Finance Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 224; and for s. 31 (3) of the Finance Act, 1947, see 12 HALSBURY'S STATUTES (2nd Edn.) 776.]

Cases referred to:

- (1) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 102; 28 Digest 105, 649.
- (2) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.

Motion for Mandamus.

The applicants, Linsleys (Established 1894), Ltd. moved for an order of mandamus directed to the Special Commissioners of Income Tax requiring them to give a direction under s. 245 and s. 262 of the Income Tax Act, 1952, in respect of the period Apr. 6 to May 7, 1953, in respect of the applicant company.

Cyril King, Q.C., and *H. H. Monroe* for the applicants, the company.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), *Sir Reginald Hills* and *E. Blanshard Stamp* for the respondents, the Special Commissioners of Income Tax.

Cur. adv. vult.

Oct. 19. **DONOVAN, J.**, read the judgment of the court: In this case counsel for the company moves for an order of mandamus addressed to the Special Commissioners of Income Tax requiring them to make a direction under the mandatory terms of s. 262 of the Income Tax Act, 1952, in respect of the company's income for the period Apr. 6, 1953, to May 7, 1953.

That section is one of a number of provisions designed to prevent the avoidance of surtax through the withholding from distribution of the profits or income of private companies under the control of a few shareholders. The history of this legislation goes back to 1922*, since when it has, on various occasions, been made more stringent as the taxpayer has discovered new loopholes in it. In particular the legislature in 1936, and again in 1939†, singled out what it called investment companies for special and drastic treatment. These were companies whose income was derived from property rather than from trading; and the target of these new provisions was, no doubt, the kind of scheme under which a taxpayer transferred all his assets to a limited company and then arranged that the company distributed little or no income in such a way as to make him liable to surtax. In the case of investment companies it was provided by s. 14 of the Finance Act, 1939, now s. 262 of the Income Tax Act, 1952, that the company's income should suffer surtax however much or however little it had distributed in dividend.

The general plan of this legislation as regards both investment companies and other companies is that the Special Commissioners first direct that the

* See s. 21 of the Finance Act, 1922; 12 HALSBURY'S STATUTES (2nd Edn.) 237.

† See s. 20 of the Finance Act, 1936, and s. 14 of the Finance Act, 1939; 12 HALSBURY'S STATUTES (2nd Edn.) 358 and 427.

A company's income for the period under review be deemed to be the income of the members. The company's income for that period is then computed and apportioned (notionally, of course) among the members according to their interests in the company. The amount so apportioned to any member then becomes his income for surtax purposes: and if he is an individual it is added to his other income and the appropriate surtax is computed. That surtax is payable by the company unless within a given time the member elects to pay it himself. (See s. 245, s. 248 and s. 249 of the Income Tax Act, 1952*.)

There are various provisions for appeals which are not here in question. There is, however, this distinction between trading companies and investment companies. In the case of a trading company, the initial question for the Special Commissioners is whether it has distributed a reasonable dividend for the period in question, and the commissioners have a discretion whether to make a direction or not. In the case of the investment company the commissioners have no such discretion. A direction must be made, however much or however little the company has distributed.

Section 262 of the Income Tax Act, 1952, reproducing s. 14 of the Finance Act, 1939, reads thus:

D “(1) Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which s. 245 of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to

E be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said s. 245 in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income.

F “(2) The provisions of this Chapter shall apply, with the necessary modifications, in cases in which directions are given by virtue of sub-s. (1) of this section as they apply in cases in which directions are given by virtue of the last preceding section with respect to a year of assessment.”

It is this section which the company is asking shall be put into effect. The Special Commissioners have declined to put it into effect, contending that in the special circumstances of the case they are under no duty to do so.

G The explanation of this unusual reversal of roles, where the taxpayer is seeking to be taxed and the taxing authority declines to tax it, is this. After going into voluntary liquidation on May 7, 1953, the company made distributions, in the liquidation, of trading profits previously undistributed. These distributions attracted a distribution charge under the profits tax legislation to be found in the Finance Act, 1947, s. 30 (3) and s. 35†. This distribution charge will be

H diminished if the company is made liable to surtax as it claims. This will result if the members of the company avail themselves of the provisions of s. 31 (3) of the Finance Act, 1947‡. But this they cannot do, under the terms of that sub-section, unless the company's income for the relevant period is made the subject of a direction for surtax purposes pursuant to s. 262 of the Income Tax Act, 1952, in which case it would be followed by an apportionment of such

I income among the members. Once that is done, the way is clear for the company and such of its members as are themselves corporate bodies to exercise their rights under s. 31 (3) of the Finance Act, 1947, which will have the result already indicated. Hence the present proceedings, which are designed to require the Special Commissioners to make such a direction and apportionment.

* See 31 HALSBURY'S STATUTES (2nd Edn.) 232, 235 and 236 for these sections.

† See 12 HALSBURY'S STATUTES (2nd Edn.) 775 and 779 for s. 30 (3) and s. 35.

‡ See 12 HALSBURY'S STATUTES (2nd Edn.) 776 for s. 31 (3).

Nothing of moment turns on the fact that the company is in liquidation, or that the period involved is the short one, viz., Apr. 6 to May 7, 1953. That period (hereinafter called "the relevant period") is by s. 262 (6) deemed to be a year of assessment for the purposes of sub-s. (1) of the section. No question of figures is involved. Nor is it necessary to consider at length the intricate language of s. 31 (3) of the Finance Act, 1947, embodying the right of election above referred to. It is sufficient to indicate its broad effect which appears to be this. If, within the elastic time limit allowed by the section, the company and such of its members as are not individuals so elect, then for the period in question the business of the company will be treated as carried on by all the members in partnership. The effect of that will be that the members of the company who are themselves bodies corporate will pay profits tax on their shares of the apportioned income, but those members who are individuals will pay surtax only on their share of such income, measured in each case as the sub-section provides. An additional result is that the company itself will not be liable to profits tax for the relevant period, and presumably the total tax bill for all concerned will be reduced. A condition precedent to this right of election, however, as already noted, is that the company's income for the period is apportioned for surtax purposes among its members.

The rival contentions of the parties are these: Counsel for the company says that the provisions of s. 262 (1) of the Income Tax Act, 1952, are mandatory, and that the Special Commissioners have wrongfully refused to operate them. He complains that until they do so the right of election under s. 31 (3) of the Act of 1947, which Parliament has conferred on the company and some of its members, cannot be exercised: and that a continued refusal to put s. 262 (1) into effect will completely frustrate that right, which cannot have been intended by the legislature.

The Attorney-General argues that in the circumstances of this case the Special Commissioners are under no duty to make a direction under s. 262 (1) and a consequential apportionment, one effect of which will be that the full distribution charges which ought to be paid will not be paid.

The reasons advanced by the Attorney-General why the Special Commissioners are under no obligation to make a direction and apportionment are these:—

1. A necessary preliminary to that operation is the computation of the company's actual income from all sources in accordance with the terms of s. 255 (3) of the Income Tax Act, 1952*.

2. In computing that income, profits tax payable by the company for the relevant period must be deducted under the mandatory provisions of s. 68 of the Finance Act, 1952†.

3. The amount of the said profits tax is £29,856.

4. When that is deducted, the result is that the actual income from all sources of the company for the relevant period is reduced to nil.

5. There is no obligation to make a direction in regard to non-existent income, and no possibility of apportioning nothing.

6. Therefore s. 262 (1) imposes no duty on the Special Commissioners for the relevant period.

Counsel for the company's answer is twofold: First, the Attorney-General's conclusion does not follow even if the rest of his argument is right: for the Special Commissioners are bound by s. 262 (1) to direct even if the income is nil, and to make an apportionment of nil. We need not decide this question, and content ourselves with saying that we think there are formidable difficulties in the way of the argument. Counsel's second answer is that the whole of the Crown's case is based on a misconception, namely, that profits tax for the

* For s. 255 (3) see 31 HALSBURY'S STATUTES (2nd Edn.) 244.

† The terms of this section, so far as relevant, are printed in the footnote at p. 577, ante.

A relevant period is payable by the company. He says that this cannot be properly asserted in the existing circumstances.

If counsel for the company is right on this point, it disposes of the case. For, if no deduction has to be made in respect of profits tax, the company will admittedly have an actual income from all sources of some £8,900, and a direction and apportionment of that income can be made.

B The Attorney-General contends that profits tax is "payable" within the meaning of s. 68 of the Finance Act, 1952*, because the distributions made by the company in liquidation attract profits tax under the charge imposed by s. 30 (3) of the Finance Act, 1947: and the amount of tax has been particularised by an assessment made on the company. He quoted and relied on the words of LORD DUNEDIN in *Whitney v. Inland Revenue Comrs.* (1) ((1925) 10 Tax Cas. 102 at p. 110) to the effect that liability to tax does not depend on assessment but on the charging provisions of the taxing Act: the assessment merely particularising the amount payable. He adds that the circumstances of an appeal, and the prospect that later on profits tax may not be payable by the company for this same period, i.e., in the event of an election under s. 31 (3) of the Finance Act, 1947, is irrelevant. As things stand at the moment, he says profits tax is payable.

For the company, however, it is said that whether profits tax is payable depends on a consideration of all the relevant provisions of the taxing Act. The charging section may impose a charge, but a later section may remove it in particular cases. That, it is argued, is or may well be the position here, because, if the right of election under s. 31 (3) of the Finance Act, 1947, is exercised, no profits tax will be payable by the company for the relevant period.

E Apart altogether from this, it is argued that the appeal against the profits tax assessment already lodged prevents the tax from being payable until the appeal is disposed of. Reference is made in this connection to para. 5 of Part 2 of Sch. 5 to the Finance Act, 1937†, which clearly recognises, by implication, that a taxpayer cannot be made to pay profits tax while it is in dispute and the subject-matter of an appeal.

F "Payable" is a word which may bear different meanings according to its context. Here it has to be considered in its context in s. 68 (1) of the Finance Act, 1952. By that section the Special Commissioners are told that:

G "... if any amount is payable by the body corporate by way of the profits tax or the excess profits levy . . . a deduction shall be allowed . . ."

And sub-s. (2), which is directly in point here, tells the Special Commissioners that in the case of an investment company a deduction is to be allowed

"... in relation to any amount payable by the company by way of profits tax or the excess profits levy . . ."

H Bearing in mind that the ultimate purpose is the imposition of surtax liability on the members of the company, under what have been authoritatively called "penal provisions" (see *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (2) ([1942] 1 All E.R. 619)), it seems a little unlikely that Parliament intended that such surtax should be reduced by the deduction of a sum for profits tax which might turn out never to be payable at all.

I Sub-section (4) of s. 68 itself also seems to throw light on the point. This deals with the case where a deduction has been allowed under s. 68 for excess profits levy, which levy is later reduced (as it might have been when that levy was in force) by losses incurred in a subsequent year. An appropriate repayment of the levy previously paid would then be recovered by the company. When that happens, so sub-s. (4) provides, fresh apportionments must be made

* See p. 577, letter F, ante.

† See 12 HALSBURY'S STATUTES (2nd Edn.) 388 for this paragraph.

to counteract the excessive deduction. There is no similar provision as regards profits tax: and, although that was levied on a different basis, the absence of any provision to correct deductions for profits tax which afterwards turn out to be excessive tends to show that in s. 68 the legislature was using the word payable in relation to profits tax as connoting a liability ascertained and fixed. A

If the word payable is construed in this sense, the results are that a direction can be made as s. 262 (1) directs, and be followed by a consequential apportionment, since no deduction for profits tax will fall to be made. In addition, the company and its non-individual members will be able to exercise the right of election given by s. 31 (3) of the Finance Act, 1947. The untoward result is that some tax will be lost to the Revenue and while that is a relevant consideration, it is not an overriding one on a question of construction. If, on the other hand, the word payable is construed as the Revenue wishes, the company and its non-individual members will never be able to exercise an election under s. 31 (3) for the period in question. B C

Bearing all these considerations in mind, we think the better construction is that for which the company contends; in other words, that in the circumstances of this case the Special Commissioners were not bound under s. 68 to make a deduction for profits tax on the footing that it is at present payable by the company within the meaning of that section. We think that word connotes a liability to pay which has become ascertained and fixed so far as profits tax is concerned: and that the Special Commissioners are not bound to treat as "payable" profits tax which is the subject of a pending appeal and which, if the company follows a course allowed it by the law, may never become payable by the company at all. If it were merely an outstanding appeal which created the difficulty, no doubt the Special Commissioners would merely await its outcome before calculating actual income and making an apportionment. D E

On the view we take, therefore, a direction under s. 262 (1) followed by a consequential apportionment can be made in this case and, having regard to the mandatory terms of that section, must be made.

An order of mandamus will accordingly issue, and the respondents will pay the costs of the motion. F

Order of mandamus to issue.

Solicitors: *Smith & Hudson* (for the applicants, the company); *Solicitor of Inland Revenue* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

McKAY AND ANOTHER v. GILLIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Donovan, JJ.), October 17, 1956.]

Gaming—Lottery—Tickets printed for use in lotteries and held in stock for sale—Tickets sold to purchaser but not for use in a particular lottery—Tickets later used in an illegal lottery—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 22 (1) (a), (b).

The appellants, who were printers, printed, kept in stock, and sold at their premises at Camberwell Road in London tickets which were designed for lotteries. In May or June, 1955, E., who kept a café at Farringdon Road, London, bought a number of these tickets which, between Sept. 12 and Oct. 31, 1955, he used to promote unlawful lotteries among the customers of his café. The appellants were charged with (i) on a day unknown between Aug. 1 and Oct. 31, 1955, printing tickets for use in a lottery promoted at E.'s café, contrary to s. 22 (1) (a) of the Betting and Lotteries Act, 1934*, (ii) having in their possession on Dec. 1, 1955, at Camberwell Road tickets for sale in lotteries, contrary to s. 22 (1) (b) of the Act, and (iii) on a day unknown between Sept. 25 and Nov. 1, 1955, distributing at Camberwell Road tickets in a lottery promoted at E.'s café, contrary to s. 22 (1) (b) of the Act. On appeal against convictions on these charges the appellants contended that, on the true construction of s. 22 (1) (a) and (b), the offences thereby created were offences of printing, possessing, or distributing tickets in connection with (in the words of the statute) "the lottery", i.e., a particular lottery, being in the present case E.'s lottery, and that there was no evidence that any tickets were printed, possessed or distributed by the appellants for that lottery.

Held: the convictions must be quashed because there was no evidence that the tickets were either printed for use, or possessed by the appellants for sale, or distributed, in connection with "the lottery" referred to in para. (a) or para. (b) of s. 22 (1) of the Act of 1934, viz., on the facts of the present case, the particular lottery promoted by E. in September or October, 1955.

Appeals allowed.

[For the Betting and Lotteries Act, 1934, s. 22 (1) and s. 30 (3), see 10 HALSBURY'S STATUTES (2nd Edn.) 801, 808.]

Case Stated.

This was a Case Stated by the deputy chairman of the Appeal Committee of the County of London Quarter Sessions, under the Criminal Justice Act, 1925, s. 20. At the Metropolitan Magistrates' Court sitting at Clerkenwell on Jan. 26 and Feb. 15, 1956, the appellants, Douglas McKay and John McKay, were found guilty on three informations preferred by the respondent, Frank Gillies, a superintendent of police, charging that (i) on a day unknown between Aug. 1 and Oct. 31, 1955, at 72/74, Camberwell Road, S.E.5, they printed tickets for use in a lottery promoted at 94, Farringdon Road, E.C.1, in relation to the results of greyhound races, contrary to the Betting and Lotteries Act, 1934, s. 22 (1) (a); (ii) on Dec. 1, 1955, at 72/74, Camberwell Road, S.E.5, they had in their possession for the purpose of sale tickets in lotteries, contrary to s. 22 (1) (b) of the Act; and (iii) on a day unknown between Sept. 25 and Nov. 1, 1955, at 72/74, Camberwell Road, S.E.5, they distributed tickets in a lottery promoted at 94, Farringdon Road, E.C.1, in relation to the results of greyhound races, contrary to s. 22 (1) (b) of the Act. The appellants were each fined £60 on the first offence and £20 on each of the second and third offences respectively and were each ordered to pay £10 10s. costs. All the tickets seized were ordered to be destroyed.

* The relevant terms of s. 22 (1) (a) and (b) are printed at p. 586, letters C and I, post.

The appellants appealed to the General Quarter Sessions of the Peace for the County of London against the convictions and sentences, and on the hearing of the appeal on Mar. 14, 1956, the following facts were proved. The appellants, who were brothers, carried on business in partnership as general printers at 72/74, Camberwell Road, S.E.5. They had carried on business there since 1938, and throughout that period had printed and sold and, since 1954, had widely advertised for sale, large quantities of tickets similar to those the subject-matter of the summonses without any prior complaint. Their annual turnover was now about £25,000, of which between one-third and one-half represented the sale of such tickets. They sold such tickets to philanthropic, sporting, social, political and other clubs and societies who used them for the purpose of promoting private lotteries. To print individual names of clubs and promoters on such tickets would treble their price and put them out of the financial reach of many such clubs and societies, or render them unremunerative. For about three years ending in the spring of 1954, one Edo Enrico had been the secretary of the City of London Football Club, and had from time to time during that period purchased tickets from the appellants for the purpose of sale by the thirty to fifty members of the club, and had made his purchases both personally and by post. In May or June, 1955, Mr. Enrico, who had then acquired a café at 94, Farringdon Road, E.C.1, went to the appellants' premises and there purchased twenty sets of eighteen cards of twelve tickets each relating to greyhound races at 1s. 6d. a set. He gave no name or address and did not say why he wanted the tickets. He was uncertain whether he was given a receipt, and the appellants were unable to produce any counterfoil or duplicate receipt relating to the transaction. He made no further purchases of such tickets. Between Sept. 12 and Oct. 31, 1955, Mr. Enrico used the tickets to promote unlawful lotteries among the customers of his café. He would allocate a set of eighteen cards which contained between them a complete range of 216 chances to a greyhound racing event to be held at one of the tracks in or near London (not always the same track), and he would orally announce to his customers the track and date he had selected. He would sell the cards for 2s. each (2d. a ticket), and would thus receive £1 16s. if he sold them all. Out of this sum he would pay the winner £1 so that, after deducting 1s. 6d., the cost price of the tickets, he would make a profit of 14s. 6d., at the most. Finding these lotteries unprofitable, he gave them up of his own accord at the end of October, 1955. On Oct. 22, 1955, Police Sergeant Radcliffe went, in plain clothes, to the appellants' premises and asked the first appellant for some greyhound tickets. On being told the price he took twelve sets, and, on requesting it, was given a receipt. The first appellant told him that the more tickets that were bought the cheaper they were and handed him a brochure containing all the prices. The appellants made no inquiries as to the purchaser's identity, nor as to his intentions in the promotion and conduct of lotteries for which they had printed and were then distributing tickets, nor as to the conditions to be observed in connection with the promotion and conduct of the same. The transaction with Police Sergeant Radcliffe was not the subject of a summons, but was relied on by the respondent to show the method followed by the appellants in the conduct of their business. On Dec. 1, 1955, police officers executed a search warrant at the appellants' premises, and seized their entire stock of 82,448 cards, worth approximately £350. This stock was the subject of summons No. (ii) for being in possession of tickets. While the police were removing the seized tickets, the first appellant said to them:

"It's up to the people who buy them to put the name of the club on them or anything else that is needed. If I sell a pack of playing cards and they are used for gambling that does not make me liable."

A Police Sergeant Radcliffe answered:

“The circumstances are not the same. Do you acquaint people who purchase tickets with the particulars required by law?”

The first appellant said:

B “I am not interested in what they do with them.”

The appellants, in their business of printing and selling the tickets, possessed no order book. Their receipt book showed a large number of cash sales to private persons but no connection was shown between such persons and any societies whatsoever. The receipt book also showed a large number of cash sales to persons with the name or initials also of societies, but nothing appeared, nor was there evidence available to show that these societies were conducted for purposes not connected with gaming, wagering or lotteries, or that the sale of tickets was confined to persons all of whom worked or resided on the same premises, or that the purchaser was a person in those categories, or was authorised in writing by the governing body of the society named on the receipt, to promote a lottery.

D It was contended on behalf of the appellants as to summons No. (i) that the twenty sets of cards concerned must have been printed at some time before May or June 1, 1955, when Mr. Enrico purchased them, and that when the cards were printed, which was the material time, there was no evidence of any specific lottery promoted or proposed to be promoted in connection with which they were printed. The cards when and as printed were inchoate documents which required to be allocated to a specific greyhound racing track and to a specific date before they could become tickets in a lottery. The cards as and when printed were capable of legitimate use by clubs for lawful private lotteries, and the appellants could not be made retrospectively guilty of an offence when one of their customers later decided to misuse the tickets. It was not incumbent on the appellants to ensure that their customers observed the law. As to summons No. (ii), it was contended that the cards seized by the police were all capable of legitimate use by clubs for lawful private lotteries. There was no evidence of “any lottery promoted or proposed to be promoted” in connection with which the appellants had the stock in their possession and the stock ought not to be destroyed. As to summons No. (iii), it was contended, in addition to the foregoing contentions, that evidence of a single sale of cards to Mr. Enrico in May or June, 1955, did not justify the appellants’ conviction for distributing tickets in a lottery promoted at 94, Farringdon Road, between Sept. 25 and Nov. 1, 1955. It was contended on behalf of the respondent that there was evidence to support all the convictions.

The appeal committee dismissed the appeals and the appellants now appealed.

H *W. D. Collard* for the appellants.
V. A. C. Durand for the respondent.

I LORD GODDARD, C.J., referred to the charges and convictions and continued: The circumstances show that the appellants had devised a method of printing tickets, which can be used by anybody promoting a lottery, legal or illegal. It is rather an ingenious scheme whereby somebody must win on greyhound racing on picking the name of a boy or girl, or something of that sort; I need not go into the details. It seems that one of their customers was a café proprietor of the name of Enrico, who had a café in Farringdon Road and was promoting a lottery. The facts shown here are that in the month of May or June, 1955, Mr. Enrico bought some of these tickets from the appellants, which were designed for and, if used, would have been appropriate to, a lottery. The sale was in May or June, and obviously from the facts of the case these tickets had been printed before that, because the appellant actually stocked them so

that anybody could go in and say: "I am going to run a lottery; give me two hundred of these things". Therefore, on the first charge put forward that on a date unknown between Aug. 1 and Oct. 31, they printed tickets for use in the lottery promoted at Farringdon Road, I am bound to say there does not seem to be any evidence. Mr. Enrico's lottery, the only one about which we are told anything, was held between Sept. 12 and Oct. 31, but these lottery tickets must have been printed a long time before. At any rate, they were sold in June and the main difficulty which has been discussed in this appeal is the construction of the Act. A
B

Section 21 of the Betting and Lotteries Act, 1934, says: "Subject to the provisions of this Part of this Act, all lotteries are unlawful". There are then provisions which enable certain lotteries to be held. Section 22 (1) says:

"Subject to the provisions of this section, every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere—(a) prints any tickets for use in the lottery . . ."

C

commits an offence. That must be read as meaning prints any tickets for use in the lottery promoted or proposed to be promoted. If other words had been used, if the word "the" had been "any", or even "a", the sub-section might have had a different meaning. I can only read it as referring to a definite lottery or to a case where a man says: "I am going to promote a lottery. There is going to be a lottery on the Grand National. I want some tickets for it", or "I have promoted a lottery, I want you to print tickets for it", but the words of s. 22 (1) (a) are "prints any tickets for use in the lottery". The lottery referred to here is a lottery which was held at Farringdon Road between Sept. 12 and Oct. 31, 1955, but when these tickets were printed they were printed as part of the stock of the appellants. They were not printed in respect of any particular lottery or any particular proposed lottery. The use of the word "the" creates the difficulty, and the argument of counsel for the appellants must prevail. As DONOVAN, J., pointed out in the course of the argument, the matter is reinforced when one looks at s. 30 (3), under which the magistrate in this case ordered the whole of this stock to be destroyed. Section 30 (3) of the Betting and Lotteries Act, 1934, provides: D
E
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"The court before which a person is proved to have committed any offence under Part 2 of this Act in relation to a lottery or proposed lottery shall order to be forfeited any coins and bank notes produced to the court which are shown to the satisfaction of the court to represent the price of tickets or chances, or prize money, or prizes in the lottery and shall order to be destroyed all documents (other than bank notes) produced to the court which are shown to the satisfaction of the court to relate to the promotion or conduct of the lottery."

G

The words "the lottery" obviously refer to some definite lottery, such as a lottery on the Grand National or the Derby, or a lottery confined to the members of a football club, or something of that sort. It follows, therefore, that there was no evidence to support the first charge. H

The second charge is that on Dec. 1, 1955, the appellants had in their possession for the purpose of sale tickets in lotteries contrary to s. 22 (1) (b). December 1 was the day of the raid on the premises under a search warrant, but there is no evidence, as I say, that, at that time, any lottery was being promoted or anyone was proposing to promote a lottery. These were all tickets which the appellants had in their possession for the purpose of selling to anybody who was going to promote a lottery. Here, again, the words of the Betting and Lotteries Act, 1934, create a difficulty because s. 22 (1) provides: I

". . . every person who . . . (b) sells or distributes, or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution, any tickets or chances in the lottery . . ."

A That throws us back again to the first part of sub-s. (1), which refers to any lottery promoted or proposed to be promoted.

The third information relates to distributing tickets in a lottery "promoted at 94, Farringdon Road, E.C.1, in relation to the results of greyhound races", but that is charged between Sept. 25 and Nov. 1, 1955, and, again, refers to Mr. Enrico's lottery. I cannot see that there is any evidence that the appellants distributed tickets in that lottery, except in the sense that they sold and handed the tickets to Mr. Enrico, which they did in May or June. Therefore, I do not think that there is any evidence to support the third charge.

For these reasons, there was no evidence to support these three charges and the appeal must be allowed with costs here and below. *

C HALLETT, J.: So far as concerns the result of these appeals, I agree with that which has been proposed by my Lord, although with considerable reluctance having regard to the merits of the matter. On the other hand, as regards some of the matters mentioned, I hesitate to agree. I have not derived from s. 30 (3) of the Betting and Lotteries Act, 1934, the assistance which has been derived from it by the other members of the court. The sub-section, as far as material, reads as follows:

E "The court before which a person is proved to have committed any offence under Part 2 of this Act in relation to a lottery or proposed lottery shall order to be forfeited any coins and bank notes produced to the court which are shown to the satisfaction of the court to represent the price of tickets or chances, or prize money, or prizes in the lottery, and shall order to be destroyed all documents (other than bank notes) produced to the court which are shown to the satisfaction of the court to relate to the promotion or conduct of the lottery."

To my mind, with all respect to those who think otherwise, the lottery there is referring back to the lottery in respect of which there has been a conviction, and that is the only effect of the definite article there. On the other hand, with regard to s. 22 (1), I do feel great difficulty in putting forward any view other than that put forward by the Lord Chief Justice. If the section had read: "Subject to the provisions of this section every person who prints any tickets for use in a lottery", and so forth, there would be no doubt, and what I have been trying to find is some function to give to the words which, in fact, occur

G "in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere."

H If the decision at which this court has arrived is correct, it seems to me that the inclusion of those words in the section has provided a loophole through which any undeserving cases—those who make the promotion of lotteries easier such as these appellants—will escape. But the fact that the words provide an undesirable loophole does not seem to be any reason for me to ignore them, and, since I can find no other function for them but that proposed by my Lord, I agree with both the reasoning and the result he has already stated.

I DONOVAN, J.: I agree. With regard to s. 30 (3) though the words "the lottery" refer back to the lottery in respect of which there has been a conviction, that reinforces, in my view, the conclusion that "the lottery" refers to a specific lottery in being or proposed. If this be the meaning in s. 30 (3) as it clearly is, the same words can hardly bear a different meaning in s. 22 (1). The prosecution succeeded in persuading the magistrate to make an order to destroy the whole stock merely because those tickets might be used in some lottery to be brought into existence hereafter but which at that moment was neither promoted nor proposed to be promoted. It is because the words "the lottery" must

bear, as I think, the same meaning in the two sections that one does get support for the construction of s. 22 from the language of s. 30 (3).

Appeals allowed.

Solicitors: *Lewis, Barnes, Wheeler & Co.* (for the appellants); *Solicitor, Metropolitan Police* (for the respondent).

[Reported by G. A. KIDNER, Esq., *Barrister-at-Law.*]

LETTS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), October 2, 3, 4, 5, 10, 1956.]

Estate Duty—Gift inter vivos—Date when made—Direction to company to allot shares to donee.

Chose in Action—Assignment—Equitable assignment—Right to allotment of shares of limited company—Direction to company to allot to nominees—Validity.

Gift—Perfecting gift—Right to allotment of shares of limited company—Direction to company to allot to donees—When gift is complete.

On the sale in 1944 of a partnership business to a company, the senior partner became entitled by virtue of the sale agreement to have issued to him or his nominees (among other shares) 7,342 five per cent. first preference shares in the company, credited as fully paid up. It was suggested to the senior partner that he might make a gift of these shares to his three children and on July 29, 1944, he signed a direction "To the directors [of the company]. I . . . hereby request and authorise you to allot to the undermentioned persons as my nominees the numbers of five per cent. first preference shares of £1 each in the capital of [the company] set opposite their respective names credited as fully paid up, which shares form part of the total number of similar shares which I am entitled to have allotted to me, or my nominees, credited as fully paid up under the provisions of " the sale agreement, and he then specified the names of his three children and divided the shares between them. The shares were allotted to the children pursuant to that direction on Feb. 9, 1945. The senior partner died on Oct. 10, 1949. The question arose whether the preference shares were liable to estate duty on the death of the senior partner as having been the subject of a gift made within five years before his death.

Held: in the circumstances the direction dated July 29, 1944, operated as a valid equitable assignment of the contractual right of the senior partner under the sale agreement to have issued and allotted to him or his nominees the 7,342 preference shares, and, therefore, the gift was perfected by the giving of the direction and the shares were not liable to estate duty on his death more than five years later.

[As to the form of an equitable assignment of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 492, para. 1018; and for cases on the subject, see 8 DIGEST (Repl.) 573-576, 230-256.]

Cases referred to:

- (1) *Milroy v. Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 8 Digest (Repl.) 631, 677.
- (2) *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; 68 L.J.Ch. 220; 79 L.T. 442; 8 Digest (Repl.) 578, 266.

- A (3) *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438; 8 Digest (Repl.) 570, 216.
- (4) *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 8 Digest (Repl.) 573, 230.
- (5) *James Talcott, Ltd. v. John Lewis & Co., Ltd. & North American Dress Co., Ltd.*, [1940] 3 All E.R. 592; 8 Digest (Repl.) 598, 422.

B Adjoined Summons.

This was an originating summons issued by Kenneth Petrie Letts, Leslie Charles Letts and Phyllis Eileen Seton against the Inland Revenue Commissioners under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, for the determination of the question whether on the death of Harry Vaughan Letts on Oct. 10, 1949, estate duty became payable by the combined effect of the Customs and Inland Revenue Act, 1889, s. 11, the Finance Act, 1894, s. 2 (1) (c), and the Finance Act, 1946, s. 47, on 7,342 five per cent. first preference shares of £1 each in the capital of Charles Letts & Co., Ltd., allotted to the plaintiffs by the said company on Feb. 9, 1945, in the following proportions, viz.: Kenneth Petrie Letts, 2,447 shares; Leslie Charles Letts, 2,447 shares; D Phyllis Eileen Seton, 2,448 shares.

In 1925 the deceased, Harry Vaughan Letts (hereinafter called "the senior partner"), and his brother, Norman Letts, entered into formal partnership under which the profits were divisible as to seven-twelfths to the senior partner and the remainder to Norman Letts. Pursuant to the provisions of the partnership deed, the senior partner's two sons, Kenneth Petrie and Leslie Charles Letts E were taken into the partnership, as also were the two sons of Norman Letts, namely, Donald and Reginald Letts. In April, 1935, Norman Letts died. By virtue of a new partnership agreement dated July 25, 1935, the profits were to be divided as to ten twenty-fourths to the senior partner and the rest equally between the four remaining partners. It was also provided that on the death of the senior partner his share of the future profits was to be divided equally among the continuing partners. In 1944 a limited company was formed to take over the business of the partnership and by an agreement dated Apr. 24, 1944, the partners agreed to sell the business to the company. For the goodwill and pending engagements the partners were to receive fifty thousand ordinary shares of £1 each credited as fully paid up, and for the remaining assets the partners were to receive five per cent. first preference shares of £1 each, also credited as fully paid up. The ordinary shares were to be divided among the partners in proportion to their interests in the profits of the business. Under cl. 3 (ii) of the agreement it was provided that

"unless and save in so far as the vendors shall in writing otherwise direct [the preference] shares shall be issued to the vendors in the same proportions as the amounts of the credit balances of their personal accounts in the books of the business as existing after the undrawn net profits of the business for the year ending Apr. 30, 1944, have been carried to such accounts in accordance with the provisions of cl. 4 hereof bear to one another . . ."

In the course of preparing the accounts for the said year, it was decided to write up the value of the partnership assets to figures which more nearly represented their true value than those appearing in earlier accounts. Of the amount I by which the assets were so written up, each partner was to be entitled to a share equal to his share in the profits of the partnership and the senior partner so became entitled to £7,342 which, on the sale to the company, he became entitled to receive in the form of 7,342 preference shares of £1 each to be issued and allotted to him or his nominees under cl. 3 (ii) of the sale agreement. It was suggested to the senior partner by his son Leslie that he might like to make a gift to his children—Leslie, his brother Kenneth and his sister Mrs. Seton—by way of gift, and, as appeared from the correspondence, the senior partner fell in

with that suggestion. A letter written by Leslie Letts to the senior partner on July 24, 1944, was in the following terms: A

"My dear Dad, Very many thanks for your note and very handsome gift, it is in a way a double one—once in itself and again in that it will reduce the estate duty eventually—I sincerely trust a long way off—to be met. About that you know I had anxiety and this gift and your arrangement about buying the farm for Phyl [Mrs. Seton] will ease the duties very considerably and save us, I hope, from having to realise C.L. & Co., Ltd. shares." B

It was not in dispute that Leslie Letts was there referring to a gift which the senior partner was proposing to make of 7,342 preference shares when issued. On July 27, 1944, Kenneth Letts wrote a letter to the senior partner as follows: C

"My dear Dad, I have just heard from Leslie that you have agreed to our suggestion that your share of the firm's assets write-up should be divided between Phyl, Les and myself. I can assure you that I very highly appreciate this generous gesture on your part, which will make my holding of preference shares in the business look very much more respectable." D

Leslie Letts wrote on July 28, 1944, as follows: E

"My dear Dad, It would appear that there is a much simpler method of effecting your gift of your share of the write-up to us three children, and that is that you sign the draft letter to the company, two copies of which are enclosed. I have filled in the number of shares in pencil; please ink these in if you agree the slight discrepancy in share, date, and return one copy to us." F

The senior partner signed a direction on July 29, 1944, in these terms: G

"To the directors, Charles Letts & Co., Ltd. I, Harry Vaughan Letts, of 'Southdowns', Park View Road, Woldingham, Surrey, hereby request and authorise you to allot to the undermentioned persons as my nominees the numbers of five per cent. first preference shares of £1 each in the capital of Charles Letts & Co., Ltd., set opposite their respective names credited as fully paid up, which shares form part of the total number of similar shares which I am entitled to have allotted to me, or my nominees, credited as fully paid up under the provisions of cl. 3 of the agreement for sale dated Apr. 24, 1944, and made between myself Kenneth Petrie Letts Leslie Charles Letts Donald Norman Letts and Reginald Hume Letts of the one part and Charles Letts & Co., Ltd., of the other part, namely . . .", F

and he set out the names of his three children and he divided the shares between them, i.e., 2,447 each to Kenneth Letts and Leslie Letts, and 2,448 shares to Mrs. Seton. The direction was delivered forthwith to the company. For some reason a direction in identical terms was signed by the senior partner on Jan. 23, 1945. H

J. Pennycuik, Q.C., and *Arthur Bagnall* for the plaintiffs, the taxpayers.

Milner Holland, Q.C., and *J. W. Brundyate* for the defendants, the Crown. I

UPJOHN, J., stated the facts and continued: It is not disputed that the whole beneficial interest in these 7,342 preference shares vested at latest in the three children on Feb. 9, 1945 (when the shares were allotted) by way of gift, but that is within five years of the senior partner's death, and so duty would be attracted under s. 38 of the Customs and Inland Revenue Act, 1881. The question is whether the direction of July 29, 1944, which was outside the five-year period, did in effect vest the shares beneficially in the three taxpayers.

- A There are two further matters which I should mention. I have pointed out that a subsequent direction was made on Jan. 23, 1945. The Crown, however, do not contend that the subsequent direction in any way superseded or rendered nugatory the earlier direction—if, indeed, that earlier direction has the effect which the taxpayers contend that it has. The other matter is that the ascertainment of the property to be sold which was to be satisfied by the issue and the
- B allotment of preference shares was a matter of some difficulty. There were questions of tax and so forth outstanding, and it was not until February, 1945, that those matters were settled. At the time of the direction of July 29, 1944, no preference shares had been issued, and it was not known how many shares the senior partner, amongst others, would be entitled to, although, of course, it was no doubt appreciated at that time that he would be entitled to a number
- C of preference shares far in excess of the 7,342 shares mentioned in the direction. In the result, he did become entitled, I believe, to something in the neighbourhood of eighty-eight thousand preference shares.

Two points really arise. The first is this: did the senior partner intend to make a gift by that document of July 29, 1944, which I have called “the direction”? Secondly, was the direction a complete and effective instrument of

- D gift? On the first point, it seems clear that the senior partner was intending to make a gift in this sense, that he was directing the company to put his children on the share register with the intention that they should become the beneficial owners of those shares. Whether he thought that by the direction he was perfecting the gift or that some further act of bounty on his part was necessary does not, I think, matter; it is a question of the interpretation of the document.
- E In fact, I do not suppose the senior partner gave one moment's thought to this interesting legal problem. The second point is the really vital one. Was the document a complete and effective instrument of gift? On that point the taxpayer must prove, in the famous words of TURNER, L.J., in *Milroy v. Lord* (1) ((1862), 4 De G.F. & J. 264 at p. 274), that

- F “the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.”

Counsel for the taxpayers submits that the direction constitutes a valid equitable assignment of the senior partner's rights under the sale contract. I should make it clear at this stage that counsel, for good reason, does not submit that

- G this direction is an equitable assignment of shares to be issued or allotted, or anything of that sort; for he recognises that on that basis he would be met with a series of grave difficulties. He submits that under the sale agreement the senior partner has a contractual right to have issued, to him or to his nominees, certain preference shares. That, he says, truly is an equitable chose in action, enforceable by specific performance if necessary, which can be disposed of by
- H the senior partner. He can transfer those rights under that contract by way of gift or for consideration. Being an equitable chose in action, no particular language need be used, no particular form need be employed. The assignment may take the form of an assignment in express terms, or it may consist of a notice to the other contracting party—the company—to perform its obligations
- I in favour of the third party. He referred me to two cases to illustrate the principle. The first was that of *Re Griffin, Griffin v. Griffin* (2) ([1899] 1 Ch. 408), a decision of BYRNE, J. I will read the headnote:

“The indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operate as a good equitable assignment of the amount on deposit at the bank; but, if anything be required to complete the gift, the appointment of the donee as executor of the donor perfects the gift.”

BYRNE, J., said (*ibid.*, at p. 412):

"To operate as an equitable assignment no particular form of words is required in the document. An engagement or direction to pay out of a debt or fund a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole debt: per CHITTY, L.J., in *Durham Brothers v. Robertson* (3) ([1898] 1 Q.B. 765 at p. 769); and a direction to pay the whole debt constitutes an equitable assignment of the whole debt. I think, therefore, that the defendant is entitled to succeed upon this ground . . ."

Counsel for the taxpayers then referred me to the well-known passage in the opinion of LORD MACNAGHTEN in *William Brandt's Sons & Co. v. Dunlop Rubber Co.* (4) ([1905] A.C. 454 at p. 462):

"But, says the Lord Chief Justice, 'the document does not, on the face of it, purport to be an assignment nor use the language of an assignment'. An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."

I have recently held that those words are equally applicable to an assignment by way of gift. Counsel submits that here is a direction to the company to carry out their obligations under the contract of sale by allotting certain shares to the persons mentioned in the direction. That is a valid assignment, he submits, by way of direction to the company to carry out its obligations in that manner, being made with the intention of vesting the shares beneficially in the children. That is perfecting the gift, for he has done all that he can do at that time, on that date, to transfer all that he has, which is a chose in action—that is, the right to enforce the contract to issue and allot preference shares against the company.

On the other hand, counsel for the Crown submitted that that is not the correct way to look at this matter. In the first place, it is submitted that the notice to the debtor must be plain and unambiguous, and in support of that proposition I was referred to *James Talcott, Ltd. v. John Lewis & Co., Ltd. & North American Dress Co., Ltd.* (5) ([1940] 3 All E.R. 592). That was a very different case, but there is no doubt that it supports the view that a notice must be plain and unambiguous. It is said that the direction is far from plain and unambiguous, for it is a direction to the company to allot to the "undermentioned persons as my nominees" certain shares. It is pointed out that the word "nominees" there is capable of bearing a number of meanings. It may be that they are to be nominees in the sense in which that word is frequently used, i.e., merely trustees or names for the senior partner. It may be that the shares were allotted pursuant to some contract of sale, or it may be that they were allotted by way of gift. It is said, for those reasons, that the document is not plain or unambiguous. I do not accept that proposition. It does not matter in the least to the company what are the arrangements made between the senior partner and his nominees. All that the company is concerned with is that it is told to allot certain shares to certain persons. It matters not to the company how those persons have become entitled to have those shares allotted to them.

The next point, I think, raises a very difficult question, and it is this. It is said that when you look at the direction the senior partner was not, on a proper interpretation, assigning his contractual rights under the agreement

- A of sale at all. What he was doing was not to assign any rights under that contract, but merely to exercise the power given to him by the contract to nominate others to be registered as shareholders. A power to nominate others to be put on the register may in some cases be a most valuable right, although I do not suppose in the case of this particular company it was considered to be of much importance. It is said with force, however, by the Crown that
- B here is no purported transfer of any chose in action, but a mere nomination pursuant to a power contained in the contract. It is pointed out that it would be very extraordinary if the situation really was that by this nomination the senior partner had thereafter put it out of his power to change his mind and direct the company to allot the shares to some other person; and that if the claim of the taxpayer is right, that must be the effect of it, because, if the document
- C did operate as an assignment, then the very day after it was executed the three children could apply to this court to restrain their father by injunction from afterwards revoking the direction. It was put, with much force, I think, that one would not expect a document couched in these terms to have this effect. It is merely a nomination under the powers contained in the agreement and, as such, would be revocable until the shares were actually allotted. It was
- D compared to the case of a father who might write to the bank asking the bank to transfer a sum of money from his account to his son's account, but before the letter arrived or before those instructions were carried out they were countermanded by the father. It was suggested that in such a case the son could have no possible rights to restrain his father from altering his mind.

- Those are powerful arguments, and the question is a difficult one; but, bearing
- E in mind that the father was undoubtedly intending that these children should have the shares representing this write-up of the assets of the partnership, I think that he was intending by this direction to the company to make an assignment of his rights. The language, as LORD MACNAGHTEN pointed out, is immaterial, but having received Leslie's letter of July 28 he was entering into this document, in my opinion, as a direction to the company as a way of implementing
- F his intention of making a gift, and so it operated as an equitable assignment. That being so, and he having done all that was then in his power in relation to his rights under the agreement of sale, it operated as a perfect gift on that day, and accordingly the contention of the Crown fails.

I must declare, therefore, that on the death on Oct. 10, 1949, of Harry Vaughan Letts, no duty became payable on these shares.

Declaration accordingly.

Solicitors: *Loxley & Preston* (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* HOBHOUSE.

[CHANCERY DIVISION (Danckwerts, J.), October 17, 1956.]

Surtax—Deductions—Annual payments—Covenant for payments—When payment due—Payments to be made on May 1 in each year—Termination of covenant on expiration of eight years from May 5, 1953—Whether “year” meant calendar year or year commencing with May 5.

On May 5, 1953, the taxpayer entered into a deed of covenant under which he undertook to pay his son the annual sum of £450 less income tax “the first payment to be due forthwith and the subsequent payments on the first day of May in each year”. The covenant was to continue in operation until the happening of the first of certain events, including “the expiration of eight years from the date hereof”. On May 1, 1954, the taxpayer made the second payment of £450 to his son and claimed to deduct it in the computation of his income for surtax purposes. The Crown contended that “in each year” meant in each twelvemonth calculated from each successive May 5 (the day of the date of the deed of covenant), with the result that the second payment did not become due until May 1, 1955, and that the second payment made in the twelvemonth commencing May 5, 1953, viz., the payment on May 1, 1954, was therefore not made under the covenant and was not deductible by the taxpayer.

Held: the payment of May 1, 1954, was deductible as being one made under the deed of covenant, since the words “in each year” in the covenant meant in each calendar year, notwithstanding the presence of the subsequent phrase “eight years from the date hereof” in which the years were made computable from May 5, 1953; the second payment had been due, therefore, on May 1, 1954.

Appeal dismissed.

[As to annual payments deductible in the computation of income for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 275-278, paras. 546-548; and for cases on the subject, see DIGEST Supp.]

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against an assessment to surtax made on him for 1954-55 in the sum of £21,201. On May 1, 1954, he had paid £450 less income tax at the standard rate to his son. He contended that the payment was deductible in computing his income for surtax purposes since it was an annual payment made in pursuance of an obligation imposed on him by a deed of covenant entered into on May 5, 1953, in which he had undertaken to pay £450 annually to his son, the first payment to be made forthwith and subsequent payments “on the first day of May in each year”. The covenant was to continue in operation until the happening of the first of certain specified events, the last of which was “(v) the expiration of eight years from the date hereof”. The Crown contended that no deduction was allowable on the ground that the deed of covenant imposed no obligation to make any payment in the year ended Apr. 5, 1955, the second payment under it falling due on May 1, 1955, because: (i) having regard to sub-cl. (v) the term “year” in the operative clause meant a year beginning with the commencement of the deed and not a calendar year; (ii) since in the absence of express provision an annuity fell due for payment at the end of the year in respect of which it was payable, the first year's annuity would not, but for the provision that it was to be paid forthwith, have been payable until May 4, 1954, and the second year's would not have been payable until May 4, 1955.

The Special Commissioners of Income Tax held that the clause in the deed of covenant created the obligation to make a payment of £450 on May 1, 1954, and that the £450 paid by the taxpayer on that date was therefore an annual payment made by virtue of an obligation imposed on him by the deed of covenant. They

A allowed the appeal and reduced the surtax assessment to £20,751. The Crown appealed.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and Sir Reginald Hills for the Crown.

J. Pennycuik, Q.C., and E. W. Griffith for the taxpayer.

B **DANCKWERTS, J.:** It seems to me that the commissioners' decision in favour of the taxpayer was correct. The appeal relates to a deed made on May 5, 1953, by which the respondent taxpayer, Sir John Richard Hobhouse, covenanted to pay an "annual sum of £450 less income tax" to his son. The terms of the deed, so far as material, are as follows:

C "The grantor hereby covenants with the said son to pay him henceforth during the continuance of this covenant the annual sum of £450 less income tax thereon at the current rate for the time being the first payment to be due forthwith and the subsequent payments on the first day of May in each year."

D At that point, certainly I should have thought that "the first day of May" plainly meant that day in each calendar year. It would not be natural to think anything else.

Then comes cl. 2:

E "This covenant shall continue in operation until the happening of the first to occur of the following events or dates, viz.: (i) the death of the grantor (ii) the death of the son (iii) the bankruptcy of the son (iv) the execution or attempted execution by the son of any assignment or of any charge on the said annual sums payable hereunder (v) the expiration of eight years from the date hereof."

The event last stated is the most important one. It is argued for the Crown that "eight years" in sub-cl. (v) must mean eight years calculated, not as years from Jan. 1, but as years beginning from May 5, 1953. That is perfectly true. F It means that the period of the covenant will expire on May 4, 1961. It is said, therefore, that this was contrary to the provisions contained in cl. 1 of the deed, and that the year is a year of the same kind, dating from May 5 in each year and not from Jan. 1. I cannot see why that should be so at all. The result of that construction apparently would be that on May 1, 1954, the son would not get any money from his father at all under the covenant, which seems a very odd G result.

It seems to me that the way the commissioners have put the matter is perfectly correct. They say:

H "On the face of it, cl. 1, which provides for 'payments on the first day of May in each year', quite clearly, in our view, provides for a payment on May 1 in each calendar year. It was argued for the Crown that in view of the provisions of cl. 2 (5) of the deed the phrase 'each year' in cl. 1 should be construed as each year ended on May 4 and that, following the first payment on the execution of the deed on May 5, 1953, no further payment was due thereunder until May 1, 1955. We are unable to accept this contention. We hold that cl. 1 which imposed the obligation to pay an annuity is clear in its terms and created an obligation to make a payment I of £450 on May 1, 1954; and that the terms of cl. 2 (5), which are part of the provisions defining the limit of the covenant, do not over-ride the clear terms of cl. 1."

That seems perfectly correct, and I agree with it. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Alsop, Stevens & Co. (for the taxpayer).*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re DONALD KENYON, LTD.

[CHANCERY DIVISION (Roxburgh, J.), October 22, 1956.]

Company—Registration—Restoration to register—Application to restore by member of company seven years after dissolution—Protection of creditors whose debts were not statute-barred at date of dissolution—Period between dissolution and date of restoration not to be counted for purposes of Statutes of Limitation—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 353 (6).

In 1937 a company was incorporated as a private company for the purpose of carrying on, among other businesses, that of a builder. Its nominal capital was £1,000 divided into a thousand £1 shares, all of which had been issued and were paid up or credited as paid up in full. In 1940 a mortgagee entered into possession of the houses which the company was building, and the company ceased to carry on business as it had no other assets. On Mar. 1, 1949, the name of the company was struck off the register of companies under s. 353 of the Companies Act, 1948. The mortgagee, having completed the construction of the houses, sold them and now had in hand the sum of £2,049 18s. 11d., which, but for the dissolution of the company, would have been payable to the company. In 1956 a director of the company presented a petition for the name of the company to be restored to the register of companies under s. 353 (6)* of the Act of 1948 and to be wound up by the court. It was stated in the petition: "It is apprehended that all the debts of the company at the time of its dissolution have since become statute-barred and that, after paying the costs of the liquidation, there should be a substantial surplus available for distribution amongst the contributories of the company". On the question whether any provision should be inserted in the order for the name of the company to be restored to the register, having regard to the final words of s. 353 (6) requiring the court, when making the order, to put not only the company but also "all other persons in the same position as nearly as may be as if the name of the company had not been struck off",

Held: the order for the name of the company to be restored to the register, under s. 353 (6) of the Act of 1948, should contain a provision that, in the case of creditors whose debts were not statute-barred at the date when the company was dissolved, the period between the date of dissolution and the date when the name of the company was restored to the register should not be counted for the purposes of the Limitation Acts.

Dicta of SIR RAYMOND EVERSHED, M.R., and HODSON, L.J., in *Tymans, Ltd. v. Craven* ([1952] 1 All E.R. at pp. 619, 628) applied.

[As to restoration to the register, see 6 HALSBURY'S LAWS (3rd Edn.) 788, para. 1590; and for cases on the subject, see 10 DIGEST (Repl.) 1140, 1141, 7938-7949.]

For the Companies Act, 1948, s. 353 (5), (6), see 3 HALSBURY'S STATUTES (2nd Edn.) 727.]

Cases referred to:

- (1) *Tymans, Ltd. v. Craven*, [1952] 1 All E.R. 613; [1952] 2 Q.B. 100; 10 Digest (Repl.) 1141, 7949.
- (2) *Morris v. Harris*, [1927] A.C. 252; 96 L.J.Ch. 253; 136 L.T. 587; 10 Digest (Repl.) 1105, 7643.

Petition.

This was a petition by Mrs. Mabel Kenyon, a director of Donald Kenyon, Ltd., that (i) the name of the company might be restored to the register of companies, and (ii) that the company be wound up by the court under the provisions of the Companies Act, 1948.

* The terms of the sub-section are set out at p. 598, letter A, post.

- A The facts, as stated in the petition, were as follows. On July 14, 1937, the company was incorporated under the Companies Act, 1929, as a private company limited by shares. Its nominal capital was £1,000 divided into one thousand shares of £1 each, all of which had been issued and were paid up or credited as paid up in full. The objects of the company were to carry on the businesses of, among other things, builders, bricklayers and stone masons. The petitioner
- B was the registered holder of five hundred shares, which were allotted to her on the incorporation of the company. The remaining five hundred shares were allotted to the petitioner's son, Donald Kenyon. The company carried on business as house builders until 1940 when the Marsden Building Society, as mortgagee, entered into possession of the houses which were then in process of being built by the company. The building society completed the construction
- C of the houses and realised its security by their sale, and it now held the sum of £2,049 18s. 11d., being the aggregate of (a) the excess of the proceeds of sale over the amounts owing by the company to the society, and (b) certain deposits made by the company with the society in the course of the company's business. But for the dissolution of the company, this sum would now be payable to the company. The company had not carried on business since its properties were
- D taken over by the building society in 1940. It had no other assets at the time and, as far as the petitioner was aware, had acquired none since. In January, 1941, Donald Kenyon joined His Majesty's forces, and thereafter the company, having no assets and no staff, was regarded by the petitioner as, for all practical purposes, defunct. On Aug. 1, 1942, Donald Kenyon died, and since that date the petitioner had been the only member and the only director of the company.
- E No administration had been taken out to the estate of Donald Kenyon and the shares allotted to him had remained registered in his name. On or about Mar. 1, 1949, the Registrar of Companies, pursuant to s. 353 of the Companies Act, 1948, struck the company's name off the register of companies. Notice thereof was published in the "London Gazette" of Mar. 1, 1949, and, accordingly, under s. 353 (5), the company was dissolved on that date. In addition
- F to the mortgage to the building society, the company had created and issued a debenture for the sum of £2,000, secured by a floating charge to another company, which was wound up and was dissolved in August, 1941.

After the facts had been set out, the petition contained the following statements:

- G "It is apprehended that all the debts of the company at the time of its dissolution have since become statute-barred and that, after paying the costs of the liquidation, there should be a substantial surplus available for distribution amongst the contributories of the company. In the circumstances, it is just and equitable that the company should be wound up."

R. H. Hunt for the petitioner.

- H **ROXBURGH, J.**, read the petition and said: There is this allegation in the petition: "It is apprehended that all the debts of the company at the time of its dissolution have since become statute-barred . . ." I read that as a suggestion that there well may have been debts of the company which were not statute-barred at the time of its dissolution. The petition, on that apprehen-
- I sion, proceeds:

"and that, after paying the costs of the liquidation, there should be a substantial surplus available for distribution amongst the contributories of the company."

The only question, and it is one on which there is at present no authority, is whether I ought to put in the order certain words for the protection of creditors whose debts had not become statute-barred at the date of the dissolution.

This application is made under the Companies Act, 1948, s. 353 (6), which reads:

"If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

There is no direct authority on the question which I am considering. There is only one relevant authority on s. 353 (6), that is *Tymans, Ltd. v. Craven* (1) ([1952] 1 All E.R. 613), although *Morris v. Harris* (2) ([1927] A.C. 252), is an important decision of the House of Lords on the Companies (Consolidation) Act, 1908, s. 223, which corresponded to s. 352 of the Act of 1948. The question which arose before the Court of Appeal in *Tymans, Ltd. v. Craven* (1) was quite different from the present question, and counsel for the petitioner in the present case referred to the fact that the question of the statute of limitations was not mentioned. To that I would reply that the statute had no relevance in that case; but, in the course of the argument, each member of the Court of Appeal made a reference to the purpose of the words at the end of s. 353 (6).

In that case the majority consisted of SIR RAYMOND EVERSHED, M.R., and HODSON, L.J., and the minority of JENKINS, L.J. Therefore, it should be right to pay, as I do, particular regard to the dictum of the Master of the Rolls, who was one of the majority. He said ([1952] 1 All E.R. at p. 619):

"On the other hand, some sensible content must be given to the final words of the sub-section, and this problem at first seemed to me to create a difficulty in the company's way. Without, however, attempting to define the scope of the words exhaustively [and I stress that], counsel for the company was able to give instances in answer to the question put to him. During the period of the company's suspended animation, the company, as well as third parties, might well have abstained from taking those steps—a step in an action, or the exercise of some contractual right—for which the proper time might have in the meantime expired. In my judgment, the final words of the sub-section can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened. More generally the final words of the sub-section seem to me designed not, by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the 'as you were position', which, according to the ordinary sense of those general words, is *prima facie* their consequence."

Dealing with this point (*ibid.*, at p. 623) JENKINS, L.J., perhaps did not put the matter quite so broadly. I do not think that I need read the passage from his judgment. HODSON, L.J., said (*ibid.*, at p. 628):

"For my part, I think the words of s. 353 (6) are clearly designed to produce an 'as you were' position, and think that the latter part of the

- A sub-section is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost."

He then gave an example.

- Looking at s. 353 (6) with that assistance, I first notice that any creditor may apply for the name of the company to be restored to the register before the expiration of twenty years from the publication of the notice in the "London Gazette". I am not prepared to say that it is not possible to visualise a debt which would not be statute-barred after the expiration of twenty years from the dissolution, but such debts must be very rare, and I hardly feel that, if I do nothing to prevent the statutes of limitations running, I would be giving full rein to what I suspect was the intention of the legislature in giving creditors twenty years within which to make an application. Moreover, what I have to do is to put "all other persons"—not only the company, but also all other persons—"in the same position as nearly as may be as if the name of the company had not been struck off."

- At the date of the dissolution those creditors whose debts were not already statute-barred could have stopped the period of limitation running against them by issuing, and perhaps serving, a writ. Counsel said that after the dissolution a creditor could have applied to have the name of the company restored to the register and then have issued his writ. It seems to me, however, that, when a company has been dissolved and, therefore, nobody can sue it without having its name restored to the register, it is only common fairness that, if the contributors for purposes of their own want to have the company's name restored to the register years later, the period between the dissolution and the date of the restoration should be disregarded for the purposes of the statutes of limitations.

- I do not think that counsel really suggested that by doing this I was violating the Limitation Act, 1939. He did suggest that I was violating the policy of that Act but, with all respect to him, this case does not seem to have been envisaged by that Act at all. What I am endeavouring to do is to apply, in the light of the direction given by the Companies Act, 1948, and the decision of the Court of Appeal, the jurisdiction conferred on me by s. 353 (6) of that Act. Except for the assistance which the Court of Appeal has indirectly given to me, the position is entirely free from authority. Common justice requires that some such provision as that which I have suggested should be inserted. It is said that it has never been done before, but, as far as I know, the point has never been considered or argued before. There is no record of it in the books. It is, I think, true to say that I am giving perhaps some slight benefit to the creditors as against the company, but it will be observed that s. 353 (6) says "as nearly as may be", contemplating that the precise equation may be unattainable. In my judgment, I am much nearer precise equation if I put some stipulation in the order than I should be if I did not. Accordingly, I propose to put a proviso in the order that in the case of creditors whose debts were not statute-barred at the date of dissolution, the period between the date of dissolution and the date of restoration to the register shall not be counted for the purposes of any statute of limitation.

Order accordingly.

Solicitors: *Bentleys, Stokes & Lowless* (for the petitioner).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re SAYER TRUST.

MacGREGOR AND ANOTHER v. SAYER AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), October 18, 19, 1956.]

Settlement—Power—Discretionary power to make grants to “dependants” and “dependent relatives” of employees—Power coupled with a duty and power collateral—Impossibility of ascertaining all members of class of beneficiaries—Uncertainty.

Power of Appointment—Collateral power to make grants—No gift over in case of non-exercise—Validity.

Power of Appointment—Uncertainty—Power coupled with a duty and power collateral—Ascertainment of objects—Impossibility of ascertaining all members of a class.

The settlor was the governing director of a private limited company which carried on the business of confectioners at some seventy shops. By a trust deed dated Feb. 14, 1950, the settlor constituted a fund to be administered by a management committee for the benefit of employees or ex-employees of the company or of any wholly owned subsidiary of the company and their dependants. Both the capital and the income were available for the purpose of the making of grants. By cl. 4 the trust deed provided that the management committee “is empowered at its discretion . . . to make payments out of the fund by way of annuity . . . or by way of lump sum grants as the committee shall decide to or on behalf of the following persons or any one or more of them namely:—(i) To employees in the company’s service on or after ceasing to be employed in such service or to persons who have been employees . . . and have already ceased to be employed in such service . . . (iv) To infant children or other infant dependants of any such employees or ex-employees as are above mentioned in which cases payment may be made to such person as the committee elects to treat . . . as having the care and custody . . . of the infant concerned . . . (v) To other dependent relatives of any such employees or ex-employees as are above mentioned in whose cases the committee decides that such assistance is merited”. By cl. 6 the trust deed provided for the winding-up of the fund in specified events and gave the committee discretion in those circumstances to apply the whole or any part of the fund to the purchase of annuities for any beneficiaries for the time being in receipt of allowances out of the fund or for other eligible persons. Clause 6 continued: “The surplus if any then remaining . . . shall be used for such purpose and in such manner for the benefit of employees or ex-employees of the company as the committee thinks most appropriate in the circumstances then existing . . .” Questions arose as to the validity of cl. 4 (iv) and (v) and cl. 6. It was common ground (a) that the powers given by cl. 4, and the power given by cl. 6 to purchase annuities, were powers collateral and were not powers coupled with a duty, and (b) that the direction in cl. 6 to distribute the surplus was (if valid) a trust for distribution. On the evidence it had been impossible at the date of the trust deed, and since then had continued to be impossible, to make a complete list of all the persons who had been employed by the company since its incorporation in 1931. It was contended that the trust (under cl. 6) to use the surplus for the benefit of “employees or ex-employees of the company” was void for uncertainty and that the descriptions “dependants” and “dependent relatives” in cl. 4 (iv) (v) were so vague as to render the powers intended to be created void for uncertainty.

Held: (i) the trust in cl. 6 to distribute the surplus assets on a winding-up was void for uncertainty, because it was impossible to ascertain the

A members of the class entitled to benefit; and a resulting trust for the settlor therefore arose.

Inland Revenue Comrs. v. Broadway Cottages Trust ([1954] 3 All E.R. 120) applied.

B (ii) the powers created by paras. (iv) and (v) of cl. 4 were not void for uncertainty because, although the whole class of beneficiaries could not be ascertained at a given time, it was not impossible in any given case for the committee or, if necessary, the court to decide whether a person was a "dependant" or a "dependent relative"; and it followed that the power created by cl. 6 for the purchase of annuities was valid.

Re Ball ([1947] 1 All E.R. 458) distinguished.

Re Hooper's 1949 Settlement ((1955), 34 A.T.C. 3) considered.

C (iii) the powers created by paras. (iv) and (v) of cl. 4 were not void by reason of the absence of a gift over (express, or implied as a matter of construction) on the failure of the trustees to exercise their power, because the law implied a resulting trust in the absence of such an express or implied gift over, and there was, therefore, a trust which the court could execute.

D [As to nature of a power collateral and of a power coupled with a duty or trust, see 25 HALSBURY'S LAWS (2nd Edn.) 510, 596-598, paras. 925, 1052, 1053; and for cases on these subjects, see 37 DIGEST 385, 386, 523-525, 7-13, 1135-1151.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Broadway Cottages Trust*, *Inland Revenue Comrs. v. Sunnylands Trusts*, [1954] 3 All E.R. 120; [1955] Ch. 20; 35 Tax Cas. 577; 3rd Digest Supp.
- E (2) *Re Gestetner, Barnett v. Blumka*, [1953] 1 All E.R. 1150; [1953] Ch. 672; 3rd Digest Supp.
- (3) *Re Coates, Ramsden v. Coates*, [1955] 1 All E.R. 26; [1955] Ch. 495; 3rd Digest Supp.
- (4) *Re Ogden, Brydon v. Samuel*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- F (5) *Re Ball, Hand v. Ball*, [1947] 1 All E.R. 458; [1947] Ch. 228; [1947] L.J.R. 513; 176 L.T. 369; 2nd Digest Supp.
- (6) *Re Hooper's 1949 Settlement*, (1955), 34 A.T.C. 3.
- (7) *Simmons v. White Brothers*, [1899] 1 Q.B. 1005; 68 L.J.Q.B. 507; 80 L.T. 344; 34 Digest 246, 2114.
- G (8) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 32 E.R. 947; 43 Digest 502, 305.
- (9) *Re Combe, Combe v. Combe*, [1925] 1 Ch. 210; 94 L.J.Ch. 267; sub nom. *Re Coombe, Coombe v. Coombe*, 133 L.T. 473; 37 Digest 527, 1181.

Adjourned Summons.

H By an originating summons the plaintiffs, John Cochrane MacGregor, a member of the management committee of a trust fund, and Martins Bank, Ltd., the custodian trustee of the said fund, asked for the determination of the following questions: (i) whether the trust powers and provisions declared by and contained in cl. 3 and cl. 4 of the trust deed dated Feb. 14, 1950, for the application of the Sayers (Confectioners), Ltd. discretionary fund pending the final distribution thereof were valid or void for uncertainty; (ii) whether the trust powers and provisions declared by and contained in cl. 6 of the said trust deed for the final distribution of the said fund were valid or void for uncertainty; (iii) whether (a) the income and (b) the capital of the said fund had as from the execution of the said trust been held on a resulting trust for the defendant, Frederick James Sayer.

E. W. Griffith for the plaintiffs, the trustee.

J. Pennycuik, Q.C., and *W. Geddes* for the first defendant, the settlor.

Geoffrey Cross, Q.C., and *Joseph Turner* for the second defendant, a beneficiary.

UPJOHN, J.: This is a summons to determine the validity of certain powers and provisions in a trust deed dated Feb. 14, 1950, whereby shares were settled, putting it very briefly, on trusts for employees, ex-employees and their dependants of a company known as Sayers (Confectioners), Ltd., of which the settlor, the first defendant, was at the time governing director. A

The deed was made between the first defendant of the first part, William McGee the second defendant of the second part and the plaintiffs, Martins Bank, Ltd., of the third part. The first recital is as follows: B

“Whereas (a) the settlor is governing director of Sayers (Confectioners), Ltd. (hereinafter called ‘the company’) and has considered it desirable that a fund (hereinafter called ‘the fund’) should be formed to provide for discretionary grants allowances annuities or payments to or for the benefit of employees or ex-employees of the company or of any wholly owned subsidiary of the company or their dependants and with that end in view has transferred certain investments to the fund and may hereafter transfer further investments and/or sums of money thereto.” C

Turning to the operative part, cl. 1 sets up the fund, and cl. 2 provides for the administration of the fund by a committee of management. The first two members of the committee were to be the settlor and Mr. William McGee as an employee of the company, and the third member was to be the auditor for the time being of the company, viz., Mr. MacGregor, the first plaintiff. Clause 3 of the deed makes administrative provisions and it is to be noted that no differentiation is made between the capital and income of the fund. Each alike was available for grants in accordance with the provisions of cl. 4 which I must read in detail: D

“(a) All grants allowances and benefits whatsoever out of the fund shall be at the discretion of the committee and no person shall have any claim or right whatsoever to receive any payment therefrom. The committee is empowered at its discretion in each individual case to make payments out of the fund by way of annuity for life or for a term of years or other period or by way of lump sum grants as the committee shall decide to or on behalf of the following persons or any one or more of them namely:—(i) To employees in the company’s service on or after ceasing to be employed in such service or to persons who have been employees in such service and have already ceased to be employed in such service in whose case the committee decides that assistance is merited by the special circumstances of such ex-employee. (ii) To such employees as above whilst still in the company’s service in whose cases the committee decides that assistance from the fund to meet special circumstances of need is merited. (iii) To widows of such employees or ex-employees as are above mentioned whether such employees or ex-employees died whilst in or after leaving the company’s service in whose cases the committee decides that assistance is merited. (iv) To infant children or other infant dependants of any such employees or ex-employees as are above mentioned in which cases payment may be made to such person as the committee elects to treat in each such case as having the care and custody (legal or otherwise) of the infant concerned without being under further responsibility of enquiry (v) To other dependent relatives of any such employees or ex-employees as are above mentioned in whose cases the committee decides that such assistance is merited.” E

Clause 5 provides for the amendment of the deed and cl. 6 provides for winding-up in certain events. It is only necessary to say that it is admitted that the duration of the trust is properly limited so as not to infringe the rule against perpetuities. Clause 6 continues: F

“In the event of any such winding-up the committee (who shall continue in office notwithstanding the winding-up or that by reason of the cessation G

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- A of the company's existence its members have ceased to be the directors or employees of the company) may at their discretion apply the whole or such part of the fund then in the trustees' hands (both capital and unapplied income) after paying or providing for all administration expenses incurred but unpaid at the date of such winding-up and the costs and expenses of and incidental to such winding-up to the purchase of annuities for any beneficiaries for the time being in receipt of allowances out of the fund or for such other persons then eligible or potentially eligible to receive such allowances as the committee may select. The surplus if any then remaining in the trustees' hands shall be used for such purpose and in such manner for the benefit of employees or ex-employees of the company as the committee thinks most appropriate in the circumstances then existing and
- C upon the completion of such winding-up the committee and trustees shall be discharged from all the duties and trusts hereof and from all further responsibility with regard to the fund."

Two main questions arise. It is common ground that in exercising their powers under cl. 4 of the deed to make grants allowances and benefits the committee is exercising a power which is not coupled with a duty. It has been called in the cases a power collateral. Similarly if and when the fund is wound up under the provisions of cl. 6, it is again common ground that on the winding-up the committee have a power as to purchasing the annuities and so forth which again is a power collateral which is not coupled with a duty or trust. It is for the first time, when the clause speaks of the disposition of the surplus remaining in the trustees' hands, that a trust to distribute arises.

- E The first question is whether that trust to distribute is or is not valid. It is not in dispute that a trust to distribute a fund can only be valid if it is possible to ascertain the members of the class with sufficient certainty. If the members of the class are not ascertainable, then the trust is invalid and void. That was decided in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1) ([1954] 3 All E.R. 120), a decision of the Court of Appeal. The objects of the trust
- F are the employees or ex-employees of the company. Evidence is, of course, admissible on the question whether that trust to distribute among the employees or ex-employees is sufficiently certain. The evidence in this case, contained in the affidavit of the plaintiff, Mr. MacGregor, makes it clear beyond any doubt, that it is quite impossible to ascertain who are the ex-employees of the company. The main reason for that is this. The company carries on in certain
- G towns the business of confectioners. I am told (though it is not in evidence) that it has some seventy shops. A large number of its employees are young ladies who are shop assistants, and one is not surprised to learn from the affidavit that shop assistants of that class tend frequently to change their employment. Although the evidence shows that this company makes the most valiant efforts to keep a record of its employees, it has in fact proved quite impossible to make
- H a list of ex-employees which bears any relationship to accuracy. I might sum up the evidence in the words of Mr. MacGregor in para. 5 of his affidavit:

- I "Although it would be possible for the trustees or committee of management of the fund at any given time to obtain or prepare a list of the persons employed by the company at that time, it was on Feb. 14, 1950 [the date of the deed] and is now impossible to make a complete list of all the persons who have been employed by the company since its incorporation on Apr. 20, 1931."

It follows from that that the trust to distribute the surplus is necessarily void and, therefore, the ultimate surplus is held on a resulting trust for the settlor.

A different and difficult problem arises, however, with regard to the exercise of the powers during the life of the fund under cl. 4 and on the winding-up of the fund under cl. 6, those both being, as I have said, not trust powers, but powers collateral.

In such a case the authorities establish that it is not necessary that the whole class of possible beneficiaries should be ascertained or ascertainable. That is in complete contrast, of course, to the case of a trust power. It is enough, if it is possible to decide with sufficient certainty whether any particular praepositus is an object of the power or not. That was decided in *Re Gestetner, Barnett v. Blumka* (2) ([1953] 1 All E.R. 1150) which, I think, must be taken to have been approved by the Court of Appeal in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1) and was followed by ROXBURGH, J., in *Re Coates, Ramsden v. Coates* (3) ([1955] 1 All E.R. 26).

That being the law, I turn to cl. 4 to see whether there is sufficient certainty in that clause. Counsel for the settlor concedes that there is sufficient certainty in para. (i) because, although it cannot be ascertained at any given moment who are all the ex-employees of the company, it can, he admits, be ascertained whether any particular praepositus is one who it is correct to describe as having been employed by the company. There might be difficulties of proof in particular cases, but those difficulties must be solved by the committee, or, if necessary, by the court by the ordinary methods of proof. There is no difficulty in para. (iii) concerning the widows of ex-employees for the like reason. There again difficulties may arise in individual cases, but it is possible to ascertain whether a particular person is one of whom it is proper to say that she is the widow of someone who has been employed by the company.

Counsel for the settlor directs his attack on these powers by reason of the contents of para. (iv) and para. (v). He attacks them, because he says that a gift to "other infant dependants of any such employees or ex-employees" and a gift to "other dependent relatives of any such employees" is too vague to satisfy the necessary test of certainty. He does not attack the gift to dependent relatives on the ground that "relatives" is a word which is too vague. He concedes quite properly on the authorities that a power to appoint among relatives is good. There might be difficulties if it had been a trust to distribute among relatives, for in a document which is inter vivos and not testamentary, it may be that "relatives", which cannot be read as "next of kin", is itself too vague; but that does not arise in this case. Therefore, his challenge is directed entirely to the reference to infant dependants and other dependent relatives. He submits that those phrases import a qualification which is so uncertain and vague as to make it impossible to predicate with the requisite certainty, whether or not a particular person is an object of the power. It seems to me logically that where an alleged uncertainty lies not in some uncertainty in fact—e.g., in the impossibility of ascertaining ex-employees, as in this case—but in the alleged uncertainty in the language used to describe the qualifications necessary for inclusion among the objects of the power, the problem is the same whether one has to consider a power of selection or trust to divide. For this reason I am unable to accept the attractive argument on behalf of the second defendant that I am relieved of the duty of considering two allegedly conflicting authorities, which I shall have to mention in a moment on the ground that one is a test to distribute and the other a power to select. I think the problem which I have to endeavour to solve is conveniently stated in the judgment of ROXBURGH, J., in *Re Coates* (3) ([1955] 1 All E.R. at p. 28) although it does not make the solution any easier:

"This question of uncertainty is a vexed question. Language draws a series of mental pictures in the mind of the person hearing the words spoken. Those pictures are sometimes fairly well defined, and sometimes blurred in outline, but they are never very precise. Language is a medium which disdains mathematical rules. I, for my part, accept as my guide what LORD TOMLIN [sitting as an additional judge of the Chancery Division] said in *Re Ogden, Brydon v. Samuel* (4) ([1933] Ch. 678) which was cited by HARMAN, J., in *Re Gestetner* (2). LORD TOMLIN said ([1933] Ch. at p. 682): 'The

- A question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the court in coming to the conclusion that the gift is bad.' That appears to me to be all that can possibly be said on the subject of uncertainty."
- B The first of these conflicting authorities is *Re Ball, Hand v. Ball* (5) ([1947] 1 All E.R. 458), which is also a decision of ROXBURGH, J. There a will contained a gift "to my son C. or his dependants equally". The court held that there was not sufficient certainty about the word "dependants", when occurring in a will, to enable the court to give effect to a gift to "dependants"; and that, therefore, as the gift to "dependants", in the case before the court, was substitutionary and incapable of taking effect the gift to the son C. took effect as an absolute and indefeasible gift. During the argument reference was made to the Workmen's Compensation Act, 1925, and the Inheritance (Family Provision) Act, 1938. The judgment is short. ROXBURGH, J., said ([1947] 1 All E.R. at p. 458):

- D "It is surprising that the word 'dependants' has, apparently, not been considered in any reported case on the construction of a will. It has been given statutory definition in the Workmen's Compensation Act, 1925, s. 4, and in the Inheritance (Family Provision) Act, 1938, s. 1, but those two definitions are mutually exclusive and that shows that I could not apply either of them as a suitable definition for the word 'dependants' in a will. Counsel for the three children of the son, Charles, has suggested two possible definitions. First: 'A person who to some extent depends on others for the provision of the ordinary necessities of life', and, secondly: 'A person to some extent maintained by another.' If that is the best that can be done in the way of definition—and I have no reason to think that anything better can be done—there is not sufficient certainty about the word 'dependants' in a will to enable the court to give effect to it. Therefore, as the gift to
- E 'dependants' in the present case is a substitutionary gift and is, in my judgment, incapable of taking effect, the gift to the son, Charles Ball, takes effect as an absolute and indefeasible gift, and I so hold."

- The other is *Re Hooper's 1949 Settlement* (6) ((1955), 34 A.T.C. 3), in which there was a settlement for the benefit of employees and ex-employees and their
- G dependants on the same broad lines as in the case before me. The clause dealing with dependants was in these terms:

- "5. The trustees shall during the trust period pay and apply any income arising from the trust fund as they shall in their absolute discretion think fit for the purposes following or any one or more of them that is to say . . .
- H (b) In making any grant allowance or gift to Doulton's employees or any one or more of them whether by way of making provision during sickness or permanent or temporary incapacity or to their wives widows children or dependants or otherwise as the trustees may think fit . . ."

- A number of matters was discussed in that case but the learned judge dealt quite shortly with the point concerning the meaning of the word "dependants".
- I He said (*ibid.*, at p. 7):

"But Mr. Stamp says that that leaves out of account this much more dangerous word or this uncertain description, 'dependants'. He says 'dependants' is a very uncertain word, and one which would give great difficulty in regard to the ascertainment of every possible beneficiary in the present case. No doubt that increases the class or widens the class which has to be considered, but it does not seem to me that it is more than a question of fact, once you have ascertained the names of the employees and of the

dependants they have or may have had. That seems to me perfectly possible of ascertainment.' ” A

So far as appears from the report, *Re Ball* (5) was not cited to the learned judge. It is also true that he does not, at any rate in any detail, deal with the question of the quality of the word “ dependant ” which of itself is said to lead to uncertainty.

I was referred by way of illustration to an authority under the Workmen's Compensation Act, 1925. It is clear, as ROXBURGH, J., said, that authorities on particular words used in the Workmen's Compensation Act, 1925, cannot be decisive in this question, but I have been referred to one case which I think is helpful, viz., *Simmons v. White Brothers* (7) ([1899] 1 Q.B. 1005). The headnote is:

“ By s. 7 (2) of the Workmen's Compensation Act, 1897, the word ‘ dependants ’ means ‘ in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death ’ ” C

Perhaps that is not a very satisfactory method of trying to define a dependant. It was held: D

“ That, in order to bring himself within the Act as a dependant, an applicant for compensation must show that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessities of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a dependant is a question of fact in each particular case.” E

In that case a boy of some fourteen years of age was accidentally killed after he had been in the employ of the employers for some five weeks. His wages were 17s. a week which he handed to his parents. The learned county court judge reached the conclusion, which at first sight is a little surprising, that the parents were dependents on their son, a boy of fourteen. The Court of Appeal held that it was really a question of fact and they could not disturb the learned county court judge's finding. COLLINS, L.J. (*ibid.*, at p. 1007), approved a passage to be found in MINTON-SENHOUSE AND EMERY ON ACCIDENTS TO WORKMEN, at p. 156, in these terms: F

“ It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessities of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator.” G H

ROMER, L.J., agreed and he said ([1899] 1 Q.B. at p. 1008):

“ As a question of principle is to some extent involved in the present case, I desire to say that I agree with the passage in MINTON-SENHOUSE AND EMERY ON ACCIDENTS TO WORKMEN, and that in my judgment a ‘ dependant ’, in order to get compensation, must be dependent in the proper sense of that term, and that it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent on him for the ordinary necessities of life, having regard to his class and position in life.” I

It seems from that that ROMER, L.J., thought that there might be such a thing as a dependant in the proper sense of the term. Of course the problem which they had to consider is different from the problem I have to consider. One

A cannot say that a definition in an Act of Parliament is void for uncertainty; one has to make it work as best one can.

The problem which I have to consider is whether the use of the words "dependants" or "dependent relatives" in a deed such as this is too vague and uncertain. The real question is this: Does a gift to the dependent relatives of employees in a deed of gift give to the court a sufficiently clear picture of the requirements to be satisfied to qualify the object of the power as a member of the class or is some further definition required? Counsel for the second defendant submitted that a gift to "friends" standing alone would clearly be too vague and too uncertain for it would instantly provoke the question "what friends?". On the other hand, counsel for the settlor enlarged on a number of examples and on the many difficulties which would arise in many cases. One can see that there may be many difficulties in deciding in any particular case whether it was proper to describe somebody as a dependent relative or not. I do not think that this case is really governed by cases on wills, the correctness of which I do not challenge. Different considerations may well arise when a testator is talking of a gift to his dependent relatives. This is a deed providing for dependent relatives of employees or ex-employees of a company which is a very different thing. I think that the solution to this case is this. The problem must be approached in a practical way. Here is a committee consisting of three business men, the settlor, the governing director, Mr. McGee, an employee representing the employees, and the first plaintiff, the auditor. They are administering a trust which is for the benefit of employees, ex-employees and their dependent relatives. I do not believe, although there may be difficult cases, that it is impossible to decide who qualifies as a dependent relative. Dealing with the class of employees of this very considerable company and exercising ordinary common sense, I think that the committee and if necessary the court, can come to a conclusion in any given case whether or not a particular praepositus is properly described as a "dependent relative". Accordingly, in my judgment, the provisions in cl. 4 of the deed so far as that point is concerned are valid. It is common ground that if that be so with regard to cl. 4 the same result must flow with regard to the powers contained in cl. 6 which arise on the winding-up of the fund.

Counsel for the settlor has another point with which I must now deal. He submits that if property is vested in trustees with a mere power, not coupled with a trust to distribute it among a class, with no gift over on failure to exercise that power, i.e., no gift over either expressed in the deed or to be implied on construction of the deed itself, then the power to appoint is in fact invalid and inoperative and the property is held by the trustees on trust for the settlor. He says in such a deed as he envisages there is no trust which the court can execute. He relies on the well-known principle set out in the judgment of LORD ELDON in *Morice v. Bishop of Durham* (8) ((1805), 10 Ves. 522), that if there is no trust that the court can execute, then it cannot be a valid trust. However, he is driven to concede that if in a particular case there was, either expressly or by implication from a proper interpretation of the deed, a trust for the settlor in default of the exercise of the power, then the power would be valid, because in default of its exercise there would be a trust in the deed for the settlor. That argument seems to me a startling one. If the deed expresses what the law would otherwise imply, the point admittedly goes; but if the deed does not express it, and, therefore, the law implies what the deed might have expressed, the point is apparently a good one. It seems to me in principle that the presence of a trust which the court can execute is necessary to its validity, but that trust may be expressed or it may be implied by the operation of law. If in default of the exercise of a mere power, there remains a trust by operation of law for the settlor that is a trust which the court will execute. It may be very simple to execute it by merely transferring the property to the settlor but it is a trust which the court can execute and with all

respect to the argument I do not agree with it. No authority has been cited in favour of the proposition. As counsel for the second defendant pointed out, it would have provided a very short answer in *Re Combe, Combe v. Combe* (9) ([1925] 1 Ch. 210), and the point, if it is one, was overlooked by so eminent a judge as TOMLIN, J., and so eminent a conveyancer as SIR ARTHUR UNDERHILL. The point was apparently raised in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1), but it was not dealt with directly by JENKINS, L.J., in his judgment. As I have said, I do not agree with that point.

Accordingly it follows that the powers during the life of the trust and the power which arises on the winding-up of the trust are in my judgment valid, but the trust of the surplus is invalid and I must declare accordingly.

Declarations accordingly.

Solicitors: *Batesons & Co.*, Liverpool (for all parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re HAYWARD (*deceased*).
KERROD v. HAYWARD.

[CHANCERY DIVISION (Upjohn, J.), October 9, 17, 1956.]

Administration of Estates—Hotchpot—Intestacy—Nominations by deceased in favour of son of middle age—Relevance of size of payments in deciding whether advancement intended—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 47 (1) (iii).

In 1946 a father nominated savings certificates valued at £315, and the amount (which was £191) standing to his credit in the Post Office Savings Bank, in favour of his elder son. In 1949 the father died intestate leaving a net estate of £1,779 which was divisible between his two sons on the statutory trusts in accordance with the Administration of Estates Act, 1925, s. 47 (1). At the time of the nominations, the elder son was middle-aged and in Her Majesty's armed forces. No evidence as to the intention of the father in making the nominations was adduced. On the question whether the savings certificates and bank balance were nominated by way of advancement and should accordingly be brought into account in the division of the intestate's estate as having been paid towards satisfaction of the share of the elder son by virtue of s. 47 (1) (iii)* of the Act of 1925,

Held: although the amount of a gift inter vivos or of a nomination might be so large as to raise a presumption that the gift or nomination was made by way of advancement within s. 47 (1) (iii), yet the nominations in this case were not sufficiently large to raise that presumption having regard to the age of the elder son and in the absence of evidence of the nature of the purposes for which the nominations were made.

Dictum of SIR GEORGE JESSEL, M.R., in *Taylor v. Taylor* ((1875), L.R. 20 Eq. at p. 157) and dictum of VAUGHAN WILLIAMS, L.J., in *Re Scott* ([1903] 1 Ch. at p. 10) applied.

Re Livesey's Settlement Trusts ([1953] 2 All E.R. 723) criticised.

[As to payments by way of advancement, see 16 HALSBURY'S LAWS (3rd Edn.) 403, para. 777; and for cases on the subject, see 20 DIGEST 463, 464, 1890-1898.]

For the Administration of Estates Act, 1925, s. 47 (1) (iii), see 9 HALSBURY'S STATUTES (2nd Edn.) 754.]

Cases referred to:

- (1) *Re Livesey's Settlement Trusts, Livesey v. Livesey*, [1953] 2 All E.R. 723; 3rd Digest Supp.

* The terms of the paragraph are set out at p. 610, letter B, post.

- A (2) *Taylor v. Taylor*, (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 20 Digest 458, 1825.
- (3) *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 20 Digest 459, 1840.

Further Consideration.

- B The plaintiffs, William Kerrod and Mabel Elizabeth Kerrod, were the executors of Frank Cyril Hayward who died on Aug. 11, 1951. He was the elder son of Frank Charles Hayward, deceased (hereinafter called "the father"). The father died on Dec. 11, 1949, having by his will devised and bequeathed all his property to his wife who predeceased him. The defendant, Reginald Charles Hayward, was the administrator of the estate of the father. On May 19, 1955,
- C the plaintiffs by originating summons commenced proceedings for the administration of the estate of the father. On July 18, 1955, HARMAN, J., in chambers, made an order for administration, ordered the usual accounts and inquiries to be taken and adjourned the action for further consideration. On July 9, 1956, Master WHEATCROFT certified that there was a balance of the estate of
- D £1,779 8s. 1d., which sum the defendant claimed to have distributed to himself as beneficiary, so that the only property of the father's estate outstanding was that sum due from the defendant subject to his claim. Although the defendant did not move that the certificate be discharged, UPJOHN, J., allowed him to raise the question whether nominations by the father in favour of his elder son were to be accounted for as being in partial satisfaction of the elder son's
- E share of the residue.

E. F. R. Whitehead for the plaintiffs.

The defendant appeared in person.

- UPJOHN, J.: This application raises a point of some interest. It arises on the further consideration of an action for administration begun in this court on May 19, 1955. The question is whether certain sums belonging to an intestate,
- F Frank Charles Hayward, in the Post Office Savings Bank and in National Savings, which were nominated by him to his elder son, ought to be taken into account as an advancement in the administration of his estate.

- The intestate died on Dec. 11, 1949, leaving two sons. The elder was Frank
- G Cyril Hayward who died on Aug. 11, 1951, and the plaintiffs in this action are his executors. The defendant is the younger son and he has appeared in person before me. Letters of administration to the intestate were granted to him on Nov. 22, 1951. On July 18, 1955, an order was made for the administration of the estate, directing the usual accounts and inquiries. The master duly certified the results of those accounts and inquiries by a certificate dated July
- H 9, 1956.

- [His LORDSHIP referred to the course of proceedings and objections raised by the defendant and disallowed and, after stating that on looking at the papers one point had appeared with which in justice to the defendant the court should deal and that the court would treat the defendant as having moved to vary the certificate, His LORDSHIP continued:] The point is this. By nomination on
- I Oct. 31, 1946, the intestate nominated National Savings Certificates to the value of £315 15s. 6d., standing in his name, in favour of his elder son and on Nov. 21, 1946, he nominated the sum of £191 17s. 11d. standing to his credit in the Post Office Savings Bank again in favour of his elder son. Under the relevant statutory provisions*, those respective sums, the nominations not having been revoked, vested in the elder son on the death of the intestate and did not become

* See the Savings Certificates Regulations, 1933 (S.R. & O. 1933 No. 1149), reg. 17, and the Post Office Savings Bank Regulations, 1938 (S.R. & O. 1938 No. 556), reg. 35.

part of his estate. The question is, should those sums amounting in the aggregate to £507 be brought into account by the estate of the elder son in the distribution of the estate? That depends on s. 47 (1) (iii) of the Administration of Estates Act, 1925, which is in these terms:

“Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives.”

I apprehend that to come within that section the property which is nominated must be by way of advancement or on marriage (which does not arise) or settled for the benefit of such child. In the circumstances of this case I must, therefore, find something in the nature of an advancement if the property is to be brought into account.

Counsel for the plaintiffs submitted in this case that the nominated sums were not capable of being an advancement. The matter stood over in order that the authorities might be further looked into, because counsel naturally was not prepared to deal with the matter on the earlier hearing for it did not arise on the certificate. As a result of his further researches he admits that the nomination of sums, such as we have here, are capable of being an advancement within the meaning of para. (iii) of s. 47 (1) which I have just read; but he submits on the evidence that in the present case there is not such an advancement. There is no evidence on the matter except that these sums were nominated by the intestate to the elder son on the dates that I have mentioned in 1946 and that the elder son was then in the forces. The sums so nominated amounted to just over £500. When the deceased died some three years later his net estate was found to amount to £1,700 or a little more.

In the recent case of *Re Livesey's Settlement Trusts, Livesey v. Livesey* (1) ([1953] 2 All E.R. 723), ROXBURGH, J., held that no presumption of advancement could arise merely by the fact of the size of the sums advanced, and he held there must be positive evidence of it. With all respect to that decision, it seems to me inconsistent with two earlier authorities which, from the report of the case, do not seem to have been cited to ROXBURGH, J. The first one is *Taylor v. Taylor* (2) ((1875), L.R. 20 Eq. 155), and I can usefully read a part of the judgment of SIR GEORGE JESSEL, M.R., where he says this (*ibid.*, at p. 157):

“I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock-in-trade; all these things I understand to be portions or provisions. Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose. But I do not think that these words ‘by portion’ are to be disregarded, nor is the word ‘advancement’ to be disregarded. It is not

- A every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shown to be that which every one would recognise as being for establishing the child or making a provision for the child."
- B In *Re Scott, Langton v. Scott* (3) ([1903] 1 Ch. 1) VAUGHAN WILLIAMS, L.J., made some further observations on the question of the rule against double portions, and there again he pointed out (*ibid.*, at p. 10) that the gift of
- C "... a large sum of money—bears so much the characteristics of a portion that, in the absence of anything to rebut the conclusion, we ought, I think, to assume that the first of the presumptions mentioned by BOWEN, L.J.,* applies."
- I propose to approach this case on the footing that in the case of large sums that fact may be sufficient to raise the presumption of an advancement. The question is what has happened in this case? Mr. Hayward argued the case extremely well. He has cited to me a number of authorities and I found his argument of assistance. But it is fair to him to point out that a number of the authorities to which he referred me used the word advancement in another sense: that is to say whether a sum of money paid by a parent to a child is by way of advancement or whether the child held the money from the parent on a resulting trust. When any payment is made by a parent to a child, there may be a presumption of advancement in that sense, but that type of advancement is not the advancement with which we are now concerned, which is an advancement by way of portion the general nature and characteristics of which have been sufficiently described in the passage I have read from the judgment of SIR GEORGE JESSEL, M.R.
- E I think that this is a difficult and border-line case. The sum of £500 is not by itself a large sum. It is, however, quite large compared to what, I must assume, were the total assets of the intestate at the time when he made his nomination. At that time the son was in middle age and in the absence of some evidence as to the nature of the purposes for which these nominations were made, I do not think that the sum is sufficiently large by itself to raise the presumption of advancement, although I regard it as rather a border-line case as the intestate was himself a man of no great wealth. However, in the result,
- G in my judgment, this sum does not have to be brought into account by the plaintiffs as part of the estate of the elder brother.

Order on further consideration accordingly.

Solicitors: *H. W. & S. Patey* (for the plaintiffs).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

* The reference was to the judgment of BOWEN, L.J., in *Re Lacon* ([1891] 2 Ch. at pp. 497, 498), where he said: "Accordingly, in order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule."

DAVIDSON v. DEEKS (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Danckwerts, J.), October 17, 1956.]

Income Tax—Allowance—Maintenance—Private road—Cost of local authority making up private road—Frontager not owning private road—Not part of maintenance and repair of frontager's dwelling-house—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 101 (1).

The owners of a house and land let it on a ninety-nine year lease but retained possession of the adjoining road which had previously been constructed by the owners as a private road. The road was taken over and made up by the local authority under the Private Street Works Act, 1892, the works carried out being found to constitute repair and maintenance of the road. The apportioned cost of the works was recovered from the taxpayer, the lessee of the house and land, as "owner" of the land fronting on to the road for the purposes of the Act. The taxpayer claimed relief against the Sch. A assessment of his house and land in respect of the payment made as being maintenance within s. 101 (1) of the Income Tax Act, 1952, having regard particularly to s. 101 (2) under which maintenance included the replacement of farmhouses, farm buildings, cottages, fences and other works.

Held: the taxpayer was not entitled to the relief claimed, since the expenditure was incurred not in relation to the land that was the subject of the Sch. A assessment but in relation to the adjoining road, and the "other works" referred to in s. 101 (2) of the Income Tax Act, 1952, meant works that were on the land which was the subject of the Sch. A assessment.

Appeal dismissed.

[As to the cost of maintenance and repairs exceeding the repairs allowance for Sch. A purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 49, para. 95; and for a case on the subject, see 28 DIGEST 15b.]

For the Income Tax Act, 1952, s. 101 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 95-97.]

Cases referred to:

- (1) *Pearce v. Doulton*, [1947] 1 All E.R. 378; 27 Tax Cas. 405; 2nd^{*} Digest Supp.
- (2) *Inland Revenue Comrs. v. Wilson's Executors*, 1934 S.C. 244; 18 Tax Cas. 465.

Case Stated.

The taxpayer appealed to the General Commissioners of Income Tax for the division of Howes in the County of Cambridge against the refusal of the respondent inspector of taxes to grant relief against Sch. A to the Income Tax Act, 1952, for the year ended Apr. 5, 1954, in respect of a sum of £70 6s. 11d. paid by him for road works carried out by Cambridge City Council under the Private Street Works Act, 1892. The question for determination was whether the taxpayer was entitled to an allowance under s. 101 (1) of the Act in respect of the sum.

The taxpayer was the lessee of a plot of ground of one rood, twenty poles, having a frontage of about sixty feet to Sedley Taylor Road, Cambridge, and a dwelling-house thereon, 32, Sedley Taylor Road. He was assessed to Sch. A in respect of the house and land for 1953-54. He was the "owner" of the house and land for the purpose of s. 101 (1), but was at no time the "owner" of any part of the road within the section and at no relevant time had he been charged to Sch. A in respect of it. The road was constructed in 1926 and 1927 as a private road by Trinity College, Cambridge, on land of which the college was then and was still the freehold owner. On Aug. 1, 1931, a lease of the land and dwelling-house was granted by the college to George Clark for a term of ninety-nine years

A from Dec. 25, 1929, at a rent of £1 for the first year of the term and £11 in each year thereafter. There was a provision that the rent should be reduced by £1 per annum for the remainder of the term on production to the lessors of proper evidence of payment by the lessee to the local authority of his proportion of the cost on the taking over of the road by the authority or on payment of the proportion to the college. The college also reserved the right to alter or modify
B the scheme of road as laid out on the plan of the estate and to the running of water and soil from other lands and buildings of the college through sewers, drains and watercourses on the land and house. Since 1949 the land and house had been held by the taxpayer under the lease as successor in title of George Clark.

By a letter dated Apr. 20, 1950, the college notified frontagers to the road that they intended to ask Cambridge Borough Council to make up and take over the road and offered to make a contribution to the cost. On Jan. 2, 1951, the taxpayer was notified that the council had resolved to execute certain street works under the Private Street Works Act, 1892. An estimate of the works to be carried out and a provisional apportionment of their cost among the frontagers was approved by the council. The proposed works were objected to by the
D taxpayer and other frontagers under s. 7 of the Act of 1892, but the objection was disallowed by a court of summary jurisdiction and the proposal to carry out the works was confirmed. The works were completed in March, 1952, and the sum of £70 6s. 11d., the taxpayer's liability on the apportioned cost, was paid on Sept. 30, 1953. An appeal by the taxpayer and other frontagers to the Ministry of Housing and Local Government under s. 268 of the Public Health
E Act, 1875, was dismissed on Feb. 20, 1954. On Mar. 8, 1954, the college sent a cheque for £42 9s. 8d. to the taxpayer as an *ex gratia* payment of half the sum of £70 6s. 11d. and other sums paid by the taxpayer. It was found as a fact that the works constituted repair and maintenance of the road.

The taxpayer contended that: (i) as he had paid for works of repair and maintenance carried out on the road as owner of his house under the Private
F Street Works Act, 1892, which referred to frontagers as owners without distinction between freehold and leasehold owners, he should be similarly regarded as owner when seeking relief under s. 101 (1) of the Income Tax Act, 1952; (ii) as an expense incurred on repairs to the road providing access to the house, the expenditure was allowable as relating to the house and land under s. 101 (1) of the Act of 1952, which was not limited to works on the actual property (s. 94
G) provided for relief on expenditure on draining, fencing, embanking and sea walls and the expenditure fell within the words "and other works" in s. 101 (2)).

The Crown contended that: (i) an allowance under s. 101 (1) could be granted only if the road was charged under Sch. A, and as there was no such charge no relief could be given; (ii) an allowance under s. 101 (1) could only be granted (if at all) to the owner of the road and not to the owner of adjoining land.

H The commissioners held that the taxpayer was not entitled to claim maintenance relief under s. 101 (1) on the ground that: (i) he was not the owner (or lessee) of the land on which the expenditure was incurred; (ii) the land was not assessed to tax under Sch. A; and (iii) the expenditure was incurred by virtue of the taxpayer being the owner (lessee) of land fronting and abutting on the roadway and assessed to tax under Sch. A. They disallowed the appeal. The
I taxpayer appealed.

The taxpayer appeared in person.

B. L. Bathurst, Q.C., and Sir Reginald Hills for the Crown.

DANCKWERTS, J.: The taxpayer is tenant of the land and house known as 32, Sedley Taylor Road, Cambridge, under lease for some ninety-nine years from 1929, at a rent of £11 a year, and he claims to be entitled to relief against Sch. A tax in respect of a sum of £70 6s. 11d. which he had to pay for road works carried out by Cambridge City Council under the Private Street Works Act, 1892.

The land is assessed to Sch. A tax at £68 per annum gross and £54 5s. per annum net. He has to pay Sch. A tax, and is unable to get it back from his landlord because he is paying less than the rackrent of the property. He claims that he is entitled to an allowance in respect of the sum of £70 6s. 11d. by reason of the provisions relating to allowances for repairs in s. 101 of the Income Tax Act, 1952, which re-enacts r. 8 of Sch. A to the Income Tax Act, 1918. He claims he has paid this by reason of his occupation of the land in question, and therefore it ought to be an allowable claim under s. 101 for maintenance under the provisions of that section. The case against him is that it is not maintenance of the land of which he is tenant, but maintenance, if it is maintenance at all, of the land representing the site of a road on which his property fronts, and therefore it is not within the terms of s. 101. That, very shortly, is the issue.

Looking at the Private Street Works Act, 1892, under which the work was done by the local authority and under which the charge on the taxpayer was made by apportionment, it is plain that he is not assessed to that charge by reason of any ownership of the road, but simply because he is owner of the land of which he is tenant, and in respect of which he is assessed to Sch. A tax and the land fronts on to the road in question. This payment obviously affects the land and its amenities and value but I have to find whether the claim is within the terms of the statute, bearing in mind that this is a claim, not by the Revenue to tax, but by the taxpayer for exemption or relief in respect of tax. In other words, the onus is on the taxpayer to show that the words of s. 101 of the Income Tax Act, 1952, confer on him a right to a further allowance against Sch. A tax.

Section 101 (1) provides:

"If the owner of any land (inclusive of farmhouses and other buildings, if any) or of any houses, being land or houses the assessment on which is reduced for the purposes of collection, shows that the cost to him of maintenance, repairs, insurance and management, according to the average of the preceding five years, has exceeded, in the case of land, one-eighth part of the annual value of the land as adopted under Sch. A, and, in the case of houses, the authorised reduction as defined by the last preceding section, he shall, in addition to the reduction of the assessment, be entitled, on making a claim for the purpose, to repayment of the amount of the tax on the excess.

"Provided that—(a) no repayment of tax shall be made under this section in respect of the cost of maintenance, repairs, insurance or management if or to such extent as that cost has been otherwise allowed as a deduction in computing income for the purposes of income tax; and (b) a claimant shall not be entitled to relief under this section in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain or satisfy out of any payment which he is liable to make to any other person.

"(2) For the purposes of this section, 'maintenance' shall include the replacement of farmhouses, farm buildings, cottages, fences and other works, where the replacement is necessary to maintain the existing rent, and shall also include additions or improvements to farmhouses, farm buildings or cottages, but only if no increased rent is payable in respect of the additions or improvements, and in so far as they are made in order to comply with the provisions of any statute or the regulations or byelaws of a local authority."

The taxpayer says the words "and other works" in sub-s. (2) are apt words to refer to the works which have been done by the local authority, the cost of which, in part at any rate, has been charged against him, and therefore he comes within the words of that sub-section.

However, one has to read the section as a whole, and, although the opening words are vague enough, "If the owner of any land", I think that it is plain,

A from the terms of the whole sub-section, that it is referring to the owner of any land which is the subject of Sch. A tax who is making a claim for further allowance in respect of repairs. Having received some relief already under s. 99 and s. 100, he is here being given some further relief in respect of the expenses of the maintenance, repairs, insurance and management. It is impossible to avoid the conclusion that all those words must relate to maintenance, repairs, insurance and management in respect of the land which is under consideration and is charged to Sch. A. Therefore, maintenance, repairs, insurance and management of that land only are referred to. In the same way, in the enlarged meaning given to "maintenance" in sub-s. (2), "replacement of farmhouses, farm buildings, cottages, fences and other works" must all relate to the Sch. A tax on the piece of land on which the owner is claiming that, as he is assessed to Sch. A, he should receive further relief. Therefore, *prima facie*, any other sum expended on land which is not the subject of the particular assessment is not material.

As the taxpayer has correctly pointed out, certain reliefs given in s. 94 (1) plainly include works done on other lands apart from that which is the subject of the Sch. A assessment; e.g.,

D " (a) the amount charged on lands, tenements, hereditaments and heritages by a public rate or assessment in respect of draining, fencing or embanking "

may well include charges in respect of other land. Embanking is something which may be necessary to preserve the land which is subject to Sch. A tax and which may be done on different land. In the same way, by para. (c) an allowance is given in respect of the amount expended by the landlord or owner of the land on an average over twenty-one years in making or repairing sea walls or other embankments necessary for the preservation or protection of the lands against the encroachment or overflowing of the sea or any tidal river, although the sums expended may not have been charged on the lands by a public rate or assessment. That is relief in respect of expenditure by him which, in the case of a sea wall, may well be on land some distance from the land charged to Sch. A, but necessary for the preservation of that land. The Revenue's natural observation is that these are specific cases of relief given by the taxing Act, though the expenditure has in fact been made on other land, and their allowance by the Act is therefore not necessarily any argument for the construction of s. 101.

I have been referred to two cases, neither of which is really of great assistance. In *Pearce v. Doulton* (1) ([1947] 1 All E.R. 378) ATKINSON, J., said (at p. 379) that the provision about "maintenance, repairs, insurance" (which was the point in that case) "and management" obviously related to the land subject to the assessment to Sch. A, and that seems to me the principle to be applied in the present case. *Inland Revenue Comrs. v. Wilson's Executors* (2) ((1934), 18 Tax Cas. 465) shows that expenditure of a capital nature cannot be the subject of relief against an income claim under Sch. A under those provisions. That may be so, and possibly the making up of a road, even though it is, in a sense, maintenance, is a charge once and for all which is of a capital nature. It is unnecessary for me to decide that point, however, because I am reluctantly brought to the conclusion that, on the terms of the Act, an allowance cannot be claimed for expenditure which is on other land, though the taxpayer has been charged by virtue of his ownership or occupation of the particular land, for the purposes of s. 101 of the Income Tax Act, 1952.

I Accordingly, the taxpayer's appeal must be dismissed, although he has to make this expenditure by reason of his occupation of the land.

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue.*

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

SIEVWRIGHT v. SIEVWRIGHT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), July 18, 19, 1956.]

Variation of Settlement—"Post-nuptial settlement"—*Conveyance after marriage to husband and wife of dwelling-house by way of gift*—*Sale of house after decree absolute of divorce*—*Division of part of proceeds of sale before application for variation of settlement*—*Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.*

The parties were married in 1940, and there was one child of the marriage. In 1946 the wife's father caused a dwelling-house, which became the matrimonial home, to be conveyed to the parties as a gift to be held by them as joint tenants on trust for sale. In January, 1950, the wife was granted a decree nisi of divorce on the ground of the husband's adultery and she was given the custody of the child. The decree was made absolute on the husband's application in November, 1950. In 1951 the parties signed an agreement to the effect that the matrimonial house should be sold and the net proceeds of sale paid into a banking account in the joint names of their respective solicitors to be retained by them pending settlement either by agreement or order of the court of any outstanding questions as to the disposal of furniture and matrimonial effects. The sale took place and in December, 1951, the wife signed a document authorising the solicitors for both parties to pay £3,000 to herself and £3,000 to the husband out of the proceeds of the sale. The sums of £3,000 were paid accordingly. Certain moneys remained in the joint account and these together with other sums agreed to form part of the one fund are referred to as "the £2,000 fund".

In November, 1955, the wife applied for leave to file an application for variation of settlement. Leave was granted, and she applied (i) for an inquiry whether there was a post-nuptial settlement and of what it consisted, (ii) for the variation of any such settlement by extinguishing the husband's interest at and from the date of the decree absolute, and (iii) for an order for the maintenance of the child of the marriage. It was agreed (a) that the £2,000 fund represented property that was the subject of a post-nuptial settlement, viz., the conveyance of 1946, and (b) that it was no longer possible to trace the £3,000 received by the husband, but the wife contended that that sum had been received by him in a fiduciary capacity or as trustee and should therefore form part of the post-nuptial settlement. The registrar in his report expressed the opinion that the husband did not receive the £3,000 in any fiduciary or trustee capacity, and since that sum no longer existed it could not be brought back into settlement, that accordingly the post-nuptial settlement consisted of the £2,000 fund. The registrar recommended that, after payment of costs the balance of the £2,000 fund should be divided and one half should be paid to the wife and the other half should be held on trust for the child; the registrar also recommended that the husband should pay £200 a year (or £133 6s. 8d. annually if the wife were to be regarded as contributing from her means) for the education and maintenance of the child until she attained the age of eighteen. On an application by the wife to vary that report (i) by increasing the amount of maintenance for the child and (ii) by directing the husband to refund the sum of £3,000 to be held on trust,

Held: save that the order for maintenance would be expressed to continue "until further order" and the amount of the maintenance would be increased to £250, the registrar's report would be confirmed since, although at the date of the decree absolute the conveyance of 1946 constituted a post-nuptial settlement which could be the subject of an application to vary, yet when the parties, having sold the house, divided the £6,000

A between themselves they were exercising a power which had been given to them and which had not been determined or diminished, and accordingly, at the date of the hearing before the registrar some four years later the only subject-matter remaining effective under the settlement was the £2,000 fund.

B [As to the settlements that are variable being those in existence at date of decree absolute, and as to the considerations being those applicable at date of the hearing, see 12 HALSBURY'S LAWS (3rd Edn.) 451, para. 1014, notes (f) and (g); and for cases on the subject, see 27 DIGEST (Repl.) 641, 642, 6039, 6040.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

C For the Matrimonial Causes Rules, 1950, r. 3 (3) (h) and r. 44 (1), see 10 HALSBURY'S STATUTORY INSTRUMENTS 198, 219.]

Case referred to;

(1) *Colclough v. Colclough & Fisher*, [1933] P. 143; 102 L.J.P. 87; 149 L.T. 287; 27 Digest (Repl.) 655, 6169.

D Application.

The wife applied for the variation of a report of Mr. Registrar COLLIS dated June 11, 1956, in which he made recommendations consequent on her applying (i) for an inquiry as to a post-nuptial settlement arising out of the conveyance of certain property and funds representing the same, (ii) for variation of any settlement by cutting out the right, title and interest of the husband as though he had died at the date of the decree absolute and the wife had survived him, and (iii) for an order for the maintenance of the child of the marriage. The facts appear in the judgment.

D. A. Fairweather for the wife.

J. P. Comyn for the husband.

S. E. Williamson for the child.

F WALLINGTON, J.: I take the facts from the registrar's report dated June 11, 1956.

"On Sept. 3, 1949, the wife filed a petition for dissolution of marriage on the ground of the husband's adultery with a woman named, and she was granted a decree nisi on Jan. 18, 1950, and the wife was given the custody of the only child of the marriage, Linda Louise Sievwright, who was born on Nov. 25, 1946. The wife did not have the decree made absolute, and it was made absolute on Nov. 20, 1950, on the application of the husband.

G "The parties were married on Sept. 7, 1940, and by a conveyance dated Aug. 30, 1946, the wife's father caused certain property now known as 16 Wergs Hall Road, Wolverhampton, in the County of Stafford, which became the matrimonial home, to be conveyed to the parties as joint tenants on trust for sale. It is agreed that this property was a gift to the parties by the wife's father, although he was not a party to the conveyance. Considerable correspondence took place between the then solicitors for the wife and the solicitors for the husband, with regard to this property, certain furniture, and the maintenance of the child of the marriage, and on Apr. 9, 1951, the parties signed a document to the effect that the property should be sold and the net proceeds of sale be paid into a bank account in the joint names of the solicitors for the parties, to be retained by them pending settlement of any outstanding questions as to the disposal of furniture and joint matrimonial assets. On Dec. 17, 1951, the wife signed an authority directed to the solicitors for both parties to pay £3,000 to herself and £3,000 to the husband out of the before mentioned bank account, and payment of certain other moneys in connection with costs; and it is agreed that the moneys in this bank account were the proceeds of the sale of the property,

which had by then taken place. Until the wife's present solicitors came on the record as her solicitors on Nov. 11, 1955, the wife's solicitors for the purposes of her divorce petition had been her father's solicitors who had also acted in the conveyance of the said property in 1946.

"On Nov. 24, 1955, a summons was issued and served on the husband's solicitors, whereby the wife applied for leave to file notice of application for variation of settlement notwithstanding she was out of time for so doing, as such a notice to be within time should have been filed not later than Jan. 20, 1951. That application came before me on Dec. 19, 1955, when the wife was granted leave, the application for variation to be issued within two months. The costs of that summons were reserved. The application was issued on Dec. 30, 1955, and was directed to the husband, to his solicitors, to the bank holding the joint account before mentioned, to a firm of estate agents holding certain moneys, and to the wife's former solicitors. The application asked (i) for an inquiry as to a post-nuptial settlement arising out of the conveyance of the said property and funds representing same, which meant ascertaining whether there was a post-nuptial settlement at all, and if so what it consisted of; (ii) variation of any such settlement; and (iii) maintenance of the child of the marriage, and any such order for maintenance would necessarily be linked with any order made in respect of any variation of a post-nuptial settlement. Appearances to the application were entered by the husband and by the wife's former solicitors, but the bank, the estate agents and the husband's solicitors did not enter appearances.

"On May 28, 1956, the application came before me when the wife and the husband were both represented by counsel but the other respondents to the application did not attend and were not represented. The first question that arose was whether the child of the marriage should be separately represented, and it was agreed by counsel for the wife and for the husband (hereinafter called the parties) that the child ought to be separately represented on the consideration of this report by the judge, and accordingly I directed the wife's solicitors to instruct counsel separately to represent the child.

"Although it was not clear from the application and the pleadings that the £150 proceeds of the sale of certain furniture in the hands of the estate agents was claimed to form part of the post-nuptial settlement, it was agreed between the parties that this sum should be deemed to be part of the post-nuptial settlement and should be linked with the £1,790 in the bank, which it was agreed was a post-nuptial settlement. These two sums, together with bank interest, now exceed £2,000, and are hereinafter referred to, for convenience, as 'the £2,000 fund'. The wife asks that the husband's share of any post-nuptial settlement be applied for the exclusive benefit of the child. I think that the husband's counsel suggested that the whole of the post-nuptial settlement should be applied for the child if the husband's share was to be so dealt with. Counsel for the wife referred me to *Colclough v. Colclough & Fisher* (1) ([1933] P. 143) and I see no reason to recommend that the wife's interest in her share in the proceeds of the freehold property should be curtailed.

"It was contended by counsel for the wife that the £3,000 which the husband had received and which it was admitted by him was part of the proceeds of the sale of the freehold property should form part of the post-nuptial settlement whether or not this £3,000 had disappeared and was no longer in the hands of the husband, either as money or in the form of some other asset on the ground that the husband had received it in a fiduciary capacity or as a trustee, and that he should therefore bring a sum of £3,000 into the post-nuptial settlement. The wife's counsel further contended

A that if the husband did not receive the £3,000 in any such capacity as aforesaid, nevertheless if the £3,000 could be traced in the hands of the husband the wife was entitled to have it brought back into the settlement. With regard to the first contention, counsel for the husband contended that the husband did not receive the money in a fiduciary capacity or as a trustee, first because the parties were holding the moneys as joint tenants, B secondly that he received the £3,000 more than two months after the decree absolute, which was the time within which an application should have been made by the wife giving notice to the husband that she claimed these moneys to form part of a post-nuptial settlement*. Thirdly he received the moneys with the agreement of the wife. Fourthly that there was no certainty that this money would be held to be a post-nuptial settlement, and, if it was, whether any variation of it would be made.

C “With regard to the second contention, it was agreed that the £3,000 was part of an item of £3,250 credited to the husband’s account at the Wolverhampton branch of the Midland Bank, Ltd., on Jan. 8, 1952, and thereby converted his overdraft of some £550 into a credit account of £2,689 4s. 4d. It was further agreed that the sum of £1,999 paid into the husband’s D account with the Union Bank of Scotland, Ltd., at St. Andrews, represented £2,000 of the said £3,000, and this was immediately absorbed in reduction of an overdraft for a larger amount at that bank. It was further agreed that any part of the £3,000 remaining in the Midland Bank, Ltd. account ultimately disappeared in general expenses, and that account later in 1952 became overdrawn again. Accordingly counsel for the wife agreed that E he was unable to trace any part of the £3,000 remaining in the husband’s hands either in its original form or converted, or mixed with any other assets.

“In my view the husband first did not receive the £3,000 in any fiduciary or trustee capacity, and secondly he cannot be required to bring the £3,000 back into settlement as it no longer exists, and it is not an asset of the post-nuptial settlement on which the court can order a variation. If F this view is correct then the post-nuptial settlement now consists of ‘the £2,000 fund’, and with regard to this I recommend as follows:—(i) that out of ‘the £2,000 fund’ the costs of both parties, including also the costs of representation of the child, be paid on a solicitor and client basis, relating to this application dated Dec. 30, 1955, and any costs in connection therewith subsequent to that date. That there be no order for costs in respect G of the summonses dated Nov. 24, 1955, (ii) that out of the balance one-half be ordered to be paid to the wife, and (iii) as to the other half, be ordered to be held by trustees, to be agreed by the parties and if not agreed to be appointed by the court, to hold the same and the income therefrom on trust for the education, benefit and maintenance of the child of the marriage, with power to advance the capital and income in whole or in part as the H trustees think fit, and to pay any balance there may be to the said child on her attaining the age of twenty-one years, and in the event of her not attaining the age of twenty-one years, then on trust for the wife . . .

I “With regard to any order for the maintenance of the child, it appears that her education at a day school, together with incidental expenses of travelling and so forth, amounts at the present time to approximately £100 per annum, and I think that if the post-nuptial settlement is dealt with on the lines indicated above that it would be reasonable for the husband to pay £200 per annum for the education and maintenance of the child, if the whole burden of this should fall on him. However, counsel for the wife, without producing any authority in support of it, stated that he contended that in view of the substantial financial position of both

* See Matrimonial Causes Rules, 1950, r. 44 (1): 10 HALSBURY’S STATUTORY INSTRUMENTS 219.

parties his client might reasonably be expected to contribute towards the education and maintenance of the child. If that principle is accepted then I recommend that an order be made for the husband to pay two-thirds of £200 per annum for the maintenance of the child, namely, £133 6s. 8d., to continue until the child attains the age of eighteen years. It was agreed that the husband had paid only £35 in respect of the child's maintenance since the date of the decree absolute, namely, Nov. 20, 1950, but the wife's counsel did not ask for maintenance to be ante-dated; and I recommend that the order for payment of maintenance be made to run from the date of this application, namely, Dec. 30, 1955, and that it be ordered to be paid quarterly either to the wife or to the child as may be desired."

Then the registrar certifies for counsel. When the learned registrar dealt with the matter of the £3,000 received by the husband, he held the view that the husband did not receive the £3,000 in any fiduciary or trustee capacity and, secondly, that he could not be required to bring the £3,000 back into settlement as it no longer existed, and that it was not a sum of money in relation to which the court could order a variation of the settlement. The husband has not indicated by any notice either to the wife or the court that he objects to the second finding of the learned registrar, namely, that out of the balance one-half be ordered to be paid to the wife, and, therefore, I need not deal with it. The next matter with which I ought to deal is the fact that the registrar, when making an order for maintenance, recommended that that order should continue until the child attained the age of eighteen years. I propose, before dealing with the rest of the report, to delete those words from it because, in my opinion, an order for maintenance should not be carried so far, but should be in the form of an ordinary order, namely, "until further order".

The wife has given notice by solicitors on her behalf,

"that on the hearing of this cause in open court before the judge the wife will move to vary the report of the district registrar dated June 11, 1956, in the following respects, that is to say: (i) By increasing the amount of maintenance recommended to be paid to the child of the marriage of the wife with the husband and by directing the same to be paid to the said child direct; (ii) By directing the husband to refund the sum of £3,000 and the same to be held on the trust referred to in para. 3 of the recommendations of the said report; (iii) In the alternative by directing the husband to refund the sum of £3,000 and the same to be held by trustees with power to invest the same in shares in the husband's company (R. H. Sievwright & Co., Ltd.) and to hold the same on trust for the husband for life, and the remainder to the said child."

A few general observations will lead to the conclusions at which I have arrived. First of all, there is no doubt that when the conveyance of the property was executed in 1946, no one had the slightest idea that it would figure in any way as a post-nuptial settlement. The conveyance was in the ordinary form to the two parties to the marriage simpliciter but with a declaration of (a) a trust for sale and for the disposal of proceeds of sale and the net rents and profits for the benefit of the spouses as joint tenants; (b) power of mortgaging and all the powers of an absolute owner. That state of affairs continued to the day before the decree absolute in the present case. So far as the parties were concerned, they were regarding it as an ordinary gift to them by the father of the wife, and they no doubt regarded themselves, at that time, as quite competent to deal with it in any way on which they could agree. In fact, however, the petition in the present case was filed on Sept. 3, 1949, and that is the date on and from which such events as might take place might have an effect on the

- A conveyance of the house, which they then jointly held. When the decree absolute was made on Nov. 20, 1950, the wife became entitled to apply, within two months, for a variation of any marriage settlement which there might be. There is, in my opinion, no doubt that when the decree was made absolute in the divorce proceedings, the conveyance to which I have already referred was within the class of documents which may be the subject of an application to vary on the footing of its being a post-nuptial settlement.

- I have to determine whether or not the registrar was wrong when he refrained from making an order in the terms referred to in paras. (ii) and (iii) of the wife's notice of application to vary his report, namely, by directing the husband to refund the sum of £3,000 and the same to be held on the trust referred to in para. 3 of the recommendations of the said report, or, in the alternative, by directing the refund of the £3,000 and to be held in trust by trustees on the security of certain shares owned by the husband in a company called R. H. Sievwright & Co., Ltd., and to hold the same on trust for the husband for life, and the remainder to the said child. I think that the registrar was right in taking out of his purview, for the purpose of considering the suggested variation of settlement, the sum of £6,000 altogether. First of all, there was no application on the part of the wife for any variation of settlement within the two months laid down by the rules, as the period within which such an application must be made if it is to be effective*. The matter remained in the minds of the parties, and also apparently in the thoughts of their advisers, in the same position as if there had not been a divorce. There is no suggestion by anyone, so far as I have been able to understand, that either party thought that the divorce had altered his or her rights in relation to the property conveyed to them in effect as joint tenants. In fact, on Apr. 9, 1951—one year and two months after decree nisi and four months after decree absolute—the parties, obviously acting on that view, signed a document in these terms:

- "We jointly and severally agree to the freehold dwelling-house known as The Bridge House, Wergs Hall Road, Tettenhall, being sold with vacant possession by public auction by Messrs. Walker, Barnett & Hill at the first available opportunity and at a price to be settled by Messrs. Fowler, Langley and Wright, and Messrs. James F. Addison and Cooper after consultation with the auctioneers and we undertake to execute such documents as may be necessary to vest the house in any purchaser."

- Plainly, they thought that nothing had happened to change their rights and their mutual interests or their ownership or freedom from any trust up to that time.

- "We further agree that the net proceeds of sale shall be paid into a bank account to be opened in the names of Messrs. Fowler, Langley and Wright and Messrs. James F. Addison and Cooper and retained by them pending settlement (either by mutual agreement or order of the court) of any outstanding questions as to the disposal of furniture and joint matrimonial assets and that immediately these matters have been settled the net balance available shall be equally divided between us."

- The "outstanding questions" were limited to the questions as to the disposal of furniture and joint matrimonial assets.

That is the course that they would have been entitled to take if there had not been a divorce, and I repeat that it is plain that neither they nor their solicitors had the slightest idea that they were doing anything that was wrong or was in any way infringing anyone's rights or creating any breach of trust in relation to the property which was the subject of the conveyance. Probably

* See Matrimonial Causes Rules, 1950, r. 44 (1): 10 HALSBURY'S STATUTORY INSTRUMENTS 219.

that state of mind was directly or indirectly caused by the express trust contained in the conveyance. Perhaps I ought to add that I can well understand the words in parenthesis in the second part of the document—that the money shall be retained in the bank pending settlement “either by mutual agreement or order of the court” of any outstanding questions as to the disposal of furniture and joint matrimonial assets—because, of course, it would have been open to either of them to take proceedings under s. 17 of the Married Women’s Property Act, 1882*, to determine questions of ownership, and it was therefore agreed that the money should remain in the bank until those matters had been either decided by the court or agreed between the parties. A B

On Dec. 17, 1951, nearly nine months after the agreement to which I have just referred, the wife and, I suppose, the husband, signed a document in the terms set out below. I am not sure about that. I have not seen a similar one signed by him, but there is no doubt that the document to which I am about to refer was brought into existence by agreement between the parties. The document reads: C

“I the undersigned Betty Sievwright at present residing at Orton Ridge, Spring Hill, Penn in the County of Stafford hereby authorise and request out of the moneys held by you in your joint names in an account at Barclays Bank Ltd., Wolverhampton, in pursuance of an agreement signed by me on Apr. 9, 1951, to pay the following amounts, namely: To myself £3,000; to my former husband £3,000; to Messrs. Walker Barnet & Hill in connection with the sale of White Ladies formerly The Bridge House, Wergs Hall Road, Tettenhall, £204 18s. 9d.; to yourself in settlement of legal costs in connection with the sale of White Ladies, £90 15s.” D E

This document is addressed to the solicitors in whose joint names the money was paid into the bank and remained there. When the wife signed that document, she expressly signed it in pursuance of the agreement which provided for the disposal of the money in the bank after those other questions had been decided either by agreement or by the court. Accordingly, those two sums were paid out—£3,000 to the wife and £3,000 to the husband. At the time when they received those moneys the conveyance had ceased to be operative except as a document of title in the hands of the purchaser, the property had ceased to be held by the two people as joint tenants, and the court had not found and had not been invited to hold that there existed or had at any time existed a post-nuptial settlement. It may well be that the undistributed portion of the proceeds of sale, namely “the £2,000 fund”, remained, as between the spouses, subject to the trust declared in the conveyance for the joint and equal benefit of the spouses. F G

Nothing further happened until Nov. 24, 1955, five years after the date of the decree absolute. In the meantime, the transactions to which I have referred took place. On that date, the wife applied for and, on Dec. 19, 1955, obtained leave to file an application for variation. Counsel for the husband in his argument before me pointed out that there is no obligation on anyone to apply for variation of settlement merely because there is or may be a settlement; it depends entirely on the parties. It does not matter what the document is, or what name is applied to it; it is when the application to vary is made that the matter arises for the first time and the character of the document falls to be ascertained. Of course, long before the present application the document was one which was capable of becoming the subject of an application for a variation order. H I

I have considered all the facts and circumstances attending this transaction. I do not overlook the fact that the wife has not made any offer to restore the £3,000 that she received so that it might be effectively dealt with by a variation.

* See 11 HALSBURY’S STATUTES (2nd Edn.) 804.

- A Nor has the husband put in any counter-application for variation by asking that the wife should be directed to do that. The fact, as I see it, is that not until someone acting for the wife in November, 1955, woke up to the fact that maintenance for the child and perhaps some variation in the interest of the child might be fruitful, did any idea enter anyone's mind that this was a transaction which ought to be dealt with by an application such as the present. The
- B registrar, in my view, with all respect to him, was wrong in supposing that he had no jurisdiction to deal with the matter. In fact, however, in my opinion, he has dealt with the application in a practical fashion. The date of the decree absolute is the date on which the document is first capable of being brought within the machinery of the statute and rules of court which lead to the decision as to the character of the document put forward for variation as a marriage
- C settlement*. I am, however, clearly of opinion that in considering whether or not a document is a marriage settlement which ought to be varied and, if so, what should be the character and extent of the variation, it is impossible to disregard the course of subsequent events and the implications of those events.
- In my view it is clear that at the date when the parties sold the house and divided the £6,000 between themselves they were exercising the power given
- D to them to do so, a power which, so far as I can see, had not been in any way determined or diminished. In my opinion the registrar was right in coming to the conclusion that on the day of the hearing before him the only subject-matter remaining effective under the settlement was what he has called "the £2,000 fund". In those circumstances, I am unable to give effect to the wife's application for variation of the registrar's report as contained in paras. (ii)
- E and (iii) of the notice of application to which I have already referred. As to the order for maintenance, such an order must in my view be until further order and not for a fixed period. It seems to me, looking at all the circumstances of the case and exercising the discretion of the court, that the amount of maintenance ought to be at the rate of £250 per annum less tax and to be paid to the child on the dates and in the proportions recommended by the
- F registrar until further order. The result is that I confirm the registrar's report, varied as to the amount of maintenance to the child by substituting £250 for the sum of £200 and deleting the words, "to continue until the child attains the age of eighteen years".

Order accordingly.

Solicitors: *Langhams & Letts*, agents for *Philip Baker & Co.*, Birmingham (for the wife and for the child); *Gregory, Rowcliffe & Co.*, agents for *Fowler, Langley & Wright*, Wolverhampton (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* See Matrimonial Causes Act, 1950, s. 25: 29 HALSBURY'S STATUTES (2nd Edn.) 412.

H. L. BOLTON (ENGINEERING) CO., LTD. v. T. J. GRAHAM & SONS, LTD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), October 8, 9, 10, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises for own business—Surrender of intermediate tenants' tenancy for no consideration within five years—Whether interest "purchased" by superior landlords—Evidence of intention of landlord—Landlord a limited company—No board meeting—Whether directors' intention imputed to company—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (g) (2).

Landlords in 1941 let their land and buildings to tenants on a lease terminable by three months' notice by either party. The tenants sub-let part of the premises to sub-tenants on a lease similarly terminable. On July 22, 1954, the landlords gave the tenants notice to quit on Dec. 25 of that year, and the tenants gave their sub-tenants notice to quit on the same date. Both notices were rendered ineffective by the coming into force of the Landlord and Tenant Act, 1954, on Oct. 1, 1954, but the tenants surrendered their tenancy without any consideration in January or February, 1955. The landlords subsequently gave the sub-tenants a valid notice terminating their sub-tenancy under the Act of 1954, and opposed the sub-tenants' application for a new tenancy under s. 24 (1), on the ground that they intended to occupy the premises for the purposes of their business. The sub-tenants contended that the landlords were not entitled to oppose their application on this ground because their interest in the premises had been "purchased" within five years before the termination of the tenancy contrary to s. 30 (2) by virtue of the intermediate tenants' surrender of their tenancy.

Held: the landlords were entitled to oppose the sub-tenants' application for a new tenancy on the ground that they intended to occupy the premises for the purposes of their business because they had not "purchased" their interest in the premises, i.e., the leasehold interest of the intermediate tenants, within the meaning of s. 30 (2) of the Act of 1954, since they had received no consideration for the surrender and "purchased" in the section had its popular meaning "bought for money".

Baker v. Lewis ([1946] 2 All E.R. 592) and *Powell v. Cleland* ([1947] 2 All E.R. 672) applied.

Company—Intention of company—Evidence of intention—Decision of directors without formal meeting—Whether sufficient evidence of intention in opposition to tenants' application for new tenancy—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (g).

In pursuance of a resolution of a meeting of the managing directors of a group of cement companies to develop certain land by the building of a new warehouse and office block, the three directors of the company in the group which owned the land caused notice to quit to be given to the tenants of it and gave instructions for plans to be prepared and for work to be done, as part of the scheme of development of the remainder of the land, which was in the company's possession, and contracts were entered into for the purpose. In doing this the directors frequently met informally, their architect prepared plans, but the directors did not hold any meeting of the board, pass any resolution or record their decisions in any minute. The conduct of the company's business was normally left to the directors individually, and the board of directors met only about once a year. The company subsequently sought to oppose an application by tenants of part of the land for a new tenancy thereof under the Landlord and Tenant Act, 1954, s. 24 (1), on the ground that the company intended to occupy the

A holding for the purpose of a business to be carried on by them thereon under s. 30 (1) (g). The county court judge found that the company had formed the intention so to occupy the land.

B **Held:** the company were entitled to oppose the application on this ground since, having regard to the standing of the directors in control of the company's business, the intention of the directors was in the circumstances the intention of the company; and the county court judge had been entitled to infer that the company intended to occupy the land for the purposes of their business.

Appeal dismissed.

C [For the Landlord and Tenant Act, 1954, s. 30 (1) (g) and (2), see 34 HALSBURY'S STATUTES (2nd Edn.) 414-416.]

Cases referred to:

- (1) *Baker v. Lewis*, [1946] 2 All E.R. 592; [1947] K.B. 186; [1947] L.J.R. 468; 175 L.T. 490; 31 Digest (Repl.) 706, 7949.
- (2) *Powell v. Cleland*, [1947] 2 All E.R. 672; [1948] 1 K.B. 262; [1948] L.J.R. 250; 31 Digest (Repl.) 705, 7939.
- D (3) *Austin Reed, Ltd. v. Royal Assurance Co., Ltd.* (July 18, 1956, C.A., not reported); the Chancery action, ante p. 490, was on another point.
- (4) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 41 Digest 418, 2616.
- (5) *R. v. I.C.R. Haulage, Ltd.*, [1944] 1 All E.R. 691; [1944] K.B. 551; 113 L.J.K.B. 492; 171 L.T. 180; 108 J.P. 181; 2nd Digest Supp.

E Appeal.

The tenants appealed against an order of His Honour JUDGE FORBES, in Birmingham County Court, made on June 6, 1956, dismissing the tenants' application for a new tenancy of premises at No. 106, Queens Head Road, Handsworth, Birmingham, under s. 24 (1) of the Landlord and Tenant Act, 1954.

F The landlords opposed the application on the ground that they intended to occupy the premises for the purposes of a business to be carried on by them therein under s. 30 (1) (g). The tenants contended that the landlords were not entitled to oppose the application on this ground because: (i) they had "purchased" their interest in the premises within five years before the termination of the tenants' current tenancy which was a disqualification by virtue of s. 30 (2); and G (ii) the landlord company had not formed any intention of occupying the premises for the purposes of a business to be carried on by them therein, since there had been no formal meeting of the board of directors at which the decision so to occupy the premises could have been arrived at.

Michael Albery, Q.C., and *P. J. Cox* for the tenants.

R. O. Wilberforce, Q.C., and *Frank Whitworth* for the landlords.

H **DENNING, L.J.:** In this case tenants of business premises claim a new lease under the Landlord and Tenant Act, 1954. The tenants are H. L. Bolton (Engineering) Co., Ltd., who are precision engineers. The landlords are T. J. Graham & Sons, Ltd., who are builders' merchants. The premises are some buildings at No. 106, Queens Head Road, Handsworth, Birmingham. The I landlords own a much larger area at this place, amounting to some six acres in all. The buildings which are let to the tenants are on a small part of the area, lying in the midst of it, so that the tenants have to cross the landlords' ground to get to the buildings.

It is necessary to trace the title with some particularity. The whole of the land and the buildings on it were bought by the landlords in 1941 freehold with vacant possession. They bought the place because they had to find a new depot for their business; but, owing to the war conditions prevailing in 1941, they could not develop it at that time. So they let the whole of the land and buildings to a

company called Tubes, Ltd., under a lease which enabled either side after the war to determine it by three months' notice. Tubes, Ltd. used a good deal of the land themselves, but they sub-let some of the buildings to a Mr. Bolton as from 1941 under a lease which in turn was determinable by three months' notice. In 1946 Mr. Bolton turned his business into a limited company, H. L. Bolton (Engineering) Co., Ltd., and his sub-tenancy was taken over by the limited company. The position, therefore, from 1946 to 1954 was that the superior landlord of the whole six acres was T. J. Graham & Sons, Ltd.; the tenant of the whole was Tubes, Ltd., the sub-tenant of part, namely, the buildings, was H. L. Bolton (Engineering) Co., Ltd. Such was the position when the events which I have to describe took place.

On July 22, 1954, the landlords, by their secretary, gave notice to Tubes, Ltd. to determine the tenancy on Dec. 25, 1954. Their letter stated:

"It is our intention to commence developing the above site at the early part of next year and in these circumstances it is necessary for us to give you formal notice to determine your tenancy on Dec. 25 next."

That notice would have been effective at common law to have determined the tenancy of Tubes, Ltd., but before that notice expired, on Oct. 1, 1954, the Landlord and Tenant Act, 1954, came into operation. The effect of that Act was to render the notice to quit of no effect. The tenancy of Tubes, Ltd. was varied by statute, so that it could no longer be determined by three months' notice but only by a six months' notice of termination. A similar statutory variation was imported into the sub-tenancy between Tubes, Ltd. and the present tenants. The right view I think is that the common law tenancy subsisted with a statutory variation as to the mode of determination.

It appears, however, that Tubes, Ltd. did not take advantage of this new statutory variation. They thought that they were bound to go by reason of the existing notice to quit, and they went in January or February, 1955, a few weeks after Dec. 25, 1954. They gave up the land which they occupied and they handed over everything, so far as they could, to the superior landlords, T. J. Graham & Sons, Ltd. Thereupon there was, as the judge finds—and it is not contested—a surrender by operation of law of the tenancy of Tubes, Ltd., to the superior landlords, T. J. Graham & Sons, Ltd. As a result of that surrender, the sub-tenants, H. L. Bolton (Engineering) Co., Ltd., became direct tenants of the superior landlords, T. J. Graham & Sons, Ltd. The intermediate tenancy dropped out. The tenants contend that they are entitled to the protection of the Landlord and Tenant Act, 1954, for the buildings which they occupy for their business.

The landlords wished to get possession of the premises because they wanted to develop the whole site as a depot for their business. So, on Oct. 25, 1955, they, by their secretary, served a notice on the tenants to terminate their tenancy on Apr. 26, 1956. That was a notice of termination which complied with the Act. At the same time, and in accordance with the Act, they gave notice to the tenants that they would oppose an application to the court for grant of a new tenancy, on the ground

"that on termination of the tenancy we intend to demolish certain parts of the premises and reconstruct them and to occupy the whole of the premises for our own purposes."

On receipt of that notice, the tenants took the necessary steps to bring the matter to the court, claiming that they were entitled to a new tenancy. In answer, the landlords relied on two provisions of the Act to resist any new tenancy.

One provision was s. 30 (1) (f), under which a landlord may oppose an application for a new tenancy on the ground that he intends

A "... to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction . . . "

B We need not consider that provision, however, because the county court judge held on the facts that that ground was not established. The landlords intended to do a good deal of work on their own land, of which they already had possession, but not sufficient work on the particular buildings which were in the possession of the tenants.

The other provision is s. 30 (1) (g), which enables a landlord to resist a new tenancy on the ground:

C "... that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein . . . "

That is the ground with which this appeal is concerned.

Before I consider sub-para. (g) itself, however, I must first turn to s. 30 (2) which provides:

D "The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing sub-section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . . "

E The object of sub-s. (2) is to prevent an incoming landlord, within the last year or two of a tenancy, from buying up the premises over the head of the tenant and then ejecting the tenant on the ground that he requires it for his own purposes. In order to prevent this, the Act says that the landlord cannot rely on sub-para. (g) unless he has bought the relevant interest more than five years before the end of the tenancy. In this case the current tenancy ended on Apr. 26, 1956. The landlords bought the freehold interest in 1941, much more than five years before; but the relevant interest here, says counsel for the tenants, is not the freehold interest, but the leasehold interest which the landlords acquired when Tubes, Ltd. surrendered their tenancy. That was acquired in January or February, 1955—well within the five years. I think that counsel is right in saying that the leasehold interest of Tubes, Ltd. is the relevant interest. It is an interest which has merged in the landlords' freehold, and but for the merger would have been the interest of the landlords. If the landlords "purchased" that interest after the beginning of the five-year period, then the landlords cannot rely on sub-s. (g). Counsel does not suggest that the leasehold interest was "created" after the five-year period began; indeed it was extinguished in the five years after merger. But he says that it was "purchased" by the landlords within the five years, because they purchased in January or February, 1955, when it was surrendered by operation of law.

G The question therefore is: What is the true meaning of the word "purchased" in sub-s. (2)? Counsel for the tenants contends that it has its old technical legal meaning and denotes any acquisition of land other than by descent or escheat; whereas counsel for the landlords contends that "purchased" here has its modern popular meaning of buying for money.

I In this contest I think that much help is to be gained from the fact that this Act of 1954 is dealing with a similar subject-matter to that of the Rent Restrictions Acts. In the Rent Restrictions Acts it is clearly established—by *Baker v. Lewis* (1) ([1946] 2 All E.R. 592) and *Powell v. Cleland* (2) ([1947] 2 All E.R. 672)—that "purchased" there is not used in its technical legal sense, but is used in its popular sense of buying for money. There are good grounds for thinking that "purchased" is used in this Act of 1954 in the same sense as in the Rent

Restrictions Acts. For instance, s. 12 (1) of the Landlord and Tenant Act, 1954, provides that a landlord may regain possession of residential premises on the grounds specified in Sch. 3, "which correspond . . . to the grounds on which a court may make an order for possession under the Rent Acts"; and when one turns to Sch. 3, one finds the grounds stated in almost the self-same words as in the Rent Restrictions Acts. In particular the Schedule provides that the court shall not make an order of the kind there specified,

"(a) if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after Nov. 21, 1950."

This provision corresponds to a similar provision in the Rent Restrictions Acts. It is clear to my mind that the word "purchased" in the Schedule is used in the same sense as it is in the Rent Restrictions Acts. So also it must be used in the same sense in s. 30 (2), which is in similar terms. It means, therefore, "buy for money".

It is true that the words "or created" are added in Sch. 3 and in s. 30 (2), whereas they do not appear in the Rent Restrictions Acts. The reason for that is apparent. The word "created" was inserted so as to deal with such a case as *Powell v. Cleland* (2). An incoming landlord ought not to be able to avoid the provisions of the Act simply by taking a long lease in his own favour instead of buying the premises. If he takes a newly created interest within the specified time and acquires the position of landlord in that way, then he is barred from relying on sub-para. (g). The insertion of the word "created" means that the decision in *Powell v. Cleland* (2) does not apply to this Act, although no similar word "created" has yet been introduced into the Rent Restrictions Acts. This meaning of "purchased" seems to me to conform with the intention of Parliament. It was to prevent a speculator buying up the property and then ejecting the tenant on the ground that he required it himself. Parliament did not intend to place a like fetter when the premises came into the landlord's hands by a surrender for no money payment at all. I would agree that, if the landlords had bought out Tubes, Ltd.—if they had paid a substantial sum of money in return for the surrender—then it would have been a purchase. But there is no such feature here; and in the absence of it I am satisfied that the interest which merged was not purchased within the meaning of this Act. My conclusion is, therefore, that "purchased" in this Act has the same meaning as in the Rent Restrictions Acts. It has its popular meaning of buying for money, and not the technical legal meaning of acquisition otherwise than by descent or escheat. The landlords did not purchase within the five years and they are therefore not debarred from relying on sub-para. (g).

The second question is whether the landlords have proved the necessary intention to occupy the holding for their own purposes. This point arises because the landlords are a limited company. Counsel for the tenants says that there was no meeting of any board of directors to express the landlords' intention, and that therefore the landlords, the company, cannot say that they have the necessary intention. The landlords are a subsidiary of a big company, the Associated Portland Cement Manufacturing Co., Ltd., which controls the cement group of companies. The landlords have three directors, two of whom, Mr. Reiss and Mr. Ellison, are also directors of the Cement Marketing Co., Ltd. The third director of the landlord company is a local director, a Mr. Tomkinson. Those three directors do not carry on business as a board. They do not have regular board meetings. They only have a board meeting once a year. Each of them individually played some part in the proposed development of this land: but they did not act collectively or as a board. It happened in this way. On July 15, 1954, there was a meeting of the managing directors of the cement group of companies. Mr. Reiss, who was a director of the landlord company and also of

A the Cement Marketing Co., Ltd., made a memorandum which was submitted to the meeting. The report of the meeting says that:

B “Mr. Reiss’s memorandum was considered and it was resolved to approve the development of Handsworth Depot, at present owned by [the landlords] for use by them and the Cement Marketing Co., Ltd., by the building of a new warehouse and office block, the conversion of existing buildings, etc., at a total cost of £60,000.”

C In consequence of that decision, a notice to quit was given on July 22, 1954, by the secretary of the landlord company to Tubes, Ltd. Later on the architect of the landlords, Mr. Bloomer, put forward plans showing the nature of the work. He discussed the matter with the directors on several occasions. He saw the directors, Mr. Ellison and Mr. Reiss as well as Mr. Tomkinson, about it. The directors met frequently and discussed the development. It is quite true to say that they did not meet as a board and no vote or minute was taken, but nevertheless those directors individually considered the matter, and went forward with it as a real project. Indeed, on the adjoining land of the company, they gave instructions for a great deal of work and they entered into contracts on behalf of the company without any minute or resolution of the board at all. It was all part of the one development scheme. So the directors and the architect were all of one mind about this development and the need to get the premises.

E When the case came into court, the position was the same. There was still no board meeting or minute relevant to the project. But after the first day’s hearing, when the case had been adjourned for several days, the directors held a board meeting during the adjournment and passed a resolution in which they gave the history of the matter. They described how the managing directors committee of the cement group had made a decision for development, and how the local director, Mr. Tomkinson, with the architect, had got out plans, and so on; and they affirmed the landlord company’s intention to take possession of the site.

F Such being the facts, counsel for the tenants urges that the landlords have not shown the necessary intention. He says there must at least be a board meeting. In view of the recent decision of this court in *Austin Reed, Ltd. v. Royal Assurance Co., Ltd.* (3), he has to concede that the decision of the board need not formally be recorded in a minute, but he says that, even though it is not formally recorded, there must be a board meeting by which there is a collective decision, and it is not sufficient that individual directors should individually be of one mind. The judge rejected that contention. He said:

H “I am told their board only meets once a year and it seems to me that the mode of conducting their business is to leave nearly everything to their agents, and so far as their agents are concerned I think there is no doubt about what they mean to do . . . So far as the agents of the company, the business managers, or the directors of the company who manage the business (to use a more accurate expression) are concerned, they in their managerial capacity have certainly affirmed the intention to occupy the premises in question. An intention of a company, of course, cannot be formed in the company—a company are an abstract being and must act by agents or by their board of directors, particularly in matters of importance. It is not necessary so far as I understand it that any resolution by the board should have been expressed by a minute, although it ought to be so. However, I do not want to be understood as finding, and I do not find, that the board of this company has ever met or passed any resolution that the company intend to occupy these premises for their own purpose. I do not propose to find that at any effective time the board of this company has passed a resolution of the intention to occupy these premises but the business of the company has been so conducted and the position of the

company is such that matters of this sort, which are business matters, are dealt with by the agents of the company, the people who manage the business. Their intention is quite clearly to occupy these premises as soon as they can. There is another point to which I ought to refer. Instructions had been given to architects to prepare certain plans with regard to alterations to the premises and these had been agreed from time to time. Plans had been prepared and submitted to the managers, the business managers of this company, and I think it would be difficult for the board of this company, after all that had been going on, to meet and say 'We will proceed no further in this business'. They have already made a contract in relation to the building and erection of an office block on adjoining land, all in preparation for occupation by the company of this land, and therefore on the whole I think it is right to find that the intention of the company is to occupy this land and they are entitled therefore to succeed in their opposition on the grounds which they set out in their notice of October, 1955, namely, on the grounds of para. (g)."

So the judge has found that the landlord company, through their managers, intend to occupy the premises for their own purposes. Counsel for the tenants contests this finding and he has referred us to cases decided in the last century, but I must say that the law on this matter and the approach to it have developed very considerably since then. A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in LORD HALDANE'S speech in *Len-nard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (4) ([1915] A.C. 705 at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R. v. I.C.R. Haulage, Ltd.* (5) ([1944] 1 All E.R. 691) to which we were referred this morning. The court said (*ibid.*, at p. 695):

"Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company . . . must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

So here the intention of the landlord company can be derived from the intention of their officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, it seems to me that the judge was entitled to infer that the intention of the landlord company was to occupy the holding for their own purposes. I am of opinion, therefore, that the judge's decision on this point was right.

I say nothing about the further point raised by counsel for the landlords in this matter as to s. 44 of the Act, because in the view which I take of the case

A that does not arise. I therefore find myself in agreement with the judge and would dismiss the appeal.

HODSON, L.J.: I agree. I also find myself in agreement with the learned county court judge on both points argued before him and in this court. I find it unnecessary to add anything to the judgment of my Lord, with which I agree.

B MORRIS, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Stafford Clark & Co.*, agents for *Faber & Co.*, Birmingham (for the tenants); *J. F. W. Unsworth* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WHEELER v. MERCER.

D [HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), July 17, 18, October 31, 1956.]

E *Landlord and Tenant—New lease—Tenancy at will—Whether protected—Claim under Landlord and Tenant Act, 1927—Statutory provisions replaced by Landlord and Tenant Act, 1954, during negotiations—“Tenancy”—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (3), (4), s. 43 (3), s. 69 (1).*

F The respondent was the tenant of business premises which she held under a quarterly tenancy. On Sept. 29, 1953, the tenancy was terminated by a notice to quit. On receipt of the notice to quit, the respondent gave notice under s. 5 (1) of the Landlord and Tenant Act, 1927, claiming a new lease. In October, 1953, the hearing of this claim was adjourned to enable the parties to negotiate. The respondent continued in occupation of the premises but did not apply for an order for security of tenure under s. 5 (13) of the Act of 1927, nor did the appellant take proceedings for possession. In April, 1955, the appellant instituted proceedings for possession. By that time the Landlord and Tenant Act, 1927, s. 5, had been repealed by the Landlord and Tenant Act, 1954, s. 45. The respondent claimed the protection of the Act of 1954.

H **Held:** a tenancy at will was not, on the true construction of the Landlord and Tenant Act, 1954, a “tenancy” within the Act since, although by s. 69 (1)* of the Act “tenancy” meant “a tenancy created . . . by a tenancy agreement” and this definition was capable of comprising a tenancy at will, yet, having regard particularly to s. 25 (3), (4)* and s. 43 (3)*, the definition did not include a tenancy at will; accordingly, as the respondent was a tenant at will or (per LORD MORTON OF HENRYTON) if she were a tenant at will and not a tenant on sufferance, the protection of the Act did not extend to her tenancy and the appellant was entitled to possession.

I Decision of the COURT OF APPEAL ([1955] 3 All E.R. 455) reversed.

[For the Landlord and Tenant Act, 1954, s. 25, s. 43 and s. 69, see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 426, 443.]

* The terms of s. 69 (1), s. 25 (3), (4) and s. 43 (3) are set out at p. 637, letters I, A to C, and F, post, respectively. It is to be noted that it was admitted that s. 69 (2), which provides that “references in this Act to an agreement between the landlord and the tenant . . . shall be construed as references to an agreement in writing between them” relates only to such agreements as are contemplated by, e.g., ss. 32-35 of the Act (see p. 638, letter B, post).

Cases referred to:

- (1) *Errington v. Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp.
- (2) *Morgan v. Harrison (William), Ltd.*, [1907] 2 Ch. 137; 76 L.J.Ch. 548; 97 L.T. 445; 31 Digest (Repl.) 35, 1914.
- (3) *Martinali v. Ramuz*, [1953] 2 All E.R. 892; 3rd Digest Supp.

Appeal.

Appeal by the landlord, Alfred Morris Wheeler, from an order of the Court of Appeal, dated Oct. 24, 1955, and reported [1955] 3 All E.R. 455, affirming an order of His Honour JUDGE GLAZEBROOK, dated July 28, 1955, and made at Tunbridge Wells County Court, in an action in which the appellant claimed possession from the respondent, Helen Molly Mercer, of the ground floor of premises at 59, Grosvenor Road, Tunbridge Wells, occupied since 1936 by the respondent, who carried on the business of a tobacconist. The facts appear in the opinion of VISCOUNT SIMONDS.

Harold Brown, Q.C., and *M. C. Parker* for the appellant, the landlord.

R. E. Megarry, Q.C., and *J. R. B. Fox-Andrews* for the respondent, the tenant.

The House took time for consideration.

Oct. 31. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant is the owner in fee simple of premises at 59, Grosvenor Road, Tunbridge Wells, in the County of Kent, of the ground floor of which the respondent has been in occupation since 1936, there carrying on the business of a tobacconist. On Apr. 13, 1955, the appellant issued a summons in the Tunbridge Wells County Court against the respondent claiming possession of the premises and mesne profits from Sept. 29, 1953, to May 12, 1955. On July 28, 1955, the learned county court judge dismissed his claim for possession and adjourned the claim for mesne profits. From that decision the appellant appealed to the Court of Appeal and that court unanimously dismissed his appeal.

It is common ground that the appellant is entitled to recover possession of the premises unless the respondent can avail herself of the protection given by Part 2 of the Landlord and Tenant Act, 1954, and that she can only do so if she establishes (a) that at the relevant date she was in possession of the premises as tenant at will of the appellant, and (b) that a tenancy at will is protected by the Act. Both these propositions must now be examined.

On the first question, I do not think it necessary to say much, for I find myself in complete agreement with the county court judge on this point and am content to adopt his careful judgment as my own. Having been in possession as joint or sole lessee under a lease which terminated on Sept. 6, 1943, she thereafter became a quarterly tenant until the expiration, on Sept. 29, 1953, of a notice to quit which had been validly given. Since that date she has remained, and she still remains, in possession of the premises. In the meantime, both before and after the notice to quit, negotiations took place for the grant of a new lease. These were protracted and exhausting, and at an early stage of them the respondent gave notice under the Landlord and Tenant Act, 1927, claiming a new lease or compensation. This was a circumstance which, in my opinion, is of paramount weight in determining in what relation the parties thereafter stood to each other and leads decisively to the conclusion that, pending negotiation, the respondent remained in possession not as a licensee nor as a tenant at sufferance of the appellant but with his positive assent. The learned judge, in my opinion, rightly held that she was a typical tenant at will, conforming to all the classical definitions of such a tenant.

The respondent was, then, a tenant at will of the premises when, on Oct. 1, 1954, the Landlord and Tenant Act, 1954, came into operation and repealed the

A relevant provisions of the earlier Act. I do not think that the present proceedings are in any way affected by the provisions of Sch. 9 to the Act of 1954 and do not further refer to them. It remains to be considered whether Part 2 of the Act of 1954 protects a tenancy at will, and on this question I am of opinion that the judgments under review cannot be supported.

Before I come to the crucial definition of "tenancy" in s. 69 (1) of the Act, B I propose to examine briefly the earlier sections in Part 2 in which that word occurs. By s. 23 (1) it is provided that that Part applies to any tenancy where the property comprised therein is or includes premises occupied by the tenant for the purpose of a business—a word which is defined by s. 23 (2) to cover a wider range of activities than those which the earlier Act had protected. Section 24 provides for the continuation and renewal of tenancies. It enacts that a C "tenancy" shall not come to an end unless terminated in accordance with the provisions of that Part of the Act, and provides by sub-s. (1) that, subject to the provisions of s. 29, the tenant may apply to the court for a new tenancy—(a) if the landlord has given notice under s. 25 to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26, and by sub-s. (2) that sub-s. (1) shall not prevent the coming to an end of a D tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy. I pause to note that there are no words in sub-s. (2) which are apt to cover the case of a tenancy at will. Section 25 is of crucial importance. It purports to deal comprehensively with the way in which a landlord may terminate a tenancy. Sub-section (1) is general in its terms. It provides that a landlord may terminate a tenancy by a notice in the prescribed E form specifying the date at which the tenancy is to come to an end, referred to as "the date of termination". The prescribed form does not throw any light on the present problem. Sub-section (2) provides that, subject to the provisions of sub-s. (3), a notice under the section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein. Sub-section (3) deals with that class of tenancy which apart from the F Act could have been brought to an end by notice to quit given by the landlord, and enacts what the date of termination in such cases may be. A tenancy at will is not determined by a notice to quit and does not fall within the sub-section. Sub-section (4) deals with "any other tenancy"—these are the vital words—and provides that, in the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from G Part 2 of the Act the tenancy would have come to an end by effluxion of time. A tenancy at will is not a tenancy which comes to an end by effluxion of time, and does not appear to be within the sub-section. The other sub-sections of this section do not help, and I find, therefore, in the section which is a vital part of the machinery of the Act a significant omission of any provision which covers the case of a tenancy at will.

H Section 26 deals with a tenant's request for a new tenancy. It covers only the case where the tenancy under which the tenant holds for the time being is a tenancy granted for a term of years certain exceeding one year. It does not apply to a tenant at will. Nor need I refer to s. 27 and s. 28. Section 29 must be noticed. It provides that, subject to the provisions of the Act, on an application under s. 24 (1) of the Act for a new tenancy the court shall make an order I for the grant of a tenancy comprising such property, at such rent and on such terms, as are thereafter provided. This is mandatory, and I attach some importance to it. For there must be many cases, e.g., where a purchaser has been let into possession before completion without any special stipulation and is, therefore, at law a tenant at will, where it would be manifestly unjust to grant any tenancy. I must observe that, notwithstanding the observation of DENNING, L.J.,* and the reference to *Errington v. Errington & Woods* (1) ([1952] 1 All E.R.

* See [1955] 3 All E.R. at p. 457, letter C.

149), I cannot but regard the example that I have given as a typical case of a tenancy at will. But there must be still more cases where the court would have nothing to guide it as to what should be the terms of a tenancy granted to a tenant at will. The grant of another tenancy at will would be of little value unless succeeded by another and yet another similar grant, while the grant of a term certain or of a periodical tenancy would substantially change the previously subsisting relation between the parties. I can now pass over a number of sections of which it may truly be said that their language is more appropriate to a periodic tenancy or a tenancy for a term certain yet, if the context otherwise admitted, it might be wide enough to cover a tenancy at will, and I come to s. 43, which, by sub-s. (3), provides that Part 2 of the Act does not apply to a tenancy granted for a term certain not exceeding three months unless—(a) the tenancy contains provision for renewing the term or for extending it beyond three months from its beginning, or (b) the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds six months. Counsel for the appellant relied strongly on this section. He justly pointed out the anomaly of excluding from the protection of the Act tenancies granted for a term certain not exceeding three months, unless certain conditions are satisfied, but bringing within its protection tenancies at will whose duration might be for a far shorter period. The answer made to this was that it was no greater anomaly than that which was provided by a weekly tenancy which had been extended from week to week by a tenant holding over, and would, it was claimed, be within the protection of the Act. I am not satisfied what the rights of such a tenant would be and do not think it desirable to discuss it. It is sufficient to say that in s. 43 (3) I find once more language which is not appropriate to the case of a tenancy at will, and which I should expect to find extended or amplified if such a tenancy was intended to be protected.

I come then to the interpretation section, s. 69 (1). There are only two expressions to be considered, which have meanings assigned to them without the usual qualification of an admitting context. "Notice to quit" means a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy. I have already observed that a tenancy at will is not terminated by such a notice or, I should say more accurately, that such a notice is not appropriate or necessary to the termination of such a tenancy. The other relevant expression is "tenancy", which means

"a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease . . . or by a tenancy agreement or in pursuance of any enactment (including this Act) . . ."

A "tenancy" then includes a tenancy "created . . . out of the freehold . . . by a tenancy agreement". Can a tenancy at will be thus described? And, if it might in another context be so described, is the description itself at least ambiguous so that its meaning may be influenced by the context of the Act? I do not find these easy questions to answer. It may, I think, be truly said that, since a tenant at will is regarded at law as being in possession by his own will and at the will express or implied of his landlord, he is a tenant by their mutual agreement, and the agreement may, therefore, be called a tenancy agreement. He is distinguished from a tenant at sufferance in that such a tenant is said to be in possession without either the agreement or disagreement of the landlord. But, my Lords, though, on a logical analysis, it is possible to regard a tenancy at will as a "tenancy created by a tenancy agreement", I am not satisfied that, according to the ordinary use of language, even apart from any context, it would be so described. A tenancy at will, though called a tenancy, is unlike any other tenancy except a tenancy at sufferance to which it is next of kin. It has been properly described as a personal relation between the landlord and his tenant.

- A It is determined by the death of either of them, or by any one of a variety of acts, even by an involuntary alienation, which would not affect the subsistence of any other tenancy. It is true that, in some cases, the relation of tenant at will may be expressly created by contract: see, e.g., *Morgan v. William Harrison, Ltd.* (2) ([1907] 2 Ch. 137), but this is an exceptional case and I do not exclude the possibility of such a contract being a "tenancy agreement" even if a tenancy at will arising by implication of law is not.

- B If I am right in concluding, as I do, that "tenancy agreement" is itself an expression which is ambiguous in its scope, I am led by the context of the Act which I have examined in some detail to the further conclusion that it does not cover a tenancy at will arising by implication of law. It may, or may not, be unfortunate that the respondent in this case cannot avail herself of the protection which the Act affords; in the case of another tenancy at will the misfortune might lie the other way. Your Lordships are concerned only to interpret the Act, and, in my opinion, on its true interpretation, the respondent is not protected. The orders of the Court of Appeal and of the learned county court judge should, therefore, be reversed so far as the appellant's claim to possession of the premises is concerned. The orders as to costs will not be disturbed and there will be no order as to the costs of this appeal. I move your Lordships accordingly.

- D My Lords, my noble and learned friend, **LORD KEITH OF AVONHOLM**, who is unable to be here today, has asked me to say that he concurs in the opinion which I have given.

- LORD MORTON OF HENRYTON:** My Lords, two questions arise on this appeal—(i) On Oct. 1, 1954, when the Landlord and Tenant Act, 1954, came into operation, was the respondent a tenant at will of the ground floor of No. 59, Grosvenor Road, Tunbridge Wells? (ii) If so, is a tenancy at will protected by the Act?

- The first question is not an easy one. A tenancy at will can only arise with the consent, express or implied, of the landlord. I think there is much to be said for the view that the appellant never consented to the respondent's occupation after Sept. 29, 1953, but took no active steps to recover possession, on the principle that "what cannot be cured must be endured", because he knew that any application for possession would be countered by an application for protection under s. 5 (13) of the Landlord and Tenant Act, 1927. If this were the true view, the respondent would be a tenant on sufferance. I find it unnecessary to form a concluded opinion on this point, for, in my opinion, the respondent is not protected by the Act of 1954, even if she is a tenant at will. I think that s. 69 (1) of the Act of 1954, read by itself, gives rise to a very real doubt whether a tenancy at will is, or is not, "a tenancy created . . . out of the freehold . . . by a tenancy agreement" within the meaning of the definition of "tenancy" in that section. This being so, it is right to seek enlightenment on the point from the rest of the Act, and, in my view, a study of s. 23 to s. 29 inclusive, and, in particular, sub-s. (3) and sub-s. (4) of s. 25, leads inevitably to the conclusion that a tenancy at will is not within the Act. I agree with everything which has been said from the Woolsack as to this group of sections.

- I add that I should have thought it surprising if the legislature had intended to bring within the scope of the Act a relationship so personal and so fleeting as a tenancy at will. It is certainly unfortunate for the respondent that she gets no protection, but the circumstances of the present case are most unusual, and I cannot think that any real injustice is involved, having regard to the course of the protracted negotiations. On the other hand, I think that, if the Act had been extended to tenants at will, undeserved hardship to the house-owner would have resulted in many cases.

LORD COHEN: My Lords, the question for determination on this appeal is whether the appellant is entitled to an order for possession of shop premises at Tunbridge Wells situate on the ground floor of No. 59, Grosvenor Road. The

respondent has been in occupation of those premises since 1936. Originally she held under a lease but in the later stages under a quarterly tenancy. That tenancy was determined by a notice to quit which expired at Michaelmas, 1953. When the respondent received that notice to quit she gave, as she was entitled to do, a notice under the Landlord and Tenant Act, 1927, claiming a new lease on the ground that goodwill had become attached to the premises, or in the alternative £3,000 compensation. There were proceedings in the county court on her claim for a new lease, but the case never came to hearing because, in October, 1953, it was adjourned so as to enable the parties to negotiate. The respondent did not apply, as she could have done, under s. 5 (13) of the Act of 1927, for an interim order authorising her to continue in possession of the premises for such time and on such terms as the tribunal might allow. No doubt there were good reasons why she did not do so, but, unfortunately for her, on Oct. 1, 1954, while the negotiations were still pending, the Landlord and Tenant Act, 1954, came into force. This repealed s. 4 to s. 7 of the Act of 1927 under which the respondent had commenced the adjourned proceedings. Paragraph 8 of Sch. 9 to the Act of 1954 contained transitional provisions for the protection of persons who had obtained an interim order under s. 5 (13) of the Act of 1927, but these provisions do not assist the respondent. Her right to resist the claim for possession must depend on the operative provisions which are to be found in Part 2 of the Act of 1954.

Before I turn to these provisions, I should mention that negotiation continued up to Apr. 6, 1955, when the appellant's patience seems to have been exhausted and his solicitors wrote to the respondent's solicitors asking that the respondent should vacate the premises immediately. On Apr. 7, 1955, the appellant issued his summons for possession in the Tunbridge Wells County Court. The respondent set up a number of defences. Only one of them is now material. That is the defence that the respondent is and has, since Michaelmas, 1953, been a tenant at will and is, therefore, entitled to remain in possession. The case came on for hearing on June 28, 1955, when Mr. J. R. B. Fox-Andrews, for the respondent, argued that the respondent was a tenant at will and that such a tenancy was covered by the protection given by the Act of 1954. This submission was upheld by the county court judge in a considered judgment delivered on July 28, 1955. On Oct. 24, 1955, the Court of Appeal affirmed his judgment. It is from this decision that the present appeal is brought.

Before dealing with the arguments addressed to your Lordships, I must refer to the relevant provisions in Part 2 of the Act of 1954.

"Continuation and renewal of tenancies

"24.—(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act.

"(2) The last foregoing sub-section shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy . . .

"25.—(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination'): Provided that this sub-section has effect subject to the provisions of Part 4 of this Act as to the interim continuation of tenancies pending the disposal of applications to the court.

"(2) Subject to the provisions of the next following sub-section, a notice under this section shall not have effect unless it is given not more than

A twelve nor less than six months before the date of termination specified therein.

“ (3) In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—(a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section; and (b) where apart from this Part of this Act more than six months’ notice to quit would have been required to bring the tenancy to an end, the last foregoing sub-section shall have effect with the substitution for twelve months of a period six months longer than the length of notice to quit which would have been required as aforesaid.

B
C

“ (4) In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time.”

D Section 26 enables a tenant who is holding under a tenancy for a term of years certain exceeding one year, or granted for a term of years certain and thereafter from year to year, to request a new tenancy, but this provision is not available to the respondent. Section 33, s. 34 and s. 35 deal respectively with the duration, the rent payable under, and the other terms of a new tenancy granted pursuant to the Act. I need not set out the sections in full. I only mention them because

E the appellant submitted that they seemed more applicable to a case where the applicant for a new tenancy was a tenant under a periodical tenancy or for a term certain than to a case where he was a tenant at will. I do not myself get much assistance from the provisions of these sections.

Section 43 (3) is in the following terms:

F “ This Part of this Act does not apply to a tenancy granted for a term certain not exceeding three months unless—(a) the tenancy contains provision for renewing the term or for extending it beyond three months from its beginning; or (b) the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds six months.”

G

The appellant relied on this sub-section because, as he said, it showed that a weekly tenancy was not within Part 2 of the Act unless the terms could be brought within para. (b). It was unlikely, so the argument went, that Parliament intended the still more impermanent tenancy at will to be within Part 2 of the Act. The respondent countered this argument by pointing out that the exclusion only applies to tenancies “ granted for a term certain ”, and a weekly tenancy is not a term certain. All periodical tenancies were, therefore, within Part 2 of the Act.

H

The last, and the most important, section to which I need refer is the interpretation section, s. 69. Sub-section (1) provides that:

I “ In this Act the following expressions have the meanings hereby assigned to them respectively, that is to say:— . . . ‘ notice to quit ’ means a notice to terminate a tenancy (whether a periodical tenancy or a tenancy for a term of years certain) given in accordance with the provisions (whether express or implied) of that tenancy; . . . ‘ tenancy ’ means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or in pursuance of any enactment (including this Act), but does not include a mortgage term or any interest arising in favour of a mortgagor

by his attorning tenant to his mortgagee, and references to the granting of a tenancy and to demised property shall be construed accordingly; . . .” A

Sub-section (2) provides that references in the Act to an agreement between the landlord and the tenant (except in s. 17 and sub-s. (1) and sub-s. (2) of s. 38) should be construed as references to an agreement in writing. At first sight, it might be thought that a “tenancy agreement” mentioned in s. 69 (1) came within the operation of this sub-section, but counsel for the appellant did not feel able to support this suggestion and admitted that sub-s. (2) was dealing only with agreements between landlord and tenant such as were contemplated, e.g., by ss. 32-35 inclusive. I need not, therefore, trouble your Lordships further with sub-s. (2). B

With these sections in mind, I turn to the arguments which were addressed to your Lordships. It was common ground between the parties that there were two questions which your Lordships had to decide—(i) When the present proceedings were commenced, was the relationship between the parties that of a tenancy at will? Unless it was, it was common ground that the appellant was entitled to succeed. But if it was, then the second question arises. (ii) Is a tenancy at will a tenancy within the meaning of the Act? C

My Lords, on the first question I find myself in complete agreement with the learned county court judge when he says: D

“In my opinion the [respondent] was a typical tenant at will, conforming to all the classical definitions of such a tenant. I refer to WOODFALL’S LAW OF LANDLORD AND TENANT, 23rd Edn., pp. 283, 284; FOA, 7th Edn., p. 3, and HILL AND REDMAN, 10th Edn., pp. 16 and 17, and the cases cited by those authorities. She was not in my view a mere licensee because she was in exclusive possession with the consent of the owner; nor was she a tenant at sufferance because I think the landlord’s positive assent must be implied from the circumstances.” E

I would, therefore, answer the first question in the affirmative, and I turn to the second question. F

Counsel for the respondent says that a tenancy at will is “a tenancy agreement” within the meaning of s. 69 (1), since a tenancy at will is a tenancy and agreement is of the essence of a tenancy at will; it is, indeed, the feature which distinguishes a tenancy at will from a tenancy at sufferance. I am prepared to accept that the expression “a tenancy agreement” may comprise a tenancy at will, but I think that it might also be the apt language to use where the draftsman had in mind only a tenancy for a fixed term and a periodical tenancy. The question of the sense in which it is used in a particular statute must be answered by construing the statute as a whole, and, in my opinion, the language of s. 25 is consistent only with the adoption of the narrower construction I have indicated. It is, I think, clear, reading sub-s. (2), sub-s. (3) and sub-s. (4) together, that sub-s. (3) and sub-s. (4) are intended to comprise all the tenancies to which the Act applies. Sub-section (3) deals only with tenancies which could be determined by notice to quit, and it was common ground between the parties that a tenancy at will is not such a tenancy, since a tenancy at will is determined not by a notice to quit but, e.g., by death, bankruptcy or a demand for possession. G

Sub-section (4) is to apply “in the case of any other tenancy”. This is an omnibus phrase covering all tenancies to which the Act applies, except such as are determinable by a notice to quit. It is clear, however, from the language of the sub-section that it cannot comprise a tenancy at will, because such a tenancy could never come to an end by effluxion of time. H

In the Court of Appeal, their Lordships sought to avoid this conclusion by treating sub-s. (2) as governing the matter in the case of any tenancy falling outside the scope of sub-s. (3) and sub-s. (4). My Lords, I am unable to find I

- A anything in the language of sub-s. (1) and sub-s. (2) which justifies me in ignoring what I think to be the plain meaning of sub-s. (3) and sub-s. (4), nor am I able to find any indication in any other section which would lead me to place the wider meaning on the expression "tenancy agreement" for which counsel for the respondent argues. He relied on *Morgan v. William Harrison, Ltd.* (2) ([1907] 2 Ch. 137), which was a case where the court held, on the construction of certain
- B correspondence, that the defendant, who had been tenant of a coal-mine and remained in possession after the expiration of his lease, was a tenant at will with a right to get the coal and a right to exercise a way-leave, and that he held on all the terms and conditions of the original tenancy so far as applicable to a tenancy at will, including an arbitration clause. Counsel for the respondent submitted that such a case was clearly within the policy of the Act of 1954, but would be
- C excluded from its operation unless a tenancy at will were held to fall within the definition of "tenancy" in s. 69 (1). My Lords, I agree with counsel that, on the construction which I have placed on the Act of 1954, tenancies such as that under consideration in the case cited would be outside the scope of Part 2 of the Act, but I believe them to be rare. Certainly your Lordships' attention was not directed to any other such case, and I console myself with the reflection that
- D mining leases are in any event excluded by s. 43 (1).

I derive some support for the conclusion I have reached from the decision of the Court of Appeal in *Martinali v. Ramuz* (3) ([1953] 2 All E.R. 892). That was a case under the Leasehold Property (Temporary Provisions) Act, 1951. Section 10 of that Act enabled an occupier of shop premises to apply for, and in certain circumstances to obtain, the grant of a new tenancy where the expiring tenancy

E would come to an end immediately before the Act came into force or within two years beginning from that date

"and would so come to an end by effluxion of time or by the expiration of a notice to quit given by the landlord."

- F The Act contained in s. 20 a definition of tenancy the same in all material respects as that contained in s. 69 (1) of the Act of 1954. The tenant died and his executors applied for a new lease under s. 10 (1). The county court judge heard a preliminary objection that the occupier was a tenant at will, and that, as his occupation had not been determined by notice to quit and it was not a tenancy which expired by effluxion of time, it was not covered by s. 10 of the Act of 1951. The
- G learned county court judge decided the case on the ground that no notice to quit had been given, but he expressed the opinion obiter that a tenancy at will did not fall within the protection afforded by the Act of 1951. In the Court of Appeal, SINGLETON, L.J. (*ibid.*, at p. 893), expressed the same view; the other members of the court did not deal with the point. My Lords, the wording of s. 10 of the Act of 1951 is, no doubt, more definite than anything to be found in the Act of 1954, but s. 25 of the Act of 1954, as I read it, also indicates that the protection
- H afforded by that Act was intended only to apply to tenancies determinable by effluxion of time or notice to quit.

For these reasons, I would allow the appeal and discharge the orders in the courts below, save so far as they ordered the appellant to pay the costs of the respondent. The appellant is entitled to an order for possession and mesne profits. Each party will bear his own costs of the appeal.

- I **LORD SOMERVELL OF HARROW:** My Lords, I agree that the respondent was a tenant at will. The question remains whether a tenancy at will is within the Landlord and Tenant Act, 1954. If the definition of "tenancy" in s. 69 (1) plainly excluded a tenancy at will, that would be an end of the case. I do not think it does. Nor do I think it plainly includes it. Tenancies at will have such special characteristics that it would be convenient if definitions expressly stated whether they were included or excluded. One turns, therefore, to the other provisions of the Act. Section 25, in my opinion, makes it clear that

tenancies at will are excluded. Sub-section (3) and sub-s. (4) provide, in effect, that the statutory notice must not take effect at a date earlier than that on which the tenancy would end or could be ended. The opening words of sub-s. (4) show that all tenancies covered by this Part of the Act are covered by these two sub-sections. Tenancies at will are not brought to an end by a notice to quit and are, therefore, outside sub-s. (3), nor by effluxion of time and are, therefore, outside sub-s. (4). They are, therefore, outside the Act. HODSON, L.J., clearly felt that these sub-sections created a considerable difficulty. He thought, and here I differ, with respect, that tenancies at will were clearly within the definition. That being so, he felt that s. 25 could not, except by express words, exclude them. It left them "in the air". If, as I think, the definition is at best ambiguous, the effect of s. 25 is to resolve the ambiguity. A

There may be some tenancies at will, and this may be one, which one would have expected to find covered by the Act, but it would be surprising if the Act were applicable to tenancies at will generally. It would be absurd if a prospective purchaser who had entered into possession pending completion was within the Act, and yet such a purchaser, in the absence of agreement to the contrary, is a tenant at will. Permissive occupation without payment of rent would also be a relationship one would not expect to find within this Part of the Act. B

It was submitted with, I thought, some force that, as under para. 8 of Sch. 9 a tenant who had got an order for extended possession under s. 5 (13) of the Landlord and Tenant Act, 1927, was protected, so should, also, a tenant be protected who had been allowed by the landlord to remain in possession without an order. Parliament may have assumed that in such cases possession would have continued on the basis of a periodical tenancy to which the Act of 1954 would apply, and not, as here, on a tenancy at will. The fact that para. 9 provides expressly for the preservation of the right to compensation under s. 4 of the Act of 1927 suggests that Parliament assumed that the more favourable rights conferred by the new Act for new tenancies would apply. It has, however, for the reasons which I have given, excluded tenancies at will and, on the facts of the present case, I cannot think that the respondent has any real grievance. C

I would allow the appeal. D

Appeal allowed.

Solicitors: *Sole, Sawbridge & Co.*, agents for *Bailey & Cogger*, Tonbridge (for the appellant, the landlord); *Waterhouse & Co.* (for the respondent, the tenant). E

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] F

A MANNING v. TURNER AND ANOTHER.

[CHANCERY COURT OF THE COUNTY PALATINE OF LANCASTER (Sir Leonard Stone, V.-C.), June 4, July 9, 1956.]

Sale of Land—Title—Defect—Contingent liability to estate duty on death of living donor of property within five years of gift—Purchaser's right to insurance policy of indemnity—Right to rescind contract on vendor's failure to obtain policy.

B At an auction on Oct. 14, 1954, a house and some furniture were sold by the defendants to the plaintiff for £500, the plaintiff paying a deposit. The defendants sold as beneficial owners, the title beginning, by special stipulation, with a conveyance of Sept. 7, 1931; part of the house was tenanted, but possession of the vacant rooms was to be given on completion, the date for which was to be "1954". On Oct. 22, 1954, the defendants' solicitors sent to the plaintiff's solicitors an abstract of title which disclosed that the defendants' title to the property depended on a deed of gift to them, dated Oct. 16, 1953, by a donor who was still living. On Oct. 26 the plaintiff's solicitors, by requisition, required the defendants to provide at their own expense an insurance policy indemnifying the plaintiff against the charge for estate duty on the property which might arise if the donor died before Oct. 16, 1958. The defendants offered to enter into a covenant of indemnity against any such liability to estate duty. By letter dated Nov. 8, and by telephone on Dec. 8, the plaintiff's solicitors informed the defendants' solicitors that, unless an indemnity policy was provided, she was not prepared to proceed with the purchase and required the return of her deposit. On Dec. 9 the defendants' solicitors wrote to the plaintiff's solicitors saying that the defendants had instructed them, without prejudice, to ascertain on what terms an insurance company would issue a policy of indemnity and that they would communicate again with the plaintiff's solicitors at an early date. No further communication from the defendants' solicitors having been received, the plaintiff, on Dec. 21, rescinded the contract and claimed the return of her deposit. The defendants then offered an indemnity policy and served notice to complete. The plaintiff brought an action for rescission and return of the deposit and the defendants counterclaimed for specific performance.

E **Held:** the plaintiff had validly rescinded the contract and was entitled to the return of the deposit since (i) specific performance of the contract would not have been decreed unless the defendants effected an insurance policy with a reputable insurance company giving indemnity against liability of the property for any charge of estate duty arising on the death of the donor before Oct. 16, 1958, and (ii) the plaintiff had repudiated the contract so soon as she had discovered the defect in title and, in the circumstances, had allowed the defendants reasonable time, viz., the period from Oct. 26 to Dec. 21, in which to provide the insurance policy.

H [Editorial Note. It seems that an expedient course in the period between Oct. 26 and Dec. 21 would have been to serve notice setting a time limit within which the indemnity policy should be provided (see p. 644, letter G, post).

I As to when the right of the purchaser to repudiate a contract for the sale of land arises and within what period it should be exercised, see 29 HALSBURY'S LAWS (2nd Edn.) 381, para. 523, 383, para. 525; and for cases on the subject, see 40 DIGEST 244-249, 2130-2170.]

Cases referred to:

- (1) *Murrell v. Goodyear*, (1860), 1 De G.F. & J. 432; 29 L.J.Ch. 425; 2 L.T. 268; 45 E.R. 426; 40 Digest 244, 2130.
- (2) *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539; 40 Digest 194, 1623.

- (3) *Elliott v. Pierson*, [1948] 1 All E.R. 939; [1948] L.J.R. 1452; sub nom. *Elliott & H. Elliott (Builders), Ltd. v. Pierson*, [1948] Ch. 452; 2nd Digest Supp. A

Action.

At an auction sale on Oct. 14, 1954, the plaintiff, Nora Manning, was declared the purchaser of a house known as 21, Litherland Park, Liverpool, for the sum of £500. She thereupon paid a deposit of £50 and signed a printed form of contract which incorporated the Law Society's General Conditions of Sale, 1934 (1949 revision), so far as the general conditions were not varied by, or inconsistent with, the special conditions and were applicable to a sale by auction. The vendors, Frances Kendall Turner and Amy Knowles (referred to hereinafter as "the defendants"), were selling as beneficial owners, and in the special conditions of sale it was stated that they held the title as owners by a conveyance of Sept. 7, 1931. The date for completion was given as "1954". Some of the rooms of the house were occupied by tenants and some were vacant. Possession of the vacant rooms was to be given on completion, and some furniture was included in the sale. B C

On Oct. 22, 1954, the defendants' solicitors sent to the plaintiff's solicitors an abstract of title which disclosed that the defendants' title to the property depended on a deed of gift to them dated Oct. 16, 1953, and made by Mrs. Florence Ellen Amos. On Oct. 26, 1954, the plaintiff's solicitors delivered requisitions on title. The material requisition stated that a claim for estate duty on the property might arise in the event of the death of Mrs. Amos within five years of the date of the deed of gift and that the defendants must, at their own expense, obtain an insurance indemnity in favour of the plaintiff in respect of such a claim. On Nov. 4 the defendants' solicitors wrote to the plaintiff's solicitors that they could not advise the defendants to obtain an insurance policy, as required by the plaintiff, but would advise the defendants to enter into a contract for indemnity in respect of any duty which might be payable on the property. On Nov. 8 the plaintiff's solicitors replied that the plaintiff was not prepared to proceed with the matter and required the return of the deposit which she had paid unless an indemnity policy in her favour was obtained. In a letter dated Nov. 17 the defendants, through their solicitors, refused to obtain an indemnity policy but offered to enter into a covenant in the conveyance, or separately, to indemnify the plaintiff against any estate duty which might become payable and charged on the property. The letter went on to say that, if the plaintiff persisted in her refusal to complete, notice to complete would be served on her in due course and all further steps which might be necessary would be taken. On Nov. 18 the plaintiff's solicitors replied to the defendants' solicitors that they did not agree that a covenant by the defendants would be a sufficient security and that, as the gift of the property to the defendants was not disclosed in the contract, the plaintiff was entitled to rescind unless an indemnity policy was obtained in her favour. During a telephone conversation between the parties' solicitors on Dec. 8 the plaintiff's solicitors again informed the defendants' solicitors that the plaintiff was not prepared to complete the purchase unless the insurance indemnity was obtained. In a letter dated Dec. 9 the defendants' solicitors told the plaintiff's solicitors that they had been instructed by the defendants, without prejudice, to ascertain on what terms an insurance company would issue a policy, and that they would communicate with the plaintiff's solicitors again at an early date. There was no further correspondence between the parties until Dec. 21, when, in a letter of that date, the plaintiff, through her solicitors, rescinded the contract, on the ground of the defendants' delay in providing for the insurance indemnity policy asked for in the requisition, and required the return of the deposit paid by her. Subsequently, the defendants offered an indemnity policy and served notice to complete. The plaintiff thereupon brought an action against the defendants for a declaration that the D E F G H I

A contract was rescinded and that she was entitled to the return of her deposit. The defendants counterclaimed for specific performance of the contract on the footing that they would, at their own expense, provide an indemnity policy affording indemnity for estate duty up to £500.

The plaintiff appeared in person.

B *E. W. Griffith* for the defendants.

Cur. adv. vult.

July 9. **SIR LEONARD STONE, V.-C.**, read the following judgment: This action concerns two questions of conveyancing practice on the first of which there appears to be no authority, and on the second of which there is authority, although the manner in which the principles enunciated ought to be applied in this case is not free from difficulty. [His LORDSHIP stated the facts, and, after referring to the fact that the plaintiff appeared in person and that in the circumstances he had reserved judgment so that he might look into the matter further, continued:]

The first question is whether, as purchaser, the plaintiff was entitled to take the attitude—which her solicitors, on her behalf, did take as soon as they had examined the abstract of title and discovered the then recent deed of gift—to the effect that the defendants must obtain a policy of insurance in favour of the plaintiff to cover the possibility of a claim for estate duty against the property, because it is not disputed that if Mrs. Amos should die before Oct. 16, 1958, the property, the subject-matter of this contract, would be charged with estate duty, the exact amount of which cannot be known before the death of Mrs. Amos. I think that the answer to that question, about which there appears to be no authority, must be in the affirmative. The contract contains no mention of, or special condition concerning, this deed of gift, or of the contingent claim for estate duty which may flow from it. The risk cannot be said to be so remote or so shadowy as to be one to which no serious attention need be paid, and the offer of a covenant of indemnity by the defendants personally carries the matter little further for, on every authority, it is on the donees that the primary obligation of discharging the duty, if it should arise, would fall. In my opinion the test must always be: would the court, in an action for specific performance at the instance of the vendors, force a title containing the alleged defect on a reluctant purchaser? In my opinion, in the case before me, the title would not be forced on the plaintiff unless the defect were first removed by an indemnity policy issued by a reputable insurance company insuring against the risk involved. It is, I think, not without significance that the defendants, by their counterclaim, only claim specific performance on the footing that they will, at their own expense, provide an indemnity policy to be issued by the National Guarantee and Surety Association, Ltd., affording indemnity against any claim for estate duty up to £500, the total amount of the purchase price.

The second question is whether the repudiation or rescission contained in the letter of Dec. 21, 1954, is valid and operative. [On this question His LORDSHIP referred to *Murrell v. Goodyear* (1) ((1860), 1 De G.F. & J. 432), reading a passage from the judgment of TURNER, L.J. (ibid., at p. 449); to *Halkett v. Earl of Dudley* (2) ([1907] 1 Ch. 590), reading the headnote and passages from the judgment of PARKER, J. (ibid., at pp. 597, 600); and to *Elliott v. Pierson* (3) ([1948] 1 All E.R. 939). After reading a passage from the judgment of HARMAN, J., in *Elliott v. Pierson* (3) ([1948] 1 All E.R. at p. 942, letter E to end of page), His LORDSHIP continued:] Those cases lay down two principles: first, that the purchaser, if he wishes to repudiate a contract on the ground that there is some defect in the title, must do so as soon as he discovers the defect; and secondly, that if he enters into a further negotiation with regard to the removal or adjustment of the defect, he must allow the vendor a reasonable time in which to do so. That involves the problem, what is "a reasonable time",

and that must, in my view, depend on all the circumstances of the particular case. In the case before me the defect was of an unusual character. Unlike the obtaining of the concurrence of the heir-at-law or the removal of a restrictive covenant or the getting in of an outstanding reversion, it was a defect which could not be righted because nothing could, before Oct. 16, 1958, get rid of the contingent charge of estate duty except the death of Mrs. Amos and the payment of the duty. On the other hand, the death of a particular person before a particular date is a calculable risk in respect of which the insurance companies of this country issue cover policies every day. It is something which can be done in the normal course of business and the only matter which has to be worked out is the amount of the premium, having regard to the age and state of health of the life involved.

The moment the plaintiff's solicitors discovered the deed of gift with the consequent contingent charge for estate duty, indeed by the requisitions on title dated Oct. 26, 1954, they required that the defendants at their own expense should obtain an insurance indemnity in favour of the plaintiff. Further, as soon as the defendants' solicitors had written that they could not advise their clients to obtain such an insurance policy, the plaintiff's solicitors, by their letter of Nov. 8, made their client's position perfectly clear:

"Our client is not prepared to proceed with the matter and requires the return of the deposit paid unless an indemnity policy in her favour is obtained."

That is quite unequivocal. It is not the same thing as entering into negotiations to adjust the defect in such a way as to amount to a waiver of the right to repudiate. In effect the plaintiff was saying, "I repudiate unless you provide an indemnity policy".

Of course, a reasonable time must be allowed for the provision of such a policy, but the subsequent course of the correspondence shows that the defendants did not accept the necessity to provide such a policy. On the other hand, the plaintiff has never modified her attitude. That appears from the letter of Nov. 18 and from the telephone conversation referred to in the letter from the defendants' solicitors of Dec. 9. Having waited until Dec. 21 without the provision of the indemnity policy or any undertaking or promise to provide it, the plaintiff, by her solicitors' letter of that date, rescinded the contract. In my view it would have been wiser if her solicitors had served a notice setting a time limit, but, in my opinion, from Oct. 26 to Dec. 21, a period of nearly two months, gave the defendants a reasonable period of time in which to provide or to undertake to provide an indemnity policy which, as I have already held, ought in the circumstances to have been provided. It is not wholly irrelevant to observe that, although time was never expressly made the essence of this contract, the contract to the knowledge of both the defendants and the plaintiff was in respect of a house let off in separate rooms, some of which were tenanted and some not, and furniture was included in the sale. In the result the plaintiff, in my judgment, is entitled to a declaration that the contract is rescinded and that she is entitled to the return of her deposit. The plaintiff is entitled to the costs of the action, and to the £13 ls. 6d. damages which she has claimed. The counterclaim for specific performance must be dismissed with costs.

Judgment for the plaintiff.

Solicitors: *Lamb, Goldsmith & Howard*, Liverpool (for the defendants).

[*Reported by K. BUCKLEY EDWARDS, Esq., Barrister-at-Law.*]

A

WOOD v. WOOD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 8, 9, 19, 1956.]

Justices—Husband and wife—Maintenance order—Discharge—Decree of divorce granted to husband by foreign court of competent jurisdiction—Service of proceedings ineffective—Wife ignorant of proceedings until after decree—No evidence of law of foreign country as to wife's rights—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7.

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The parties were married in 1945, the husband being of English nationality and domicil. On Feb. 7, 1950, the wife obtained under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, a maintenance order on the ground of the husband's desertion. In March, 1954, the husband went to live permanently in Las Vegas and acquired a domicil of choice in the State of Nevada. In September, 1954, the court in Las Vegas granted the husband a decree of divorce on the ground that he and the wife had not lived together for three years. The wife had no notice of the proceedings in that court as service was effected by advertisement in a Las Vegas newspaper. The husband applied to the magistrates' court under s. 7 of the Act of 1895 for the discharge of the maintenance order of Feb. 7, 1950. There was no evidence before the magistrates' court as to the law of Nevada regarding the rights of a divorced wife to maintenance or alimony. The magistrate held that the power to discharge a maintenance order was discretionary and in the exercise of that discretion he dismissed the husband's application. On appeal,

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Held: the order would be discharged because the marriage had been dissolved by a foreign court of competent jurisdiction (*Mezger v. Mezger*, [1936] 3 All E.R. 130, applied, *Bragg v. Bragg*, [1925] P. 20, distinguished); the fact that the method of service had been ineffective was irrelevant (*Boettcher v. Boettcher*, [1949] W.N. 83, applied), and there was no evidence that the wife was entitled to any rights in respect of maintenance before the foreign court.

Per CURIAM: the reasoning in *Bragg v. Bragg* ([1925] P. 20) based on a convenient use of the concurrent jurisdiction in England leads to the following conclusions:

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(a) that in the case of an English divorce supervening on a magistrate's order, the order should be discharged if the wife is the divorcee, except possibly (i) in the case of a decree to both parties, or (ii) where the Divorce Court has indicated the propriety of a compassionate allowance for the wife,

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(b) that in the case of a wife being divorced by a foreign court of competent jurisdiction the order must be discharged if the wife has been found not to be entitled to maintenance in that foreign court (*Mezger v. Mezger*, [1936] 3 All E.R. 130), and

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(c) that if it is evident that her rights in the foreign country differ from those in this country, the proper course is to discharge the order and leave the wife to have recourse to whatever rights she may have in the foreign country (*Kirk v. Kirk*, [1947] 2 All E.R. 118); and, further, this last result should follow also where there is no evidence as to the wife's rights in the foreign country (see p. 650, letters G and H, post).

Appeal allowed.

[As to the discharge by a magistrates' court of a maintenance order after a foreign divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 492, para. 1091, note (h); and for cases on the subject, see 27 DIGEST (Repl.) 722, 723, 6908, 6909.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.]

Cases referred to:

- (1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, 6907.
- (2) *Pastre v. Pastre*, [1930] P. 80; 99 L.J.P. 20; 142 L.T. 490; 27 Digest (Repl.) 606, 5687.
- (3) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; 27 Digest (Repl.) 722, 6908.
- (4) *Kirk v. Kirk*, [1947] 2 All E.R. 118; 177 L.T. 151; 111 J.P. 435; 27 Digest (Repl.) 722, 6909.
- (5) *Bater v. Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 11 Digest (Repl.) 482, 1087.
- (6) *Boettcher v. Boettcher*, [1949] W.N. 83; 93 Sol. Jo. 237; 11 Digest (Repl.) 487, 1117.
- (7) *Igra v. Igra*, [1951] P. 404; 95 Sol. Jo. 563; 11 Digest (Repl.) 518, 1324.
- (8) *Wood v. Wood*, [1949] W.N. 59; 93 Sol. Jo. 200; 27 Digest (Repl.) 723, 6911.

Appeal.

The husband appealed against an order of a metropolitan magistrate at North London Magistrates' Court, dated June 21, 1956, whereby he dismissed the husband's application to discharge a maintenance order made in the wife's favour on Feb. 7, 1950.

C. L. Hawser and *M. Graham* for the husband.

D. Henderson for the wife.

Cur. adv. vult.

Oct. 19. **LORD MERRIMAN, P.:** The judgment which COLLINGWOOD, J., is about to read is the judgment of the court.

COLLINGWOOD, J., read the following judgment: This is a husband's appeal from an order made by the metropolitan magistrate, sitting at the North London Magistrates' Court, on June 21, 1956, whereby he dismissed the husband's application to discharge an order made on Feb. 7, 1950, on the ground of his desertion, for payment to the wife of £3 per week for her maintenance, and 15s. per week for each of the two children. At the same time the magistrate granted the wife's application to vary the amount of the order and increased it to £5 per week for the maintenance of the wife and 30s. weekly towards that of each of the children. The grounds of the appeal are: (i) that the magistrate had no jurisdiction to continue the order or to vary it; (ii) that he was wrong in law in holding that he had a discretion to refuse the husband's application to discharge the order, and to continue and vary it as he did; and (iii) that if the magistrate had a discretion, his order was not a judicial exercise of such discretion.

The parties were married on June 9, 1945, the husband being of English nationality and domicile. There are two children of the marriage now aged ten and eight years respectively. On Feb. 7, 1950, the wife obtained a maintenance order on the ground of the husband's desertion, an order which he unsuccessfully attempted to have discharged in December, 1952, on the ground that he had made a bona fide offer to resume cohabitation which was rejected. He also alleged that the wife had committed adultery, but this charge also was dismissed. The husband is the owner of a troupe of performing chimpanzees, and in January, 1953, he took the animals to America, exhibiting them in New York and then in Las Vegas, Nevada. Shortly after arriving in America he invited the wife to join him there, but she refused to go as he was accompanied by another woman who was pregnant by him at the time. He states that he decided to make his home in Las Vegas—attracted by the climate which suited his troupe of chimpanzees, and the rate of income tax which compared favourably with that of his native land. He found, however, that he was unable to do so because

A his presence there was on a working permit only, and that in order to obtain permission to remain it was necessary to leave the United States of America and return provided with immigration papers. Accordingly he left the United States in September, 1953, and returned to England via France, in which latter country he obtained the necessary permits.

In March, 1954, he returned to Las Vegas, where he acquired a house and
B some ten acres of ground. He has paid American income tax for three years, and states that he intends to live there permanently and to become an American citizen after the expiration of the necessary five years' residence. On Sept. 29, 1954, the court in Las Vegas granted him a decree of divorce, on the ground that he and his wife had not lived together for three years. The qualification for obtaining such a decree was residence there for six weeks. The wife knew
C nothing of this suit for dissolution until after the decree, as service of the proceedings was by advertisement in a Las Vegas newspaper. In the present year the husband came to England to exhibit his chimpanzees at the Palladium in London, and on May 18, 1956, he appeared at the North London Magistrates' Court on a warrant for arrears of maintenance under the order of Feb. 7, 1950, amounting to £260 10s. He then applied for a summons to have the order
D discharged on the ground that he was now divorced, and this was granted, he being remanded on his own recognisances and agreeing to pay off the arrears (which were not disputed) at £40 per week—an undertaking which he has kept.

On May 31, 1956, this summons came on for hearing before the magistrate, together with a summons taken out on May 23 by the wife for an increase in the amount of the order on the ground that the husband's circumstances had
E improved. The learned magistrate, in giving his decision, said:

"I am satisfied that sufficiently long before the divorce the husband had settled in Nevada, and that at the time of the divorce he was sufficiently domiciled for a valid and binding decree to be pronounced by the court. In law the wife's domicile follows the husband's."

F He went on to comment on the substituted service of the petition, pointing out that the proceedings were never likely to come to her knowledge, and saying that he was satisfied that she knew nothing of them until after the decree. In view of the husband's acquisition of a domicile of choice in Nevada he felt bound to recognise that the decree was effective and the parties were divorced. He went on, however, to say that in his opinion the effect of the decision in
G *Bragg v. Bragg* (1) ([1925] P. 20) was that there was a discretion in the court of summary jurisdiction to refuse to discharge an order for maintenance which had previously been made. He also referred to *Pastre v. Pastre* (2) ([1930] P. 80), *Mezger v. Mezger* (3) ([1936] 3 All E.R. 130), and *Kirk v. Kirk* (4) ([1947] 2 All E.R. 118). After considering these authorities the magistrate decided that it was contrary to the principles of natural justice that the wife should be deprived
H of her right to maintenance, she being a completely innocent party, and her refusal to accompany her husband to America "as junior partner to a troupe formed by his family of chimpanzees and his pregnant mistress" entirely justified. He thought that to grant the husband's application to discharge the order would be to allow him to benefit by his own wrong. He added that there was no evidence before him as to the laws of Nevada regarding the rights of an
I innocent wife to maintenance or alimony in divorce or other proceedings between the parties. He therefore refused to discharge the order, and in view of the husband's greatly improved circumstances he varied the order by increasing the amount as previously stated.

The courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign countries at the commencement of the proceedings for divorce, and in considering the validity of a foreign divorce it is immaterial that the marriage sought to be dissolved abroad was solemnised

in England or that the divorce was granted for a cause which, in the view of the English law, would not entitle a petitioner to a decree in this country. Any doubts as to this were finally disposed of by the decision of the Court of Appeal in *Bater v. Bater* (5) ([1906] P. 209). In the present case the magistrate has found that the husband, who at the time of the making of the original order for maintenance was domiciled in this country, had at the time of the granting of the divorce acquired a new domicile of choice in Nevada. There was clearly evidence on which he could so find, and counsel for the wife conceded that he was not in a position to challenge it, or as a result to question the jurisdiction of the Nevada court to grant a decree of divorce, the validity of which must be recognised by the courts of this country.

Moreover, the fact that the method of substituted service by a court of competent jurisdiction was in fact ineffective is also irrelevant. Thus in *Boettcher v. Boettcher* (6) ([1949] W.N. 83), service on the respondent, who was resident in England, was held to have been effective where, as in the present case, it was made by advertisement in a local newspaper in an American state—Indiana—though such notice never in fact came to the notice of the respondent. And in *Igra v. Igra* (7) ([1951] P. 404), the respondent, then a refugee in England from the Nazi régime, had no notice of his wife's proceedings in Germany, but PEARCE, J., held that this fact did not demonstrate that the German decree offended against natural justice; he said (*ibid.*, at p. 411):

“As there is a discretion in our own court to dispense with service, we should be slow to brand a foreign decree as contrary to natural justice (particularly when it was made in time of war) merely because notice did not in fact reach the applicant. In this case I have no evidence that the usual practice of appointing a curator absentis was not adopted, or that advertisement, albeit ineffectual, was not used by way of substituted service.”

In *Bragg v. Bragg* (1) ([1925] P. 20), the wife, who had obtained a maintenance order on the ground of desertion, subsequently obtained from the Divorce Court a decree on the ground of her husband's adultery and bigamy. No order for maintenance was made or applied for in the Divorce Court. The husband then took out a summons under the Summary Jurisdiction (Married Women) Act, 1895, asking for a discharge of the order on the ground that it had ceased to be operative or, if not, ought to be discharged as soon as the parties had ceased to be husband and wife. The magistrate dismissed the summons on the ground that he had a discretion under s. 7 of the Act, and ought not to exercise it against a woman who had subsequently obtained a divorce, in the absence of some good cause—which did not exist in that case. The Divisional Court upheld this decision. In the course of his judgment SIR HENRY DUKE, P., said (*ibid.*, at p. 25) that he thought the view was right that the husband must come to a court of summary jurisdiction to get rid of the order, although there had been a decree absolute for divorce, and it seemed to him to follow that in default of the obligatory grounds for discharge of an order (that is to say, adultery or resumption of cohabitation), before the husband could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged. He had failed so to satisfy the magistrate. The magistrate had thought it a very convenient thing that the order should subsist, and that a court which was close at hand to the parties should be able to give the wife assistance if she needed it, or give the husband relief if he were entitled to it. SIR HENRY DUKE entirely agreed with these reasons.

That case was distinguished in *Mezger v. Mezger* (3) ([1936] 3 All E.R. 130). There a court of summary jurisdiction refused to discharge or vary a maintenance order made during the subsistence of a marriage since dissolved by the decree of a competent foreign court. The reasons for such a refusal were (a) that the marriage had been dissolved on grounds not recognised by English law, and

- A (b) because the wife's financial position required the continuance of the maintenance. It was held that neither of those grounds showed a judicial exercise of the discretion, because there was no longer a subsisting marriage, and the summary jurisdiction court had no concern for the reasons for its dissolution, and in addition to the continuance of the maintenance being inconsistent with the foreign decree, it was without the province of the summary jurisdiction
- B court to decide whether the former wife should be maintained by her former husband or by becoming chargeable to public assistance. In his judgment SIR BOYD MERRIMAN, P., said (*ibid.*, at p. 133):

C "But while following not merely loyally but cordially the decision in *Bragg v. Bragg* (1), it is necessary to see how far it goes and how far it applies to the circumstances in this case."

- The President then referred to the facts and judgment in *Bragg v. Bragg* (1), and said (*ibid.*, at p. 135), that however convenient and proper it might be in cases where the facts were the same as in *Bragg v. Bragg* (1) that a maintenance order should be continued after a decree of divorce, in the case where the marriage had been dissolved by a court of competent jurisdiction in a foreign country
- D after a contest in which the parties had mutually recriminated, and where the husband's allegations had been found to be proved and the wife's counter-allegations, including that of alleged failure by the husband to maintain her, had been held to be disproved, and in a case, moreover, where the court in this country could not have entertained a claim for compassionate allowance or for maintenance in any shape or form, because the parties could not possibly come
- E before the court, and therefore the question of relative convenience, as between one court and another, did not arise, he found it impossible to say that there was a judicial exercise of discretion in continuing the award of maintenance as between former spouses who had for ever ceased to be husband and wife. LANGTON, J., in the course of his judgment said (*ibid.*, at p. 136):

- F "The case of *Bragg v. Bragg* (1) provides an instance of the kind. In that case the order for maintenance existed when the wife obtained the decree. It is not surprising that the divisional court should have found it most right and convenient that the order for maintenance should be continued. There is nothing, I think, there which could shock anybody's conscience and it certainly was very convenient from the point of view of expense and avoidance of litigation."

- G *Bragg v. Bragg* (1) had also been distinguished in *Pastre v. Pastre* (2) ([1930] P. 80), where a wife had obtained a decree of judicial separation, followed by an order for permanent alimony. Subsequently the husband obtained a decree of divorce in the country of his domicile (which was France) on the ground, valid under French law, that the parties had been judicially separated for three
- H years. The husband then applied to the English court for a declaration that the order for alimony had abated or alternatively for its discharge. HILL, J., held that the alimony order remained operative until set aside, but the status of the woman as wife and her consequential right to alimony having ceased, he was bound to discharge the order therefor. He added that considering as he was the effect of the foreign judgment on a decree of judicial separation
- I in the Divorce Court, he was in no way bound by the decision of *Bragg v. Bragg* (1) in relation to a court of summary jurisdiction.

A decision similar to that in *Mezger v. Mezger* (3) is found in *Kirk v. Kirk* (4) ([1947] 2 All E.R. 118), where there had been a Scottish divorce, the husband being a domiciled Scotsman, and a maintenance order had been made in England at a time during the marriage when an English court of summary jurisdiction had jurisdiction over the case. After an inquiry about what pecuniary rights the wife had as ancillary to the decree of divorce in Scotland, the Divisional Court held, reversing the finding of the justices, who had kept the order alive, that the

proper exercise of their jurisdiction was to leave the wife to such remedy by way of maintenance as she had in the Scots courts. In the course of the judgment it was said that this court was not prepared to lay down that in no circumstances whatever could a maintenance order be kept in being after a decree of divorce by a foreign court. Nevertheless, it is clear that this court thought that the existence of a foreign divorce was a matter of cardinal importance.

Again in *Wood v. Wood* (8) ([1949] W.N. 59), the Divisional Court reversed a decision of magistrates who had refused to vary an order after the husband had obtained a decree on the ground of his wife's desertion, they having in effect come to their decision solely on the ground that the wife needed maintenance. In his judgment LORD MERRIMAN, P., said that there was no doubt on the unquestioned authority of *Bragg v. Bragg* (1) that justices had jurisdiction in the proper exercise of their discretion to keep alive an order for maintenance in favour of a wife, and for that matter an order for custody, notwithstanding a subsequent decree of divorce. However, he added that *Bragg v. Bragg* (1) was a case of a successful wife, and that no question had therefore arisen of her having disentitled herself to some form of maintenance, but that the situation was manifestly different when the wife was the guilty party in the divorce, if through her own fault she was no longer able to represent herself as a wife entitled to maintenance except in very special circumstances. The President also thought that the case was covered by *Mezger v. Mezger* (3), for he said that once the question of the validity of the foreign decree of divorce in that case had been determined, the position had become exactly as if the decree had been an English one.

We appreciate, of course, that in contrast with the case just referred to, the wife in the present case had not, so far as is known, been guilty of any matrimonial misconduct which disentitled her to claim maintenance; indeed, her rights in that respect in the State of Nevada are left wholly obscure. Nor, as in *Mezger v. Mezger* (3), was the wife before the court, still less had she recriminated in the suit, for, as has already been stated, she knew nothing about the proceedings at all. None the less, the fact remains that her status as a wife has been put an end to by a court of competent jurisdiction on a ground recognised in that jurisdiction, and there is no reported case in which an order has been maintained in favour of a wife against whom a decree has subsequently been granted, whether by an English or a foreign court.

It would appear therefore that the reasoning in *Bragg v. Bragg* (1), based on a convenient use of the concurrent jurisdiction in this country, leads to the following conclusions; viz., first, that in the case of an English divorce supervening on a magistrate's order, the order should be discharged if the wife is the divorcee, except possibly: (i) in the case of a decree to both parties, or (ii) where the Divorce Court has indicated the propriety of a compassionate allowance for the wife, and secondly, that in the case of a wife being divorced by a foreign court of competent jurisdiction the order must be discharged if the wife has been found not to be entitled to maintenance in that foreign court (see *Mezger v. Mezger* (3)); further, that if it is evident that her rights in the foreign country differ from those in this country, the proper course is to discharge the order and leave the wife to have recourse to whatever rights she may have in the foreign country (*Kirk v. Kirk* (4)). In our opinion, therefore, the same result as in the last case should follow also where, as in the present case, no evidence has been given that she is entitled to any rights at all in the foreign country.

We fully appreciate and share the views of the learned magistrate about the apparent hardship to the wife if the order in her favour is discharged. It was made on the ground of the husband's desertion, and there appears to be no reason to suppose that the desertion had been terminated at the time of the foreign decree. Indeed, the only suggestion to that effect is that when the husband went to America the wife declined to go with him. But her explanation

A of this refusal has been found to be that she was unwilling to make a third with the husband and his pregnant mistress, whom he has since married. The present proceedings, however, have resulted in the enforcement of payment of a substantial amount of outstanding arrears; and, since the husband's business is likely to bring him to this country for considerable periods from time to time, it may well be that if the order were continued it might be enforced against him

B in this country in future. Nevertheless, we do not think that it is permissible to allow these considerations to weigh against the propriety of setting aside the order in light of the foreign decree. In our opinion it is most important to avoid any suggestion that effect is not being given to the foreign decree because of the grounds on which it is based, or on the ground that the substituted service was ineffectual, or that it is being assumed, without any evidence

C of the foreign law, that the husband's adultery or his desertion would be fatal according to the foreign law to his obtaining a decree on the ground of a three years' separation. For these reasons we allow the appeal; and, accordingly, the order of Feb. 7, 1950, will be discharged.

Appeal allowed.

D Solicitors: *Tringhams* (for the husband); *J. C. Clifford Watts* (for the wife).
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

E ROBERTSON v. CILIA.

[CHANCERY DIVISION (Upjohn, J.), October 23, 31, 1956.]

Practice—Adjournment of proceedings—Inherent power to adjourn proceedings—Mortgagee's claim for possession—Arrears of instalments paid, but mortgagor unable to repay loan within reasonable period—R.S.C., Ord. 55, r. 5A, and Practice Directions thereunder.

F By a legal charge dated Jan. 12, 1953, the owner and occupier of a dwelling-house mortgaged it to secure repayment of a loan and interest by monthly instalments. The mortgagor fell into arrear with payment of the instalments, and the mortgagee became entitled to enforce her security and gave notice calling in the mortgage. In March, 1956, the mortgagee took

G out an originating summons for possession of the house. When the summons came before the judge in chambers in July, 1956, the mortgagor offered to pay up all arrears, and the judge directed the matter to be stood over generally with liberty to restore on default by the mortgagor. Subsequently, the mortgagee having taken the point that the matter could not be stood over generally without her consent, the summons was adjourned into court

H for argument. Before Oct. 23, when the adjourned summons came before the court, the mortgagor had paid up all arrears of instalments. The mortgagee was willing to accept an adjournment for a fixed period of two or three months to enable the mortgagor to pay off the whole of the amount due from him, but in the financial circumstances prevailing in the country it was impracticable for the mortgagor to obtain credit or another loan to enable

I him to discharge the mortgage and he asked for an adjournment for one year in the hope that conditions might ease.

Held: (i) the court had no jurisdiction to stand the matter over generally, without the mortgagee's consent, even on terms, because to do that (a) would be to force on the parties an agreement which they had not made, and (b) would amount to an arbitrary refusal to hear the case, as it would postpone indefinitely the mortgagee's right to have her claim for possession tried.

(ii) although the court had jurisdiction to adjourn the matter for a reasonable time to give the mortgagor an opportunity of making an offer

acceptable to the mortgagee or of discharging the loan completely, yet an adjournment for a year would not be reasonable in the circumstances, and, therefore, an order for possession would be granted.

Dictum of FARWELL, J., in *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman* ([1940] 4 All E.R. at p. 215) applied.

[As to adjournment of proceedings, see 26 HALSBURY'S LAWS (2nd Edn.) 93, para. 176.

For R.S.C., Ord. 5, r. 5A, and R.S.C., Ord. 55, r. 5A, see the ANNUAL PRACTICE, 1956, pp. 36, 1121.]

Cases referred to:

- (1) *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman*, [1940] 4 All E.R. 212; [1941] Ch. 32; 110 L.J.Ch. 36; 164 L.T. 399; 2nd Digest Supp.
- (2) *Re Yates' Settlement Trusts, Yates v. Paterson*, [1954] 1 All E.R. 619; 3rd Digest Supp.

Adjourned Summons.

The plaintiff, Mrs. Mary Robertson, was the lender under a legal charge dated Jan. 12, 1953, and the defendant, Emanuel Cilia, was the borrower. The defendant being in arrear with the instalments due under the charge, the plaintiff applied by originating summons for possession of the property comprised in the charge. The summons was adjourned into court for argument on the question whether the summons could be stood over generally on terms.

The facts appear in the judgment.

G. C. Raffety for the plaintiff, the mortgagee.

S. W. Templeman for the defendant, the mortgagor.

Cur. adv. vult.

Oct. 31. UPJOHN, J., read the following judgment: This summons is concerned with the question of the right of a mortgagee to possession of the mortgaged premises. The plaintiff mortgagee and the defendant mortgagor entered into a legal charge dated Jan. 12, 1953, on No. 145, Lancing Road, Orpington, in the County of Kent, to secure payment of £1,360 with interest at five per cent. per annum. I need refer to only a few of the clauses in the legal charge. By cl. 1 the defendant (therein called "the borrower") covenanted to pay to the plaintiff (therein called "the lender") £1,360 with interest at five per cent. on Feb. 12, 1953. Clause 2 contained a charge by way of legal mortgage on the premises, and there followed a number of clauses familiar in a mortgage deed. Clause 6 was in these terms:

"If the borrower shall perform and observe all the covenants and conditions herein (other than the covenant for repayment of principal on Feb. 12 next) the lender will accept payment of principal and interest by annual payments of £111 payable by equal calendar monthly payments of £9 5s. on the twelfth day of each month such annual payments of £111 to be first applied in satisfaction of a year's interest on the principal sum outstanding after deduction of income tax and the balance in reduction of principal (such year's interest to be calculated on Jan. 12, 1954, on the sum of £1,360, and on Jan. 12 in subsequent years on the principal sum outstanding immediately after the last previous payment on account of principal) and so long as such payments are made on the due date the lender will not enforce the security hereby constituted."

There was no attornment clause.

The defendant, for reasons which will presently appear, soon fell into arrear with payment of his instalments, no instalments being paid after Aug. 11, 1953, until Jan. 29, 1954. Thereafter instalments were paid and some arrears paid off, but the plaintiff gave notice calling in the mortgage money on June 10, 1954,

- A when the defendant was £13 15s. in arrear with his instalments. Matters, however, drifted on and the plaintiff gave another notice calling in the mortgage on Feb. 17, 1956, when the defendant was some £49 in arrear. It is not disputed that at latest when the defendant made default in the autumn of 1953 the protection granted by cl. 6 to the defendant lapsed and the plaintiff became entitled at law to enforce her security, to call in the principal money, and enter into possession of the mortgaged premises. In view of the long-continued default from September, to December, 1953, inclusive, I need not consider whether in cl. 6 time was strictly of the essence, nor do I propose to express any opinion on the point taken by counsel for the plaintiff that the plaintiff could by virtue of her estate in the premises at law enter into possession from the moment the mortgage was executed notwithstanding cl. 6, it being plain, for the reason which I have mentioned, that she was at law entitled to do so long before this summons for possession was issued on Mar. 13, 1956.

- The summons came before me in chambers in July, 1956, when the defendant appeared before me in person with a sad story that he had regularly paid the monthly instalments to his wife for her to pay to the plaintiff or her solicitors, and she without his knowledge, until he made inquiry when the summons was served on him, failed to pay over many of the instalments. That story is accepted as true by the plaintiff, although, of course, she was entirely ignorant of this trouble until the defendant told the master about it when the summons first came before him. Before me the defendant offered to pay up all arrears, and on terms that he paid punctually all future instalments, and in addition £5 a month on account of arrears until all were paid off, I stood the matter over generally with liberty to restore on default by the defendant. The plaintiff did not appear by counsel and took no point that I could not in a proper case stand the case over generally on terms if I thought fit, although she did press for an order for possession. Later on counsel applied for the matter to be re-heard in order to challenge the order, and as no order had been drawn up I adjourned the summons into court for argument. That was in July, and when the matter came before me for hearing last week, I was told that in fact the defendant has now paid up all arrears of instalments down to and including that due on Oct. 12, 1956.

- Counsel for the plaintiff submits that this court has no right without the consent of the plaintiff to stand over the summons generally, even on terms, and, notwithstanding that all arrears have now been paid up, he submits that the plaintiff is entitled to an order for possession. That raises a challenge to what I am told is a very frequent practice by masters in the Chancery Division. On the other hand, counsel for the plaintiff would not object to an order for an adjournment for a fixed period of two or even three months if the defendant wanted time to make arrangements to pay off the whole amount due under the mortgage; but counsel for the defendant frankly admits that such an adjournment would be of no use to the defendant, for inquiry has shown that as a result of financial conditions now operating, usually described as the credit squeeze, it is impossible to obtain a loan to pay off an existing mortgage.

- Before the Rules of the Supreme Court were altered in 1936, it is quite clear that the plaintiff could have proceeded in the Queen's Bench Division and obtained an order for possession as of course, but, in that year, the rules were altered by the introduction of R.S.C., Ord. 5, r. 5A, and R.S.C., Ord. 55, r. 5A*, and a practice direction was given in these terms by the judges of the Chancery Division:

"When possession is sought and the defendant is in arrear with any instalments due under the mortgage or charge and the master is of opinion

* By R.S.C., Ord. 5, r. 5A, every action in which a mortgagee of real or leasehold property is seeking any form of relief is assigned to the Chancery Division. R.S.C., Ord. 55, r. 5A, enables a mortgagee to apply by originating summons for, among other forms of relief, delivery of possession.

that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit . . . ” A

Both sides relied on *Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman* (1) ([1940] 4 All E.R. 212). The claim there made on behalf of the plaintiff was that under the terms of the mortgage and in the events which had happened the plaintiff was entitled to an immediate order for possession, and it was argued that the court had no power to order an adjournment to give the defendant an opportunity of paying off the arrears. That raised a question of some general importance, and as the defendant did not appear the Crown appeared as *amicus curiae*. FARWELL, J., said (*ibid.*, at p. 216): B

“ The proposition that this court has not power to adjourn any matter on any proper ground is new to me. No doubt the court cannot postpone the hearing of a matter indefinitely, because, if a court did so, it might thereby lead to defeating justice altogether, and a mere arbitrary refusal to hear a particular case is not a matter which, when dealing with litigation, would ever become a recognised thing. I cannot conceive any judge taking a course of that sort. However, to say that the court has not always an inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that that is the proper way to deal with the matter is a proposition entirely new to me.” C D

This passage was cited with approval by ROMER, L.J., in *Re Yates' Settlement Trusts, Yates v. Paterson* (2) ([1954] 1 All E.R. 619 at p. 622). It is equally clear from the judgment of FARWELL, J., that he recognised that if the plaintiff established a right to possession he must get it. He said ([1940] 4 All E.R. at p. 215): E

“ However, if the plaintiff proves that he is in fact in the position of a mortgagee who is entitled to possession and is entitled to his order, of course he will get possession, and there is nothing in the rules, I think, which can alter the right of the mortgagee, which he had before the passing of the Judicature Act, 1875, which he had after the passing of that Act, and which, in my judgment, he still has, to possession in proper circumstances.” F

At the end of his judgment the learned judge referred the matter back to chambers with a direction to the master that, if he was satisfied that none of the instalments had been paid during the last three months, the master should make an order for possession. Counsel for the defendant argued, with some force, that this shows by necessary implication that, if it had been proved before the master that some or possibly all instalments due had been paid, FARWELL, J., would have granted a further adjournment. With all respect to that argument, I do not think that that implication can be extracted from the judgment. He was concerned, and concerned solely, with the suggestion that there was no power in the court to adjourn at all. He never considered, for it was not before him, what would be the position if the plaintiff was still pressing for possession although it was proved that all arrears of instalments had been paid. That is the problem which I have to consider. G H

In this case the plaintiff has clearly established the fact that the mortgage is presently enforceable. She is plainly entitled to repayment of the whole loan and interest outstanding, and for that purpose to realisation of her security, in order to repay herself the moneys due, and in aid of her realisation to possession of the mortgaged premises. It seems to me clear, having heard argument on it, that I have no right to stand the matter over generally without the consent of the plaintiff, although all arrears of instalments have been paid up, even on terms as to punctual payment in the future. That is so for two reasons. First, if I were to do so I should be forcing the parties to an agreement which they have never made, namely, to compel the plaintiff to accept repayment by instalments although the defendant's right to do so has long since lapsed. The judges' I

- A direction of 1936 was never intended to give the court power to do that, and if that had been the intention the argument that the direction was ultra vires would have succeeded. Secondly, if I were to do so I should, so it seems to me, be postponing indefinitely the right of the plaintiff to have her case for possession tried, on terms which I have no power to impose. That would amount to an arbitrary refusal to hear this case.
- B Counsel for the defendant, realising his difficulty in supporting a claim to an indefinite adjournment, submitted that, as I had power to adjourn the matter for a fixed period, I should do so for one year in the hope that the credit squeeze would by then have lessened and the defendant would be thereby enabled to pay off the loan. He drew my attention to many facts in evidence, namely, that the defendant will be turned out of the premises where he has been resident for
- C nineteen years, and of which he was formerly a tenant of the plaintiff with the protection of the Rent Restrictions Acts; that he was persuaded by the plaintiff to purchase the property, and that his misfortune is due to his wife's peccadilloes. On the other hand, he urges, with some justification, on evidence, that the plaintiff herself is a victim of the credit squeeze and is pursuing her remedies only because her bankers, who are sub-mortgagees, are pressing for reduction of her
- D overdraft. If I grant a long adjournment, he says that the only effect will be that the bank will be compelled to permit the plaintiff to continue her overdraft. That is an appeal to hardship, and if I had the right to refuse relief to a mortgagee on the ground that greater hardship would be caused to the mortgagor I might well refuse to make an order for possession in this case, but Parliament has not thought right to give the court power to interfere between mortgagor and
- E mortgagee on that ground.
- No doubt, I have power to adjourn this matter for a reasonable period to give the mortgagor an opportunity of making some offer acceptable to the mortgagee, and, if necessary, trying to find means of discharging the loan altogether. That was the whole object of the alteration of the Rules of the Supreme Court in 1936, namely, to prevent a mortgagee turning a mortgagor out of possession almost
- F literally overnight without giving him an opportunity to meet and try to satisfy his creditor.
- In the circumstances of this case, however, the defendant has no acceptable proposition to put forward. It cannot, in my judgment, be a reasonable exercise of my discretion to adjourn the hearing for as long as one year in the mere hope that the financial position of the country will ease and that the defendant will be
- G able to find someone able and willing to lend him money to discharge the plaintiff's mortgage. An order for possession must go.

Order for possession in two months after service of the order.

Solicitors: *Lewis W. Taylor & Co.* (for the plaintiff); *Dowding & Dowding*, Orpington (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re 34, BRUTON STREET, WESTMINSTER.

[CHANCERY DIVISION (Vaisey, J.), October 17, 18, 31, 1956.]

War Damage—Cost of works—Making good war damage Front wall of house damaged by enemy action—Party walls reinstated as part of work of reinstating front wall—Work executed to conform with London Building Acts—Whether cost of reinstating party walls to be included in cost of works payment—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 8 (2).

The front wall of an old house, which was situated in a continuous row of buildings, was so damaged by enemy action as to require its being rebuilt. In 1948 dangerous structure notices in respect of the house were served by the county council under the London Building Acts (Amendment) Act, 1939, and the work of rebuilding was carried out under the supervision of the district surveyor and according to his requirements under the provisions of the London Building Acts. When the front wall was taken down it was found that the party walls, although they had not sustained war damage, were in too dangerous a condition for the new front wall to be block-bonded into them, and the district surveyor required the party walls to be partially pulled down and rebuilt as part of the work required to the front wall. On a claim by the owners of the property for a cost of works payment under the War Damage Act, 1943, in respect of the whole work, the War Damage Commission determined that the cost of reinstating the party walls was to be excluded from the amount of the payment to be made by them under s. 8 (2)* of the Act.

Held: the cost of reinstating the party walls should be included in the cost of works payment, because the cost of complying with the district surveyor's requirements concerning the party walls was, in the circumstances, necessary for reinstating the front wall and thus was part of the proper cost of making good the war damage to the front wall within s. 8 (2) of the Act of 1943.

Re Jamaica Street, Stepney, Nos. 36, 38, 40 & 42 ([1947] 1 All E.R. 754) applied.

[For the War Damage Act, 1943, s. 8 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 478.]

Cases referred to:

- (1) *Re Jamaica Street, Stepney, Nos. 36, 38, 40 & 42*, [1947] 1 All E.R. 754; [1947] Ch. 409; [1947] L.J.R. 1344; 177 L.T. 645; *affg.*, [1946] 2 All E.R. 658; [1947] Ch. 158; [1947] L.J.R. 284; 2nd Digest Supp.
- (2) *Re Halton Terrace, Sevenoaks, Nos. 6 & 8*, (Jan. 22, 1953), unreported.

Originating Notice of Motion.

The appellants, Massey Estates, Ltd., applied under the War Damage Act, 1943, s. 32 (3), by motion for an order that a determination dated Nov. 25, 1955, of the War Damage Commission be varied on the ground that the commission wrongfully excluded from their determination the payment of an amount equal to the proper cost of the works executed to the party walls of the property in respect of which a claim was lodged with the commission by the appellants.

The property, 34, Bruton Street, Westminster, was part of a continuous row of buildings and consisted of a basement, ground floor and four upper floors.

* Section 8 (2) of the War Damage Act, 1943, reads: "If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof: Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated."

- A It had a back addition of five storeys and was estimated to be about two hundred years old. The front wall of the property was not bonded to the flank or party wall abutting on 35, Bruton Street above a point at about the middle of the third storey. Many years before the second world war, tie rods had been installed which passed from the front to the rear of the building at second, third and fourth floor levels and tied in the front wall of the property. The property suffered
- B war damage in September, 1940, and again in July, 1944, and the commission were duly notified. Before 1944 the ground floor and basement were used as showrooms. Between January, 1944, and April, 1947, the ground floor was requisitioned by the Minister of Works. The first floor was used as offices and the top three floors were let as residential flats.

- C On Apr. 21, 1948, the London County Council served a dangerous structure notice under the London Building Acts (Amendment) Act, 1939, Part 7, in respect of the front elevation of the property. On Sept. 4, 1948, the London County Council served a further dangerous structure notice under the Act of 1939 in respect of the rear elevation of the property, the chimney breasts on the flank wall abutting on No. 35 Bruton Street, and other matters. The front wall of the property, which had sustained a certain amount of war damage,
- D had to be entirely rebuilt, and the flank or party walls, which were required to act as buttresses to the front wall, had to be reinstated, although they themselves had not sustained war damage.

- On Dec. 7, 1950, a claim for a cost of works payment was sent to the commission with a specification of the works carried out which were claimed to be in reinstatement of war damage. The specification included the rebuilding of
- E the front walls and also the flank or party walls. As no agreement was reached between the appellants and the commission as to the amount of the payment which the appellants were entitled to receive, on July 18, 1953, the matter was referred to Mr. Cecil Howitt, one of the commission's deputy commissioners, who inspected the property and made a report, dated Aug. 12, 1953. In his report the deputy commissioner said that he thought that the appellants were
- F entitled to claim under the War Damage Act, 1943, for the complete renewal of the front wall, but not for reinstating the party walls.

In a statutory declaration dated Mar. 19, 1954, Mr. L. A. D. Shiner, district surveyor for the City of Westminster at the relevant date, stated:

- " 7. Had the party walls been in sound condition, in normal circumstances I should have asked for the new front wall to be block-bonded into the party wall . . . However, when the front wall was taken down, the party wall was found to be in a dangerous condition and I was not prepared to accept block-bonding into the loose brickwork of the party wall as the condition of the wall was such that in no part was it possible to bond the brickwork into it. The pulling down of the party wall became part and parcel of the work required to the front wall . . . 10. No part of either party wall was demolished except so far as was necessary."
- G
- H

- The commission adopted the advice given to them by the deputy commissioner in his report of Aug. 12, 1953, and determined that the cost of works payment was not to include the cost of reinstating the party walls. The question of law on which the appeal was taken was whether the works executed to the party walls were works executed for the making good of war damage within
- I the meaning of s. 8 (2) of the War Damage Act, 1943.

R. E. Megarry, Q.C., and D. G. H. Frank for the appellants.

Michael Rowe, Q.C., and Denys B. Buckley for the respondents, the War Damage Commission.

Cur. adv. vult.

Oct. 31. VAISEY, J., read the following judgment: The appellants on this motion are Massey Estates, Ltd., who are the lessee owners of the property

in question. They hold it for the residue of a term of sixty-three years expiring on May 8, 1988. The property is No. 34, Bruton Street, London, W.1, which is administratively in the City of Westminster, and consists of a house in a terrace or continuous row of buildings with houses numbered 33 and 35 in the said street on either side of it. It sustained war damage on two occasions: once in September, 1940, and again in July, 1944. This was duly notified to the respondents, the War Damage Commission, in accordance with the relevant provisions of the War Damage Act, 1943. On Dec. 7, 1950, a claim for a "cost of works" payment was sent to the commission by the appellants' predecessors in title, and it is admitted that this is in fact a "cost of works" case. A

The house was an old one, being some two hundred years old, rather frail and not very solidly constructed. In 1948 dangerous structure notices were served by the London County Council in respect of the property under the London Building Acts (Amendment) Act, 1939, the first relating to the front wall of the property and the other to the chimney breasts in the wall abutting on No. 33, Bruton Street, and other matters. What, in fact, had happened was that the front wall of the house was so damaged as to necessitate its being entirely rebuilt. It is not disputed that such rebuilding is work which had to be executed for the making good of the war damage, within the meaning of those words in s. 8 (2) of the War Damage Act, 1943. The question is as to the cost of reinstating the flank walls of the house which were required to act as buttresses to the front wall. It is admitted that such flank walls themselves had not suffered war damage. I gather that the party wall between Nos. 34 and 33 had to be cut back and rebuilt to an average depth of seven feet while the party wall between Nos. 34 and 35 had to be similarly cut down and rebuilt to a somewhat greater depth. B

I think that my decision here depends on the view which I take of two pieces of evidence, the first being a statutory declaration dated Mar. 19, 1954, by Mr. L. A. D. Shiner who at the relevant time was district surveyor to the City of Westminster, the other being para. 10 of the commission's own statement of case. Mr. Shiner's declaration tells me that, if the party wall had been in sound condition, he would, in normal circumstances, have asked for the new front wall to be block-bonded into it, but that when the front wall was taken down the party wall was found to be in a dangerous condition so that he was not prepared to accept block-bonding into the loose brickwork of it. Then he said this: C
"The pulling down of the party wall became part and parcel of the work required to the front wall". That referred, apparently, to the party wall between Nos. 34 and 35. As regards the other wall, the position was not so serious. He further stated that no part of either party wall was demolished except so far as was necessary. D

Turning now to the commission's statement of case, I refer to para. 10 which consists of three sentences, of which the first runs as follows: E

"In the commission's view it would have been physically possible to rebuild the front wall of the premises together with a short return at each end, tying in to the original flank walls, without rebuilding the flank walls to the extent to which they have been rebuilt by the appellants." F

I read that sentence as indicating that what is there suggested as physically possible was not possible as a practical proposition, or, in other words, it was in a true sense impossible. The second sentence runs thus: G

"If the work had been carried out in this way, the physical condition of the property would certainly have been no worse than it was before the war damage occurred." H

A I understand that sentence to be raising the kind of point which was discussed and decided in *Re 36, 38, 40 & 42, Jamaica Street, Stepney* (1) ([1947] 1 All E.R. 754), to which I will refer hereafter. The third sentence states:

B “The commission recognise that the age and condition of the flank and back walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works.”

C In that sentence the word “occasion” is, in my judgment, equivalent in meaning to “justify” or even to “necessitate”. The law, as I understand it, is that as a general rule any preparatory remedial work which has to be done before the war damage can be made good is work for which the proper cost can be claimed as part of the war damage itself. I say “as a general rule” because the principle is one that must be applied on common-sense lines and could not be used to warrant the expenditure of a very large sum to prepare the way for the making good of the war damage properly so-called at a comparatively trifling cost.

D Here the amount allowed was £3,600, whereas the amount claimed was £7,800. These are approximate figures.

E This exact point arose in an unreported decision of my own in *Re 6 & 8, Halton Terrace, Sevenoaks* (2) ((1953), unreported), in which I gave judgment on Jan. 22, 1953. There the premises had suffered some war damage which could be repaired at a cost of £109 7s., but in order to enable such repair to be carried out other repair estimated to cost £306 12s. 6d. had to be effected prior to, or concurrently with, the carrying out of the first mentioned repair. I held in that case that the £306 12s. 6d. as well as the £109 7s. could be recovered as part of the proper cost although, admittedly, the larger sum was laid out in putting right what was not directly and in itself war damage at all. I held that the more expensive work was ancillary to or part of the main but less expensive work and I discussed the signification of the word “impossible” in terms which it is not necessary to repeat here.

F I think that the case is also covered by *Re 36, 38, 40 & 42, Jamaica Street, Stepney* (1), which is a decision of the Court of Appeal. In that case the blast from a bomb dropped by an enemy aeroplane structurally damaged the front walls of four houses, and the walls, which were previously in a bad condition, had to be rebuilt wholly or in part. The War Damage Commission determined that, as the walls were defective before the bombing, the proportion of the cost of rebuilding to be borne by the commission as being attributable to war damage should be, in each case, forty per cent. (subsequently reduced to 33½ per cent.). It was held, affirming my own decision ([1946] 2 All E.R. 658), that, in the absence of any evidence that the walls would have fallen down within any reasonable distance of time if they had been uninjured by enemy action, the commission were responsible for the whole cost of the work, since the damage making necessary the rebuilding was “the direct result of action taken by the enemy” within s. 2 (1) (a) of the War Damage Act, 1943. The question whether in some other case there could be evidence to justify an apportionment of the cost of work was kept open. The concluding words of the judgment of the Court of Appeal delivered by COHEN, L.J., in that case ([1947] 1 All E.R. at p. 758) gave a warning against injudicious applications of the principle. They do not, I think, affect the present case.

I The work which was done in the present case was done in the way that it was done by reason of the provisions of the London Building Acts, the relevant bye-laws, and the requirements of the district surveyor thereunder, and, so far as I can see, they could not have been done otherwise or more cheaply without infringing the London Building Acts. The conclusion of the commission as

set out in the final sentence of para. 10 of their statement of case is, in my judgment, wrong in point of law. I hold that the cost of complying with the district surveyor's requirements does form part of the proper cost of works executed for the making good of the war damage to No. 34, Bruton Street, and I shall so declare. The commission must pay the costs of the appellants.

Appeal allowed.

Solicitors: *Debenham & Co.* (for the appellants); *Treasury Solicitor* (for the commission).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

JOHN MEACOCK & CO. (a firm) v. ABRAHAM (LOESCHER Third Party).

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 17, 18, 1956.]

Auctioneer—Commission—Sale before auction—Contract providing for payment notwithstanding such sale—Instructions for auction from mortgagee—Sale before auction by mortgagor—Whether auctioneers entitled to commission.

A second mortgagee instructed auctioneers to sell the mortgaged property by auction. The auctioneers were to be remunerated by commission according to the scale charges of the Chartered Auctioneers' and Estate Agents' Institute. One term of those charges was as follows: "Sale before auction. In the event of any sale of the property, whether arranged by the auctioneer or not, effected between the date of acceptance of instructions and the date of the auction, commission is payable to the auctioneer on the same scale as for a sale by auction". The mortgagor sold the property on the day before that fixed for the auction and redeemed the second mortgage. The auction did not take place. The auctioneers claimed scale commission on the reserve price or the same sum on a quantum meruit.

Held: (i) (MORRIS, L.J., dissenting) the auctioneers were not entitled to the commission because the clause applied only to sale by or on behalf of the person giving instructions for sale to the auctioneers and not to a sale by a third party, such as the sale in the present case by the mortgagor (dictum of HARMAN, J., in *Murad v. Hearts of Oak Benefit Society*, Nov. 4, 1955, adopted) and

(ii) the claim on a quantum meruit did not lie, because a stipulation for remuneration by commission on a sale of the property by auction excluded a right to a quantum meruit; and (per HODSON and MORRIS, L.JJ.) no contract to pay remuneration subsequent to the original contract of employment of the auctioneers was established (*Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33, applied).

Appeal allowed.

[As to the right of an auctioneer to remuneration, see 2 HALSBURY'S LAWS (3rd Edn.) 84, 85, para. 173; and for cases on the subject, see 3 DIGEST 31-35, 226-254.]

Cases referred to:

- (1) *Murad v. Hearts of Oak Benefit Society*, (Nov. 4, 1955), not reported; a brief account of the case is given in 105 L.Jo. 754 (Dec. 2, 1955).
- (2) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (3) *Cutter v. Powell*, (1795), 6 Term Rep. 320; 101 E.R. 573; 17 Digest (Repl.) 303, 1104.

A Appeal.

The freeholder and mortgagor of five houses in Ruislip, the third party in the action, appealed against an order of His Honour JUDGE DAYNES made in the West London County Court on June 29, 1956, ordering the payment of commission to the plaintiffs, the auctioneers, by the defendant, the second mortgagee of the property, whom the mortgagor had agreed to indemnify in respect of the claim. The auctioneers had been given instructions by the second mortgagee to sell the property by auction, but before the date of the auction the property was sold privately by the mortgagor and the mortgagee instructed the auctioneers that the auction sale should not take place. The auctioneers claimed commission on the total reserve price (viz., £3,565) fixed for the purpose of the intended auction, as if the auction had taken place, or the same sum on a quantum meruit; and they claimed as a further alternative the same sum as damages for breach of contract, pleading an implied term (among others) in the contract of their appointment as auctioneers that their appointment would not be terminated by the mortgagee before the date of the auction.

B. J. H. Clauson for the mortgagor.

D *J. D. Stocker* for the auctioneers.

DENNING, L.J.: This is a troublesome and difficult case. It is a claim by auctioneers for commission on the sale of five houses in Ruislip: 31, Hartland Drive; 18, Flamborough Road; 3, Salcombe Way; 82, Dawlish Drive; and 1, Tiverton Road. Those houses were owned by a freeholder, Mr. Loescher. He had mortgaged them by a first mortgage to the Abbey National Building Society. He had also mortgaged them by a second mortgage to a Mr. Abrahams. The second mortgagee in due course called in his money, £1,150, but the mortgagor, Mr. Loescher, did not pay on that demand. So the second mortgagee decided to put the property up for sale under his power of sale. He had notified the first mortgagees what he was doing. The second mortgagee put the houses into the hands of auctioneers, Messrs. John Meacock & Co. He took the auctioneers' advice on the best way to realise these properties. One way would be to put them up to auction, in which case they would probably be bought by some one as an investment. In that way the sale might produce £3,000 or £4,000, which would be enough to cover the first and second mortgages and leave perhaps a little over for the mortgagor. That was one way of disposing of them. Another way was to negotiate with the sitting tenants. The houses were rent-restricted, and the sitting tenants would probably pay more than other people who would only buy the houses as an investment.

G In these circumstances the auctioneers, Messrs. Meacock & Co., advised the second mortgagee that the best way to sell these houses was to put them up for auction; because, if they were put up for auction, it would bring the sitting tenants up to the mark. They would want to buy the houses instead of having them sold over their heads. The second mortgagee instructed the auctioneers to act accordingly. They did so. They made arrangements to put the freehold up to auction, and meanwhile negotiated with the sitting tenants for a sale to them.

I The auction was fixed for Feb. 16, 1955. But before the auction took place, the mortgagor got busy. He had power, of course, to sell the freehold. He negotiated with the sitting tenants, and made contracts to sell four of these houses to the sitting tenants. When the second mortgagee learned about this he said that he was not going to call off the auction, because he did not know whether the sitting tenants would be able to implement the purchases. He instructed the auctioneers to go on with the auction. Then, a day or two before the auction was to be held, the mortgagor got enough money from some source or other to redeem the mortgage. He paid off the mortgage on Feb. 15,

the very day before the date fixed for the auction. That meant that the auction could not go on. The mortgage debt had been paid off and the mortgagee's power of sale had gone altogether. The auction was cancelled accordingly. A

Some weeks later the mortgagor agreed to sell the fifth house to the sitting tenant. Four of the houses have since been conveyed to the sitting tenants. The fifth has apparently still to be conveyed.

The auctioneers now claim against the second mortgagee, who instructed them, the scale commission. The second mortgagee agrees that he is bound to pay them their out-of-pocket expenses which they have incurred in and about the auction; but he says that he is not liable to pay the commission, because the sale by auction (for which he gave instructions) did not take place. He has brought in the mortgagor as a third party. The second mortgagee contends that if he is liable to pay commission to the auctioneers, he is entitled to recover it from the original mortgagor. The mortgagor agrees that, if the second mortgagee is liable to pay the commission, he ought to indemnify him. So the real contest here is between the auctioneers and the mortgagor; that is how it has been fought out before us. B C

The case turns on the scale of professional charges issued by the professional body, the Chartered Auctioneers' and Estate Agents' Institute. When the second mortgagee through his solicitors instructed the auctioneers to do this work, the auctioneers made it clear that the terms on which they did the work were to be in accordance with the terms of the Chartered Auctioneers' and Estate Agents' Institute. That is a very well-known scale which is printed in such places as the SOLICITORS' DIARY. The second mortgagee's solicitors no doubt knew all about those terms and accepted them. D E

The relevant section is headed: "Sales of freehold property and ground leases". It deals first with sales by "(a) Private treaty.—Negotiating a sale by private contract", and then with sales "(b) By auction, including the preparation of particulars and advising as to reserves:—". The commission on all such sales is stated to be: "5 per cent. on the first £300; 2½ per cent. on the next £4,700"—and so on. F

Then there is this important clause:

"Sale before auction. In the event of any sale of the property, whether arranged by the auctioneer or not, effected between the date of acceptance of instructions and the date of the auction, commission is payable to the auctioneer on the same scale as for a sale by auction." G

The object of this clause is plain. It is to cover the case where a client instructs auctioneers to sell a property for him by auction, and then, before the auction actually takes place, the client sells the property himself. In such a case the client must still pay full commission to the auctioneer, for the very good reason that the auctioneer's work in putting up the property, advertising it, and so on, may well have been one of the causes why the client was able to sell the house himself. The clause clearly covers a sale by the client before the auction, and I think it would also cover a sale with his concurrence. The auctioneers seek here, however, to extend it to a sale by a third person. It covers, they say, a sale by the mortgagor without the consent of the second mortgagee. H

I think that the people who framed this clause had not in mind the case of mortgagee and mortgagor; they had in mind the simple case of a client selling the property himself. It seems to me to be an unnatural construction of this clause to say that it also applies if some one else—some one other than the client—sells the property. I

Suppose, for instance, the first mortgagees had sold the property before the auction. They had ample power to do so, and I can imagine several circumstances in which they might have thought it desirable to do so. Would the

A auctioneers in that event be entitled to claim full commission from the second mortgagee? Clearly not. So also if the mortgagor sells.

Counsel for the auctioneers asked us to give a wide construction to this clause; but I do not think that we should do so. It must be remembered that it is a clause put in by the auctioneers for their own benefit, in which they stipulate that, although they have not done all the work that was contemplated, nevertheless they are to have full commission. For instance, in this case they have not had to hold an auction at all. I can visualise cases where they may have done nothing beyond accepting instructions. Suppose a client gives them instructions one day and sells himself the next, before they have done anything. Nevertheless, they stipulate for full commission irrespective of the amount of work they have done. Such a stipulation should be given its natural meaning

C and should not be extended so as to be given a wide unnatural meaning.

I am strengthened in this view by the observations of HARMAN, J., in an unreported case, *Murad v. Hearts of Oak Benefit Society* (1)* on Nov. 4, 1955. Although he did not actually decide the point, he expressed a view on this clause. He said:

D "I think that this 'sale before auction' clause only deals with a sale by the vendor, that is to say, the mortgagee in this action, and does not provide for the rare cases where there is redemption between the two dates."

I find myself in agreement with that expression of opinion. I do not think that this clause covers a sale by a third person without the consent of the client.

E Counsel for the auctioneers next urged that there ought to be a reasonable remuneration for the auctioneers. He suggested that they ought to recover on a quantum meruit or else damages. I have anxiously considered whether we could give effect to some such claim, because it seems to me hard that there should be no reward for the auctioneers, who have done much work. Nevertheless, it is to be remembered that auctioneers, like estate agents, stipulate for a high commission if the sale is actually completed by the client or on his behalf. They do not stipulate for a reasonable remuneration if it fails to go through. They take their chance on it. This is borne out by several instances which we put to counsel for the auctioneers in the course of the argument, in which it is quite plain that the auctioneers would not be entitled to a quantum meruit. For instance, suppose that the second mortgagee had changed his mind about selling and had withdrawn the instructions before the auction.

G In that case the auctioneers would not have been entitled to commission or to a quantum meruit. They would only have been entitled to their out-of-pocket expenses. Again, suppose that the mortgagor had redeemed the property before the date of the auction and had not re-sold at all. The auctioneers would have done much work, but they could not have claimed commission under this scale at all or any sum on a quantum meruit. Suppose the mortgagor H had redeemed the mortgage and not sold before the auction date, but had sold afterwards; again the auctioneers could not have recovered anything except their out-of-pocket expenses. So there are many cases where the auctioneers have done much work but can recover nothing under this clause and where the law cannot help them. I sometimes think it would be a good thing if auctioneers I and estate agents, in case a sale did not go through, stipulated for a reasonable remuneration for their time and labour; but I suppose that would not be good business. They always claim to be entitled to full commission, and by so doing, take their chance on the sale going through to completion.

It is worth noticing that the auctioneers in this case do not claim commission on the sale price to the sitting tenants, for the simple reason that they do not know the price at which the mortgagor sold. Moreover, one of the contracts

* A short account of the case will be found in 105 L.Jo. 754 (Dec. 2, 1955).

of sale took place after the proposed date of auction, so the clause does not cover it on any view. The auctioneers in this action only claim commission on the original reserve price which they proposed as a reserve for the auction. That is nothing more nor less than a claim to a quantum meruit, and I cannot see that a quantum meruit can be substantiated. A

On the true interpretation of the clause I have come to the conclusion that the auctioneers have not brought themselves within it. Therefore I think this appeal should be allowed and that judgment should be entered for the second mortgagee. B

HODSON, L.J.: This is an appeal by a third party (the mortgagor) from an order of His Honour JUDGE DAYNES made at the West London County Court on June 29, 1956. The mortgagor had agreed to indemnify the defendant, the second mortgagee, against a claim by Messrs. John Meacock & Co., a firm of auctioneers, for commission; and the dispute, therefore, to be decided is that between the auctioneers and the second mortgagee, although the battle has been fought on his behalf by the mortgagor. The mortgagor owned five houses in Ruislip subject to mortgages in favour of the Abbey National Building Society. On June 29, 1954, the second mortgagee lent the mortgagor £1,150, and got a second charge on the property, which was executed on Sept. 25, 1954. Notice calling on the mortgagor to redeem the charge by repaying the advance was given on Nov. 26, 1954. No notice was taken of that. Notice of the second mortgagee's intention to exercise his power to sell was given on Dec. 6, 1954. This was likewise ignored. The plaintiffs, the auctioneers, were instructed on Dec. 31, 1954, to put the five properties up for sale by public auction on Feb. 16, 1955. The contract is evidenced by a letter which the auctioneers wrote to the second mortgagee on Jan. 4, 1955, relating to the arrangements for the auction. The only matter to which I need refer is that the letter is headed: "Terms in accordance with scale of the Chartered Auctioneers' and Estate Agents' Institute". C D E

The property was never sold by auction, since before Feb. 16, namely, on Feb. 15, the mortgagor redeemed the charge and paid the £1,150, having previously entered into contracts for sale of four of the properties; he subsequently entered into a contract for the sale of the fifth property. After the date when the auction should have taken place, the first four contracts were completed, though the last contract had not been completed. The auctioneers are claiming commission for sale before the auction on the ground that the mortgagor sold the houses, and the auctioneers rely on part of cl. 10 of the scale of charges incorporated in the contract: F G

"Sale before auction. In the event of any sale of the property, whether arranged by the auctioneer or not, effected between the date of the acceptance of instructions and the date of the auction, commission is payable to the auctioneer on the same scale as for a sale by auction." H

The second mortgagee refused to pay the commission because there had not been any sale by him. The auctioneers' contention is that the word "sale" in the term which I have read is not limited in any way and includes any sale effected by anybody. To my mind that is rather a startling proposition, and, although I am naturally hesitant in differing on a question of construction from the learned judge, His Honour JUDGE DAYNES, especially as I anticipate that MORRIS, L.J., is going shortly to express a similar opinion, yet to my mind it is clear that the word "sale" in this term can only refer to a sale effected for the client. The second mortgagee was the client, and he was the man who, through his solicitors, instructed the auctioneers, and, in the surrounding circumstances against which this term must be construed, I can construe it in no I

A other way. A client instructing auctioneers to sell property for him agrees to pay commission on the sale for him, and not in my opinion if the sale is effected by some other person who may have the power to sell.

Counsel has pointed out that in the document itself, the Chartered Auctioneers' and Estate Agents' Institute's scale of charges, the word "vendor" is used in two places. The first is in the early part of cl. 10, which is headed "Freehold

B property and ground leases", and is followed by provision (a):

"Private treaty.—Negotiating a sale by private contract, or introducing a person able, ready and willing to purchase on terms authorised by the vendor."

The second place is in cl. 11, which deals with sales by auction of furniture, trade stocks and chattels on the vendor's premises, and there the word "vendor" is similarly used.

I find it impossible to arrive at any other conclusion but that on the true construction of this document the word "sale" refers to sale by the client. My Lord has already expressed the same view, and the same view for this purpose in similar circumstances was expressed, although tentatively, by

D HARMAN, J., in *Murad v. Hearts of Oak Benefit Society* (1) (Nov. 4, 1955, unreported)* where a sale was effected before auction and the learned judge found, in effect, that there was a redemption by the mortgagor, instructions having been given for the sale of the property by a mortgagee. HARMAN, J., said:

E "This was a friendly arrangement whereby it was decided to do it in this rather odd way; I do not think that it matters why it was done in that way. In effect this was the mortgagor coming along with the mortgage money in his hands and saying: 'Here is £110,000; I will put it down, and you will deal with the property according to my directions', and that is what the mortgagees did."

F The sale was to have taken place by auction but redemption took place first. After referring to the submissions of counsel in the case, the learned judge continued:

"It was submitted to me that [cl. 10 of the scale charges] applied to the case of a sale by mortgagees and that so long as a sale of the property should be effected, it did not matter by whom it was effected."

G That is precisely the submission which appealed to the learned judge in this case.

H "If that were right, and the mortgagee put property in the hands of the auctioneer and the mortgage were redeemed before the sale, then, although there could be no sale, the mortgagee would still be bound to pay commission. I feel a great deal of doubt about that, but I need not decide it. I think that this sale before auction clause only deals with a sale by the vendor, that is to say, the mortgagee in this action, before the auction and does not provide for the rare cases where there is redemption between the two dates. That I need not decide."

I So that this is merely a tentative expression of opinion, but one arrived at after careful consideration. The learned judge did not need to express a firm opinion on the construction of this term because he decided that, under the provisions of the particular contract, the terms of this sale were not applicable at all.

His Honour JUDGE DAYNES gave reasons for the view which he took. He said that the purpose of the clause was to prevent people doing the auctioneer

* A short account of the case will be found in 105 L.Jo. 754 (Dec. 2, 1955).

out of payment for his work, and he thought that the people who framed the clause were aiming at a sale by anyone. He gave certain instances which impressed him as being cases where, if the contrary view were taken, the auctioneer would lose his commission unfairly; where, e.g.,

“a wife could sell and get her husband to come in as vendor. A tenant could sell; but he would have to get in the landlord’s interest before completion. A partner could sell and attempt to do the auctioneer out of commission by getting his partner to assume the character of vendor.”

I should have thought that, in cases such as those envisaged by the learned judge, the courts ought to be able to protect the auctioneers by ascertaining the true facts; where in truth and in fact the sale was by an agent of the vendor, there would be no question but that the auctioneer would be entitled to his commission.

The claim has been put alternatively on a quantum meruit, as claims often are put in this class of case if there are difficulties in complying with the express terms of contracts. I think that we have had put before us every possible argument, support by the correspondence showing the late date at which the second mortgagee withdrew his instructions for the auction, and showing that, so far as he could, he confirmed the instructions and insisted, almost to the very last, that the auction should go forward. He was naturally apprehensive lest the mortgagor should be unable to redeem. The second mortgagee’s solicitors no doubt were of opinion that there was no reason to withdraw the instructions and they should let the auction go forward until in fact redemption took place and the matter was taken out of their hands compulsorily. Of course, once the debt had been redeemed, they had nothing to sell. Notwithstanding the attraction of the argument that, after all, the auctioneers have done their work or a substantial part of their work and it is hard on them that they should not be paid because the auction never took place, yet I feel that this class of case is in *pari materia* with estate agents’ cases where a professional man enters into a contract on which he is only to be paid commission, usually based on a percentage rate. If commission is to be paid on the happening of an event, there being a specific contract which goes off, he cannot claim a quantum meruit.

We were referred to *Luxor (Eastbourne), Ltd. v. Cooper* (2) ([1941] 1 All E.R. 33), and to the speeches of LORD RUSSELL OF KILLOWEN and LORD WRIGHT. Although that was an estate agent’s case while this is an auctioneer’s case, I think what the learned Lords said is relevant. LORD RUSSELL said (*ibid.*, at p. 44):

“As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal.”

An attempt was made by counsel for the auctioneers to set up some subsequent contract, and he relied specifically on the letter of Feb. 11, 1955, in which, five days before the date on which the auction was fixed, the second mortgagee’s solicitors wrote to the auctioneers, and concluded their letter by this paragraph:

“We would add that [the mortgagor] has entered into contracts with some of the sitting tenants but there is no evidence that the necessary finance will be available and we have, therefore, informed [the mortgagor’s] solicitors that none of these properties will be withdrawn from the auction.”

A To my mind, the writing of that letter did not alter the position which existed already, that at any time before the auction the client would be able to withdraw the property from the sale.

LORD WRIGHT, in the same case dealt with the quantum meruit claim in some more detail (*ibid.*, at p. 55):

B "It has been said in some cases that the claim may be based on quantum meruit, on the principles expounded in the notes to *Cutter v. Powell* (3) ((1795), 6 Term Rep. 320), according to which the special contract is treated as rescinded, and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for work and labour and the like, where the employer, who has got the benefit of part performance, but before full completion, has repudiated the contract, may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received. Such cases are, however, obviously different from the present case. The man who engages a plumber to do some work to his house to be paid for by a lump sum thereby promises, *inter alia*, to give the plumber the necessary facilities to do the work, so far as rests on him. That is the employer's part necessarily involved in the engagement. In the case of the commission agent, to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract, for reasons which I have explained. His only promise is that he will pay commission if the contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority to the agent. Moreover, it is a further objection to a claim on a quantum meruit that the employer has not obtained any benefit. The agent has earned nothing until the event materialises."

F The last two sentences are material to this case, because, where the employer has got no advantage from what the auctioneers have done, there is no room for a claim on quantum meruit.

For those reasons, as well as those which my Lord has given, I think that this appeal must be allowed and judgment entered for the mortgagor.

G MORRIS, L.J.: In this case I do not find myself sharing the views which my Lords have expressed in regard to the construction of the scale of charges. I need hardly say that it is with great diffidence that I venture to express a differing opinion.

H When the second mortgagee, who had a second charge on the property in question, decided to exercise his power of sale, he instructed his solicitors to consult the auctioneers, and the solicitors wrote a letter on Dec. 15, asking the auctioneers for their guidance as to the best way to proceed. They said:

"Would you kindly consider whether it would be in our client's interests to attempt to sell these properties by public auction or by private treaty, and, if by private treaty, whether the properties might be offered to the sitting tenants, who, we believe, are weekly tenants."

I The advice of the auctioneers was that the best way to proceed was to have a public auction, but they said that, in regard to the sitting tenants, their experience was that, if a date of auction were fixed, then arrangements with the sitting tenants might be facilitated. The auctioneers said in their letter of Dec. 20:

"Again, the question of sitting tenants is, from our considerable experience a somewhat protracted process unless an auction is impending when we always use the lever that unless terms are agreed and contracts exchanged no individual property may be withdrawn from auction."

They then explain that, if an auction were arranged, there would naturally be a good many out-of-pocket expenses, but they said that they would fix a figure as the maximum sum payable in respect of the out-of-pocket expenses. A

That advice having been considered, instructions were given on behalf of the second mortgagee to the auctioneers to proceed. They said, on Dec. 30:

“ On the above basis, will you please arrange a sale by public auction of these properties. The sooner the sale can take place the better”, B

and so on. On Jan. 4, 1955, the auctioneers wrote saying that they had arranged for the auction to take place on Wednesday, Feb. 16, at the George Hotel, Ruislip, and they sent two copies of the proof auction particulars. On that letter—and indeed I think on all the letters written by the auctioneers—was a heading: “ Terms in accordance with scale of Chartered Auctioneers’ Institute.” C It has been common ground in the action that the contract made between the second mortgagee and the auctioneers was a contract that incorporated the scale of the Chartered Auctioneers’ and Estate Agents’ Institute. The result, therefore, is that the auctioneers are entitled to succeed if they can bring themselves within the words recorded in this scale.

Now, it seems to me that, once instructions to sell by auction are accepted, D certain work is done for which it is contemplated that payment will be made when the auction takes place. Arrangements have to be made for the actual holding of the auction; publicity has to be arranged; advertisements have to be inserted; auction particulars have to be prepared, and also the general conditions of sale; and further there must be advice as to the reserve price to be fixed. In the present case reserve prices had to be fixed in regard to each E one of the five properties. Once instructions are given for the holding of an auction, the parties, therefore, look forward to the holding of the auction. It is contemplated, however, particularly in a case such as the present, that, although an auction is advertised, there may be sales to the tenants of the properties to be sold. In the present case, that was very much in mind, and the auctioneers wrote letters to the sitting tenants suggesting that they should F buy their properties. The fixing of a date had a certain persuasive effect in urging the tenants to make up their minds speedily. They might not wish to have the properties sold to a stranger when they had the opportunity themselves to acquire the properties. If there were sales to the sitting tenants, then, under the terms and conditions recorded in the scale of fees, it might be that G commission would be payable as on a sale by private treaty, for cl. 10 (a) reads:

“ Private Treaty.—Negotiating a sale by private contract, or introducing a person able, ready and willing to purchase on terms authorised by the vendor . . .”

At all events, if sales by the second mortgagee to the sitting tenants had been H arranged by the auctioneers, there would have been no doubt that the auctioneers would have earned their commission. They would have earned their commission either under the words which I have just read or certainly under the words which are immediately referred to in this litigation.

My Lords have referred to the wording of cl. 10 of this scale of fees. One I provision is under the heading:

“ Non-sale: In the event of non-sale at the auction, a fee, the amount of which is a matter of arrangement, is payable.”

The case there being provided for is where everything proceeds and an auction takes place, but there is no sale. The parties have agreed that in that contingency a fee shall be payable, the amount of which is a matter of arrangement. That seems to me to denote that the intention is that there shall be payment

A for the auctioneers once the somewhat intensive work involved in preparation for an auction has been performed.

There may, however, be a sale of the property before the date of the auction, in which case the auctioneer will be deprived of his remuneration unless the contract makes some special provision. So there is the provision under the heading "Sale before auction", and it reads:

B "In the event of any sale of the property, whether arranged by the auctioneer or not, effected between the date of acceptance of instructions and the date of the auction, commission is payable to the auctioneer on the same scale as for a sale by auction."

C In the ordinary case, the only person who could sell would be the person who had first given instructions for the sale to take place. If, however, that person is a mortgagee, then the present situation may arise. The possibility that the mortgagor may sell is known to the mortgagee when he enters into his contract with the auctioneers. If the second mortgagee had wanted a modification of the language of the contract, he could have asked for it. It is the selling of property before auction that normally prevents an auction taking place, but, whether the property is sold by the mortgagee or by the mortgagor, the effect is the same so far as the auctioneers are concerned.

The language of these words is very wide. It may well be that the framers of this language did not apply their minds to this particular case, but we must interpret these words according to their ordinary meaning.

The learned judge said:

E "It is argued that this does not apply because the sale that was effected was made not by the mortgagee but by the mortgagor, though in substance the mortgagee's interest was greater than the mortgagor's. There is nothing which states expressly by whom the sale must be made. Anyone can sell land taking the risk of being unable to make a title before completion. A wife could sell and get her husband to come in as vendor. A tenant could sell; but he would have to get in the landlord's interest before completion. A partner could sell and attempt to do the auctioneer out of commission by getting his partner to assume the character of vendor. If 'sale' is limited to a sale by the person who instructed the auctioneer, there would be a number of holes through which vendors could slip out of the network of the liability for commission. As a matter of language the word 'sale' is wide enough to cover a sale by anyone, wide enough to cover a sale by the mortgagor. Mr. Clauson, who argued attractively on behalf of a client whose conduct has not been wholly attractive, says that I should read into the clause after the word 'sale' the words 'by the vendor'. There might be cases where the purpose of the clause pointed to a restrictive interpretation. Here it is the other way about. The purpose of the clause is to prevent people doing the auctioneer out of payment for his work. The people who framed the clause are aiming at a sale by anyone. There is no reason to suppose that they would want it restricted. I see no reason to apply a restrictive interpretation."

I It may be difficult to decide what the framers of these words had exactly in mind. It may well be that they did not apply their minds to the present position; but we have only the words of the contract. The learned judge said that counsel for the mortgagor had submitted to him that the learned judge should read into the clause after the word "sale" the words "by the vendor". I see no reason for reading in those words. But counsel for the mortgagor says also that, as a matter of interpretation, and not of reading words into the clause, the clause should be read as denoting a sale of the property

only by the person who as vendor has given instructions to the auctioneer for a sale. A

It seems to me, however, that the purpose of the clause was to ensure that the auctioneer should not be deprived of payment for his work, once he had accepted instructions from someone in a position to give those instructions; and the work done in preparing for an auction is rather different from that involved where there is merely an invitation to agents to find a purchaser. B
If the property is sold before auction, it is but reasonable and fair that the auctioneer should be paid, and, as it seems to me, the language is wide enough to refer to a sale by anyone entitled to sell the freehold. I see no reason to read in any words of limitation, and I see no reason to give the wide words a restricted meaning, when by doing so the apparent purpose of the words and of this clause as it affects the auctioneer would be defeated. C

For those reasons, on the main question I have come to the conclusion that the learned judge was correct in his judgment. I may add that I have further diffidence in differing from my Lords when I find that HARMAN, J., though not deciding the point, has expressed his opinion as shown in the judgment to which we have been referred.

I would only add a word in regard to the alternative case advanced by counsel for the second mortgagee, on the basis of a quantum meruit. He pointed to the course of the business in this case, and showed that, at a time after the auctioneers had been in touch with the tenants and after it was known that the mortgagor was also negotiating with the tenants, the second mortgagee wrote to the auctioneers a letter the effect of which was to confirm his instructions; and, as counsel submits, to say that he would not revoke his instructions and would take the risk of redemption. Counsel submits that a promise can be implied to pay what should be reasonable. Persuasive as those submissions were, if I may say so, I do not find myself in agreement with them. It seems to me that the work done by the auctioneers was done all the time on the basis of the contract that was first made, and if they have done work that is not covered by the terms of payment, then I think they fail. But as in my judgment the position is covered by the express terms of the contract, I am of opinion that the auctioneers were entitled to succeed. D

Appeal allowed.

Solicitors: *Lieberman, Leigh & Co.* (for the mortgagor); *Keene, Marsland & Co.* (for the auctioneers). E F

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

BARNSELY CORPORATION v. LANCASHIRE COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ashworth, JJ.), October 5, 18, 1956.]

B

Children and Young Persons—Approved school order—Residence—Boy resident in institution at time order made—Parents no longer resident in former home—Residence of boy unknown—No power, on appeal, to name local authority within whose district offence committed—Children and Young Persons Act, 1933 (23 Geo. 5 c. 12), s. 70 (2), s. 90 (2).

C

In 1944 a juvenile court committed a boy, then two years old, who was living with his parents at C. in the district of the respondent council, to the respondent's care until he attained eighteen. Subsequently he resided continuously in institutions for which the respondent was the authority. In 1947 his parents left C. and came to live in the borough of the appellant corporation, but the boy never went there. In 1955 a juvenile court committed him to an approved school for an offence committed within the district of the respondent. Section 70 (2)* of the Children and Young Persons Act, 1933, required the court to name the local authority within whose district the boy resided or, if that were not known, the local authority within whose district the offence was committed, and in determining the boy's residence to disregard his residence in institutions. The court named the appellant as the local authority within whose district the boy was resident. On appeal by the appellant under s. 90 (2)† of the Act of 1933,

E

Held: the boy's place of residence at the time of the making of the approved school order was, for the purposes of s. 70 (2), unknown, since the place of residence named in the order must be a place where the boy had lived and, as his parents no longer lived at C. and the boy's residence in institutions had to be disregarded, he had no place of residence; accordingly the local authority in whose district the offence had been committed (viz., the respondent), should have been named in the order, but, since s. 90 (2) of the Act of 1933 did not enable the appellant to appeal on the ground that the boy's residence was unknown (*Isle of Wight County Council v. Warwickshire County Council*, [1953] 1 All E.R. 525, followed), the existing order must stand.

F

G

Appeal dismissed.

H

[**Editorial Note.** Under s. 90 (1) of the Children and Young Persons Act, 1933, and the Approved Schools (Contributions by Local Authorities) Regulations, 1955 (S.I. 1955 No. 253), a local authority named in an approved school order, as was the appellant in this case, must make contributions to the expenses of the school managers. The lack of jurisdiction to substitute in the approved school order the name of the authority that the court determined to be the authority that should have been named shows a defect in the legislation which the court intimates might be rectified (see p. 675, letter E, post).]

I

* The material provisions of s. 70 (2) of the Act of 1933 are set out at p. 673, letter E, post.

† Section 90 (2) of the Act provides: "A court by which an approved school order is made shall cause a copy thereof to be served forthwith on the local authority named in the order, and if that authority desire to contend that the person to whom the order relates was resident in the district of some other local authority or was resident outside England they may . . . appeal . . . and if, upon the hearing of the appeal, the court is satisfied that the person to whom the order relates was resident in the district of that other local authority, or was resident outside England, the court may by order vary the approved school order by substituting therein the name of that other authority or, as the case may be, a statement that the said person was resident outside England."

As to contributions to expenses in respect of approved schools, see 13 A
HALSBURY'S LAWS (3rd Edn.) 749, para. 1502.

For the Children and Young Persons Act, 1933, s. 70 (2), s. 90 (2), see 12
HALSBURY'S STATUTES (2nd Edn.) 1021, 1040.]

Cases referred to:

- (1) *South Shields Corpn. v. Liverpool Corpn.*, [1943] 1 All E.R. 338; [1943] B
1 K.B. 264; 112 L.J.K.B. 318; 168 L.T. 238; 107 J.P. 77; 2nd
Digest Supp.
- (2) *Isle of Wight County Council v. Warwickshire County Council*, [1953]
1 All E.R. 525; [1953] 1 Q.B. 553; 117 J.P. 160; 3rd Digest Supp.

Case Stated.

This was a Case Stated by the justices for the County of Lancaster in respect
of their adjudication as a magistrates' court sitting at Leigh on Mar. 14, 1956.
On Dec. 20, 1955, the Leigh (County) Magistrates' Court made an order in
pursuance of the Children and Young Persons Act, 1933, s. 70 (2), committing
a boy to an approved school and naming the appellant, the Barnsley Corporation,
as the local authority within whose district the boy was resident. In compliance
with s. 90 (2) of the Act a copy of the order was served on the appellant on Dec. 22,
1955. The appellant appealed to the Leigh (County) Magistrates' Court under
s. 90 of the Act on the ground that the boy was resident in the district of the
respondent, the Lancashire County Council.

The following facts, among others, were agreed for the purposes of the appeal.
The boy was born on Sept. 25, 1941. On Mar. 23, 1944, while he was living with
his parents at Coppull near Chorley, he was brought before the juvenile court at
Chorley as being in need of care or protection due to his parents' neglect. The
court made a Fit Person Order committing him, until he reached the age of
eighteen years, to the care of the Education Committee of the respondent. The
responsibility for his care was taken over from the committee by the respondent's
children's department on its inception in 1948. Until Dec. 20, 1955, when the
approved school order was made, the boy resided in a number of institutions of
which the respondent was the authority. At the time of the making of the
approved school order he was in the Homelea Remand Home to which he had
been taken while still in the care of the respondent. His committal to the
approved school was in respect of an offence of stealing committed at a children's
home within the district of the respondent. The boy's parents came to Barnsley
in February, 1947, and were still living there, but the boy himself had never
been to Barnsley.

It was contended for the appellant that when the approved school order was
made the boy was in the care of the respondent's children's department, and that,
as by the proviso to s. 70 (2) of the Act of 1933 the period during which he resided
in any place as an inmate of a school or other institution or while boarded out
under the Act should be disregarded, the boy's residence must be either what
it was when he first came into the care of the respondent or his constructive
residence with his parents. It was further contended that a person's residence
is the place where he lives, where he has his bed and where he dwells and not the
place where he may be said constructively to reside, that as the boy had never
been to Barnsley he could only have a constructive residence there, that this
could not be his residence, and that his only other residence was until 1944 in the
respondent's district.

The respondent agreed that by reason of the proviso to s. 70 (2) the boy's
actual residence at the time the approved school order was made could not be
considered, but contended that in the circumstances the only residence which

A could possibly be considered was the boy's constructive residence with his parents, that being the place where he would have been residing but for the Fit Person Order, and that the word "residence" can in principle be construed as the place where a person's family actually resides.

B The magistrates were of opinion that the boy was resident at the material time within the appellant's district and that the appellant was correctly named in the approved school order, and accordingly they dismissed the appeal.

J. M. McLusky for the appellant, the Barnsley Corporation.

R. L. Ward for the respondent, the Lancashire County Council.

Cur. adv. vult.

C Oct. 18. **LORD GODDARD, C.J.:** The first judgment which I am about to read is that of **HILBERY, J.**

The following judgments were then read.

D **HILBERY, J.,** stated the nature of the appeal, summarised the facts and continued: It is common ground that the magistrates making the approved school order had to apply the provisions of s. 70 (2) of the Children and Young Persons Act, 1933, including the proviso to that sub-section, in deciding what was the place of residence of the boy at the time of the making of their order.

E It is also the contention on both sides that the material time for the purpose of ascertaining the residence of the boy was the time when the approved school order was made. Reliance was placed on *South Shields Corpn. v. Liverpool Corpn.* (1) ([1943] 1 All E.R. 338).

The material parts of s. 70 (2) and the proviso are in the following terms:—

F "Every approved school order, other than an order made on the application of a poor law authority in their capacity as such or made by reason of the commission of an offence under s. 10 of this Act . . . shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school: Provided that—(a) in determining for the purposes of this sub-section the place of residence of a child or young person, any period during which he resided in any place as an inmate of a school or other institution . . . shall be disregarded."

G The magistrates decided in favour of a contention of the respondents that the place of residence of the boy at the time of the making of the order was where his parents resided in Barnsley. They accordingly named the appellant as the local authority within whose district the boy resided, as required by s. 70 (2).

H In my view, the provisions of s. 70 (2) did not empower the justices so to decide, and did not leave it open to them so to decide. The Act does not say that the child shall be deemed to reside with his parents wherever the parents may be, which is what the justices have decided. The Act requires the justices to ascertain what is the child's place of residence, and, as decided by this court in *South Shields Corpn. v. Liverpool Corpn.* (1), that must be the child's residence at the time of the making of the order.

I If the child is not at the time and has not for any period been in an institution the proviso does not apply and no difficulty arises. The only question then is where, on the facts, it ought to be decided that the child resides, that is to say, actually lives. If the child is or has been in an institution, which is this case, then the proviso requires the justices to disregard the periods of time in the institution or institutions. Since a place of residence for the purposes of the

section must according to the authorities be a place where he actually lives, a place such as his parents' address at Barnsley where he never has actually lived cannot qualify as his place of residence. If, at the time of the making of the order, the home where he actually lived before the times when he had been in institutions no longer exists, it is not a place where the child could possibly reside at the time when the order is made, and therefore cannot be a place of residence. A

The result, in my view, is that when, as here, after disregarding the times during which the child has been in an institution the only residence in which the child has actually lived is found to be non-existent, the magistrates cannot say for the purposes of the section that the child is living there. It cannot matter whether that former home has ceased to exist because the parents have both died or have merely moved away to somewhere else. When the periods in institutions have been disregarded, what is discovered is that the residence where once the child actually lived is no longer a place of residence where he could actually live at the time when the order is made. It would reduce the working of the proviso in such circumstances to an absurdity to say that the magistrates must then hold that the child was presently resident in a non-existent place of residence in which he could not possibly then reside. B C

These are the circumstances in this case so far as the child's one-time home at Coppull is concerned. It follows, I think, that if Coppull was not the child's place of residence for the purposes of the section, then the place of residence of the child at the time of the making of the order was not known. D

The appellant's contention that if the periods in institutions are disregarded the child's place of residence is Coppull, and that that should be entered in the order in question as his place of residence at the time of making the order fails. In my opinion the magistrates should have arrived at the conclusion that the residence of the child for the purpose of the section was unknown, and should have named the local authority, within whose district the offence was committed, in the order. E

The construction which I have thus put on the section and proviso meets the case whether the child has only recently been put in an institution or whether he has been for a long time in institutions since last he had a place of residence. If the home where he resided before being put in an institution still exists, then, whether the child has been for a long, or for a short, time in an institution, that home is the place of residence of the child because, disregarding the periods during which he has been in the institutions, he is found actually living in a place of residence, a home, which still exists as such, and can therefore notionally and sensibly be said to be his present home at the time of the making of the approved school order. I say notionally and sensibly because if the intervening periods of time between his leaving home and the date when the approved school order is made are disregarded, what was his past home is, if it still exists, to be regarded as his present home. F G H

The result in this appeal is certainly not satisfactory, because while we all feel the justices were mistaken in holding that the child's place of residence was Barnsley, the appellant could only appeal against being named in the order on the ground that the child's place of residence was within the district of another authority. In this case the appellant contended that the other authority was the respondent council. We are deciding that that contention was wrong. It was not open to the appellant to appeal on the ground which we have held was right; namely, that the case was one where the residence of the child was not known and the authority named in the order should have been the authority within whose district the offence was committed. The Act does not enable the appellant to advance that contention as a ground of appeal, and it was so decided in *Isle of Wight County Council v. Warwickshire County Council* (2) I

A ([1953] 1 All E.R. 525). The result, therefore, is that the appellant remains the authority named in the order though it should not be so named.

LORD GODDARD, C.J.: I agree with the judgment just delivered. More than three years ago, in February, 1953, the same question as arises in this case arose in *Isle of Wight County Council v. Warwickshire County Council* (2) ([1953] 1 All E.R. 525), to which HILBERY, J., has referred. In that case, which was not
B taken to appeal, the court pointed out that where a local authority, which had been named as the authority within whose district a person to whom an approved school order relates, appealed, and showed that that person did not reside within its district, and that the offence was not committed within its district, but could not show that the person named in the order resided in the
C district of another authority the court had no power to substitute for the appellant authority the authority in whose district the offence was committed. We said that the decision which we were obliged to give was not conspicuously just; which was indeed an understatement, as the present case shows.

This boy never had anything to do with Barnsley. In fact he had always lived in Lancashire both before he was sent to an approved school and while he was there; but, for the reasons given in the judgment just delivered, it is impos-
D sible to hold that at the time of the making of the order, ignoring, as the Children and Young Persons Act, 1933, requires, the years spent in the school, he had a residence in that county. It should be remembered that when justices make an approved school order no opportunity is given to the local authority whose name is inserted in the order to appear and object. All that authority can do is to
E appeal and, although it is proved beyond peradventure that the boy is not, and maybe never has been, resident in the appellant's district, and committed the offence in some entirely different district, the order, although made ex parte, must stand. This injustice results from the fact that s. 90, which gives an appeal, is so limited that it has omitted to deal with the situation where the place of residence is unknown. This would seem to be an obvious lacuna, the result, no
F doubt, of a slip on the part of the draftsman. We again call the attention of the appropriate department to this matter, in the hope that an opportunity may be found to remedy by legislation this unsatisfactory state of affairs. ASHWORTH, J., agrees with the judgment which I have just read. The appeal therefore fails.

Appeal dismissed.

Solicitors: *Torr & Co.*, agents for *Town clerk*, Barnsley (for the appellant);
Norton, Rose & Co., agents for *Clerk of the Lancashire County Council* (for the respondent).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

LE WITT v. CANNON BROOKES.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 17, 1956.]

Landlord and Tenant—New tenancy—Costs—Terms of tenancy in dispute—No dispute that new tenancy should be granted—Rent determined at figure intermediate between rents proposed by the two parties—Proper order no costs on either side—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 24 (1), s. 29 (1).

The tenant of a studio and room, who had been given notice to quit, claimed a new tenancy under the Landlord and Tenant Act, 1954. The landlord agreed to grant a new lease, but the parties could not agree on its terms, the landlord putting forward a rent of £350 per annum and the tenant putting forward a rent of £200 per annum and asking that the landlord should enter into a repairing covenant and put in new power points. On an application to the county court under s. 24 (1) of the Act, the court made an order for a new lease at a rent of £300 without the landlord's entering into a repairing covenant or providing new power points. The landlord was ordered to pay one half of the tenant's costs, the judge basing his order as to costs on analogy with the consequence of a defendant's paying into court in an action less than was ultimately recovered against him. On appeal by the landlord,

Held: in making the order as to costs the court should consider the reasonableness or unreasonableness of the offers on each side, and there was no true analogy with the position where a defendant paid money into court; in the circumstances the proper order was that there should be no costs on either side.

Gold v. Brighton Corpn. (ante, p. 442) applied.

Appeal allowed.

[For the Landlord and Tenant Act, 1954, s. 24 (1), s. 29 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 413.]

Cases referred to:

(1) *Gray v. Ashburton (Lord)*, [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; 2 Digest 47, 259.

(2) *Gold v. Brighton Corpn.*, [1956] 3 All E.R. 442.

Appeal.

The landlord appealed against an order of His Honour JUDGE RALPH THOMAS, deputy judge at Marylebone County Court, made on June 22, 1956, under s. 29 (1) of the Landlord and Tenant Act, 1954, that the landlord should pay one half of the tenant's costs on county court scale III on an application for a new tenancy under s. 24 (1). The landlord contended that the order did not represent a proper exercise of the court's discretion because the application for a new tenancy had not been opposed and the sole issue was the rent to be paid, and as the court had fixed this at a figure intermediate between that of the landlord and that of the tenant, there should be no order as to costs.

A. L. J. Lincoln for the landlord.

P. J. H. Benenson for the tenant.

DENNING, L.J.: Mr. Le Witt was the tenant of Mr. Victor Montgomery Cannon Brookes who was the landlord of a studio and room at 22, Holland Park Avenue. That tenancy was determined by notice to quit given by the landlord. The tenant claimed a new lease under the Landlord and Tenant Act, 1954. The landlord said he was willing to grant a new lease, but the parties could not agree on the rent or on the other terms. The tenant put forward a figure of £200 as rent and the landlord put forward a figure of £350 as rent. The tenant also wanted power points put in and a repairing covenant by the landlord.

A The matter before the county court judge and he decided that the rent was to be £300 a year, no power points to be put in by the landlord and no repairing covenant by him. Having come to that decision, he decided that the landlord was to pay the tenant one half of the tenant's costs. He has written a note for this court in which he states the grounds on which he took that view:

B "I took the view, that, as the landlord had only offered a new lease at a rent of £350 per annum and I had ordered the grant of a new lease at £300, the landlord's offer was not a sufficient ground for depriving the tenant of costs any more than an offer or payment into court by a defendant of an amount less than that recovered in an action for a money claim would be."

C It seems to me that it is wrong to draw any analogy with a payment into court. It would mean that the landlord, if he wanted to save the costs of the hearing, would have to offer the precise figure of rent which the county court judge afterwards determined to be the right figure, or a lesser sum. That would be quite an unreasonable thing to ask a landlord to do.

D In cases of this kind, it seems to me that the court should consider the reasonableness or unreasonableness of the offers on each side, just as they could under the rules which were considered in *Gray v. Lord Ashburton* (1) ([1917] A.C. 26). There is no such rule of court here, but the same principle should be adopted: the court in exercising its discretion should consider the reasonableness or unreasonableness of the offers amongst other considerations.

E We had the very point in the recent case of *Gold v. Brighton Corpn.* (2) (ante, p. 442), in which both parties negotiated for a new lease and could not come to terms. It had to be referred to the county court judge on the amount of the rent and other terms. The county court judge took a middle course. This court held that each party should pay his own costs. So also in this case both sides put forward figures which were fairly wide of the mark. They may perhaps have been bargaining figures. At all events, the judge took a middle course and I think in this case, as in *Gold v. Brighton Corpn.* (2), there should be no costs on either side in the court below. The judge's reasoning proceeds on the fallacy of equating the landlord's offer with a payment into court, which I think is wrong. Accordingly, I would allow the appeal.

HODSON, L.J.: I agree. On Apr. 24 in his application for a new lease, the tenant made various proposals, including a proposal for a rent of £200 inclusive and that the landlord should install electric power points to enable heating of the premises to be improved. Subsequently, at the hearing, he asked a request that the landlord should be bound to enter into a repairing covenant. On May 2 the landlord, in his answer to the application, stated that he did not oppose the grant of a new tenancy but that, if a new tenancy were granted, he objected to its being granted on the terms proposed by the tenant. That position continued until the hearing on June 22, when His Honour JUDGE RALPH THOMAS, the deputy judge at the Marylebone County Court, made the order which has been appealed from: i.e., there being no opposition to the grant of a new tenancy, he rejected the tenant's application for power points and a repairing covenant and he fixed the rent at £300 a year, which was a figure in excess of that proposed by the tenant. During the interval between the entry of the answer and the hearing, by letter of June 11, 1956, the landlord, through his solicitors, had written to the tenant's solicitors saying that he was ready to grant a new lease on terms similar in all respects to those in the original lease, save that the rent should be £350 per annum.

I At the conclusion of the case the learned county court judge, before the question of costs had been discussed, stated that the applicant should have his costs as he had succeeded in getting a new tenancy. In saying that he had perhaps overlooked the fact that the question of a new tenancy on some terms or other

had never been in dispute. When counsel for the landlord drew his attention to that the judge added this: A

“Owing to additional time taken on issues on which the tenant has not succeeded, he is to have only half his taxed costs on scale III.”

The landlord says that that is not a proper exercise of discretion, because, the application for a new tenancy not having been opposed and the only surviving question after all other matters had been disposed of being what was to be the rent, and the landlord having failed in establishing his figure and the tenant having failed in establishing his figure, the learned county court judge having taken an intermediate figure, the only proper order in the circumstances of this case or the most favourable order for the tenant which could be made was no order as to costs. I think that is right. B

The analogy which the learned county court judge put forward of payment into court breaks down, because in this case there were really two offers: an offer by the tenant to pay £200 and an offer by the landlord that the tenant should pay £350. There is no true analogy between that case and the case of a defendant who pays a sum of money into court in the hope of saving costs. C

I think, therefore, that this appeal as to costs must be allowed, and I agree with my Lord that (although the learned county court judge did not have the opportunity of seeing the case, because it has only been reported, I gather, since he gave his judgment) *Gold v. Brighton Corpn.* (2) (ante, p. 442), in which my Lord and the other members of the court agreed in varying an order as to costs, is a parallel case. This is not to say that any hard and fast rule is to be laid down that in all cases where the court fixes an intermediate figure between counter offers there should be no order as to costs, but it is an indication as to (as I think) a natural practice to follow in a situation like this, which must often arise. D E

MORRIS, L.J.: I agree. The learned judge, in a note, explained why he had made the order in regard to costs that he in fact made. What he says is that the landlord had put forward a figure for the rent of £350, whereas the award was of £300. So, the learned judge says that the landlord's offer was not a sufficient ground for depriving the tenant of costs F

“any more than an offer or payment into court by a defendant of an amount less than that recovered in an action for a money claim would be.”

If any comparison can in fact be made with a payment into court, then I think there is great force in the submission that in the present case the offer of the tenant must also be looked at as though it were a payment into court. The tenant made an offer of £200 and the figure fixed of £300 was some fifty per cent. up on what the tenant had suggested. The landlord put forward a figure of £350 and the figure fixed of £300 was some fourteen per cent. down on what the landlord had suggested. It seems to me that this case cannot be regarded as one in which there was the mere exercise of a discretion on the part of the learned judge but that this is a case where we can interfere, because the learned judge proceeded, as is shown by the note, on the basis of a faulty analogy. I agree with the order proposed. G H

Appeal allowed. Order of the county court judge varied to provide for no costs on either side. I

Solicitors: *Cannon Brookes & Odgers* (for the landlord); *Simon, Haynes, Barlas & Cassels* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re QUIBELL'S WILL TRUSTS.
WHITE v. REICHERT AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 30, 1956.]

Will—Bequest—Business—Bequest of shares in company to be incorporated by will trustees and to acquire testator's business—Company incorporated by testator after date of will—Whether bequest carried the shares held by the testator at his death.

By his will dated Apr. 8, 1935, a testator bequeathed to his trustees the goodwill of his chemist's business and the stock in trade and effects employed therein together with the leasehold premises (No. 885, Finchley Road) on which the business was carried on and all other assets of the business on trust to convert the business into a private company. The testator directed that his trustees should promote a company for the purpose of taking over the said business and should sell or transfer the said business and the property so bequeathed to them (other than No. 885, Finchley Road) to the company in consideration of ordinary shares in the company. He also directed that an underlease of No. 885, Finchley Road should be granted to the company. The testator further provided that the shares in the said company should be held on trust for his wife during her life. The testator's residuary estate was devised and bequeathed to his trustees on the usual trusts for sale on trust to pay an annuity to his daughter A. during her life and subject thereto on trust to pay the income thereof to his said wife during her life, and thereafter to pay the income to his said daughter A. during her life, with remainders over. By a codicil dated Feb. 7, 1940, the testator directed that on the death of his wife his trustees should stand possessed of the said shares and of No. 885, Finchley Road (subject to any underlease in favour of the said company) on trust for his daughter A. absolutely. In May, 1940, during the testator's lifetime, a company was formed, with a capital of £1,000 divided into £1 shares, to which the business (but not No. 885, Finchley Road) was transferred, and the testator thereafter held 510 £1 shares in the company, 488 shares being issued to A., who was a qualified pharmacist, and one each to the testator's wife and the secretary of the company. The testator died on Oct. 15, 1942, still possessed of the 510 shares and of the leasehold premises, No. 885, Finchley Road. On Feb. 11, 1948, the testator's widow died, and the question arose whether the daughter A. was entitled absolutely to the 510 shares in the limited company, or whether on the widow's death they fell into and formed part of the residuary estate.

Held: the daughter A. was entitled absolutely to the 510 shares, notwithstanding that the shares bequeathed to her were not the 510 shares but shares of a company which the trustees were directed to form, because by forming a company in his lifetime the testator had merely anticipated the course which he had intended his trustees to take and the intention shown by his will was that A. should, at the death of his widow, take absolutely the shares in the company that then owned his chemist's business.

Re Russell ((1882), 19 Ch.D. 432) applied.

[As to what may pass by a bequest of shares, see 34 HALSBURY'S LAWS (2nd Edn.) 260, para. 311, or by generic descriptions, see *ibid.*, p. 237, text and note (g); and as to the ademption of a bequest by a disposition in the testator's lifetime, see 34 HALSBURY'S LAWS (2nd Edn.) 127, para. 164.]

Case referred to:

- (1) *Re Russell, Russell v. Chell*, (1882), 19 Ch.D. 432; 51 L.J.Ch. 401; 46 L.T. 336; 44 Digest 653, 4931.

Adjourned Summons.

The plaintiff, John Henry White, one of the trustees of the will and codicil of John William Quibell, deceased, applied to the court by originating summons for the determination of the question, among others, whether on the true construction of the said will and codicil and in the events which had happened the 510 shares of £1 each in J. W. Quibell, Ltd., of which the testator was the registered holder at the date of his death ought to be held by the plaintiff and the first defendant, Mrs. Audrey Maud Reichert, as trustees of the said will and codicil (a) on trust for the first defendant for her own use and benefit absolutely, or (b) as part of the residuary estate of the testator and on the trusts applicable thereto under the said will and codicil.

By his said will, which was dated Apr. 8, 1935, the testator bequeathed to his trustees the goodwill of his trade or business of a chemist and the stock in trade and effects employed therein or belonging thereto together with the leasehold premises known as No. 885, Finchley Road, N.W.11 on which the business was carried on and the benefit of all contracts subsisting, and all book debts and moneys due to him, in respect of the said business. The testator directed that his trustees should convert the said business into a private company limited by shares and for this purpose should promote a company to take over the business and should sell and transfer the said business (and the assets specifically referred to above other than No. 885, Finchley Road) to the said private company in consideration of ordinary shares in the private company. The testator further directed his trustees (if so requested in writing by the said private company) to grant to the private company an underlease of No. 885, Finchley Road. The testator declared that his trustees should stand possessed of the shares in the private company on trust to pay the income thereof to his wife during her life. By a codicil dated Feb. 7, 1940, to his said will, the testator bequeathed the said shares and No. 885, Finchley Road after the death of his wife to the first defendant absolutely (subject to any underlease in favour of the company). Soon after the date of the said codicil, the testator proceeded himself to promote a company to acquire his said business and that company was incorporated, with a capital of £1,000 divided in £1 shares, on May 30, 1940. The business was transferred to the company in consideration of the allotment of shares of which, at all times thereafter up to the date of his death, the deceased held 510.

G. B. H. Dillon for the plaintiff, one of the trustees.

H. Hillaby for the first defendant, the second trustee, and the daughter of the testator.

S. L. Newcombe for the remaining defendants, interested in residue.

VAISEY, J.: This is a very curious point of construction which arises under the will and codicil of the late Mr. John William Quibell.

At the date of his will and also at the date of his codicil, viz., on Apr. 8, 1935, and on Feb. 7, 1940, Mr. Quibell was carrying on a chemist's business at No. 885, Finchley Road, London, N.W.11. I emphasise that both at the date of his will and at the date of his codicil, he was carrying on that business at that address. He was not carrying on that business at that address at the time of his death on Oct. 15, 1942. The will was duly proved on Mar. 9, 1943, and the testator's widow, who was a tenant for life under his will, died on Feb. 11, 1948. Between the date of his codicil and the date of his death, to anticipate a little of the story, he formed a limited company and transferred his chemist's business to that company. The result was that at his death he held shares, not all the shares but many of the shares, in that limited company and no longer owned the chemist's business.

By his will he appointed trustees and executors, and, after certain dispositions to which I need not refer, by cl. 4 he bequeathed to his trustees free of duty the

- A goodwill of his chemist's business along with the stock in trade and the effects employed therein together with the leasehold premises known as No. 885, Finchley Road, N.W.11. As the will spoke from the death and as the testator had disposed of his chemist's business to the limited company in his lifetime, that bequest could not and did not take effect; but the testator went on, assuming that it would be taking effect, to direct his trustees to form a limited company, or,
- B as he put it in a colloquial phrase, to convert the business into a private company limited by shares and to promote that company, which he referred to as "the said private company".

- After giving very specific directions as to the nature of the company and what the provisions of the articles of association and so forth were to be, he devised and bequeathed all his real and personal estate not specifically disposed of—
- C that is to say, excluding the chemist's business—on trust for sale, and then, after directing payment of his debts, he declared that his trustees should stand possessed of his residuary estate on trust to pay to his daughter, the defendant, Mrs. Audrey Maud Reichert, during her life £200 a year and subject thereto on trust to pay the income of the whole estate to his wife during her life, and after her death in trust to pay the income thereof to Mrs. Reichert during her life, and
- D after her death in trust as to both capital and income for the children and grandchildren of Mrs. Reichert as therein mentioned. He then directed that in the event of there being no person or persons living at the death of Mrs. Reichert who should attain a vested interest in the shares of the said private company and in his residuary estate, his trustees should hold the shares of the said private company and the income to arise therefrom and also his residuary estate both
- E as to capital and income in trust for his sister, the second defendant, Mrs. Wright, absolutely, or, if she should predecease Mrs. Reichert, such of her children who should be living at the death of Mrs. Reichert absolutely, and if more than one in equal shares.

- On Feb. 7, 1940, he made a codicil and he recited in considerable detail what he had done by his will with regard to his chemist's business and the property
- F in Finchley Road, and he recited, as was the fact, that by his will he had directed his trustees if requested in writing so to do by the private company, that is, the private company which they were directed to form, to grant to the private company a proper underlease of the premises in Finchley Road. The testator further provided:

- G "Whereas by my said will I have directed my trustees to stand possessed of the shares of the said private company upon trust subject as in my said will mentioned to pay the income thereof to my wife during her life for her separate use without power of anticipation and after her death upon trust to pay the income thereof to my daughter [now Mrs. Reichert] during her life for her separate use . . . and after her death [upon the trusts contained in the will] And whereas it is now my desire that upon the death
- H of my said wife the said shares in the private company shall go and belong to my said daughter for her own absolute use and benefit and that upon the death of my said wife the said leasehold premises . . . or any other freehold or leasehold premises belonging to me at my death and used solely for the purpose of the said business shall go and belong to my said daughter for her own absolute use and benefit subject to any lease or underlease of the same then subsisting in favour of the said private company. Now I hereby
- I declare that upon the death of my said wife my trustees shall stand possessed of the shares in the said private company and the said leasehold premises No. 885, Finchley Road, N.W.11 aforesaid or any other freehold or leasehold premises belonging to me at my death and used solely for the purpose of the said business upon trust for my said daughter absolutely."

In 1940, a few months after the date of the codicil, he himself formed a limited company which was incorporated on May 30, 1940, and it took over the

testator's chemist's business. The premises in the Finchley Road still remained A
vested in the testator.

The company was limited by shares and the authorised share capital was
£1,000 divided into £1 shares, 510 of which were issued to the testator and other
shares* were issued to Mrs. Reichert herself. On the death of the testator's
widow on Feb. 11, 1948, Mrs. Reichert and the other trustee, the plaintiff, John B
Henry White, took advice and they thought that the 510 shares issued to the
testator, which were still held by him at his death, were carried by the legacy
to Mrs. Reichert as contained in the codicil, and accordingly they caused those
shares to be transferred to Mrs. Reichert. Very fortunately, perhaps, the
question was then raised whether that was correct, because the codicil does not
refer to the shares in the company which had been promoted by the testator,
but refers in terms exclusively to the shares in the company to be promoted C
by his trustees in accordance with the directions contained in his will.

The only leasehold or freehold premises ever used by the testator for the
purposes of his business were the premises No. 885, Finchley Road. The com-
pany still carries on business at those premises, and is under the personal control
and supervision of Mrs. Reichert, who is a qualified pharmacist and as such D
assisted the testator in carrying on the business in his lifetime, and after the
testator's death Mrs. Reichert was appointed chairman and director of the
company. The question is now raised whether the gift in the codicil which I
have read does or does not affect and dispose of the 510 shares in the company
of which the testator was the registered owner at the date of his death, or
whether, on the other hand, the codicil does not operate on those shares at all
so that they fall into and form part of the residuary estate of the testator. E

The codicil in terms refers to shares in a private company which never came
into existence if the words are read strictly and literally, because it refers to
shares in the private company which was in the contemplation of the testator
to be incorporated by the trustees of his will. When the testator died he had
already done for himself what he had directed by his will that his trustees
should do, and, if one looks forward a few weeks or months after the testator's F
death, one finds exactly the situation which the testator appears to have con-
templated by his codicil, viz., the chemist's business was in the possession of a
limited company. There were certain shares in that limited company which
belonged to the testator, and it seems to me not to make the slightest difference
from the practical straightforward common-sense point of view that the shares
which were in fact part of the testator's estate at the conclusion of the adminis- G
tration of his estate were shares in a company which had not been formed by
the trustees but had been formed by the testator himself. In other words, the
testator anticipated the operations which he had directed the trustees to carry
out by carrying them out himself, and the fact that the shares which the codicil
purported to deal with were not shares in a company which had been formed H
by the testator himself but a company which was intended to be formed by his
trustees makes not the remotest practical difference.

Nor can I hesitate for one moment when I am asked to accept that what the
testator wanted his daughter to have were the shares in the company which
owned his chemist's business. I do not forget that the daughter is an expert I
pharmacist and well able to carry on the business which the testator had founded
and carried on, and I should have thought that the testator intended that the
shares in the company which owned that business were to go to his daughter. I
think that that intention is emphasised and established by the inclusion in the
gift, as one combined subject of gift, of the shares in the future private company
and the leasehold premises in the Finchley Road. I can feel no doubt at all that

* In fact 488 shares were issued to Mrs. Reichert, one share was issued to the testator's
wife and one share to the secretary of the company.

A the testator wanted his daughter to have at the death of his wife the shares in the private company which was carrying on his business at that time.

In a sense this case may perhaps turn on s. 23 of the Wills Act, 1837, and I think that the conclusion at which I have arrived is to some extent fortified by the decision of BACON, V.-C., in *Re Russell, Russell v. Chell* (1) ((1882), 19 Ch.D. 432). In that case the testator purported to give away a business by his will, but in point of fact he owned only a share in the business. In my judgment I am driven conclusively to apply the principle in that case to the present case.

B The fact that the testator had anticipated the operations which he directed his trustees to carry out by carrying them out himself, merely brought about, I should have thought, the situation which his codicil plainly contemplated. I hold, as a matter of construction derived from the words of the codicil and having regard to the estate as it existed at the date of the death, that the shares in this company are held on trust for the daughter, Mrs. Reichert, for her own use and benefit absolutely.

Order accordingly.

Solicitors: *Zeffertt, Heard & Morley Lawson* (for the plaintiff and first defendant); *Theodore Goddard & Co.* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

E ST. JOHN SHIPPING CORPORATION v. JOSEPH RANK, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), October 11, 12, 29, 1956.]

Shipping—Carriage by sea—Load line submerged—Whether freight recoverable—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 & 23 Geo. 5 c. 9), s. 44, s. 57.

F *Contract—Illegality—Illegal performance by one party—Principles relating to enforceability of contracts affected by illegality—Claim for freight for carriage of goods in overloaded ship—Whether freight recoverable.*

G Under a contract of carriage the plaintiffs conveyed a cargo of bulk wheat from America to England in their ship which, when bunkered with fuel sufficient for the voyage, submerged the load line contrary to the provisions of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44 and s. 57. The maximum fine, amounting to £1,200, was imposed on the master in respect of this offence, but the freight earned by the excess wheat carried was £2,295. The defendants, who were indorsees of bills of lading in respect of part (about thirty-five per cent.) of the cargo, paid part of the freight for their share of the cargo (which had been delivered safely) but, in view of the overloading, withheld £2,000 of the total freight contracted to be paid by them. On a claim by the plaintiffs for the balance of the freight the defendants contended that the contract was unenforceable by the plaintiffs by reason of illegality, viz., the overloading.

H **Held:** the plaintiffs were entitled to the balance of the freight for the following reasons—

I (i) the loading of the ship so as to submerge the load line was an infringement of law that was not contemplated by the contract and, on the true construction of the Act of 1932 the contract for the carriage of goods in the ship was not within the ambit of the prohibition against overloading enacted by the statute, which accordingly did not render the contract unenforceable for illegality (principle stated by LORD TENTERDEN, C.J., in *Wetherell v. Jones* (1832), 3 B. & Ad. at p. 225, followed), and

(ii) the plaintiffs did not need to prove the illegal act, viz., the overloading, in order to recover the freight, as it was enough to prove that the goods were delivered safely, and

(iii) the plaintiffs were not barred from recovering the freight by the fact that the overloading was a crime, as the right to the freight was not brought into existence by the crime, which affected only the total amount of freight earned, and no part of the claim for freight could be identified clearly as being the excess illegally earned (*Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602, distinguished).

Principles relating to the enforceability of contracts affected by illegality explained (see p. 687, letter E, to p. 689, letter C, post).

[As to actions on contracts involving illegality, see 8 HALSBURY'S LAWS (3rd Edn.) 148, para. 257.

As to overloading ships, see 30 HALSBURY'S LAWS (2nd Edn.) 260, para. 454.

For the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44, s. 57, see 23 HALSBURY'S STATUTES (2nd Edn.) 937, 945.]

Cases referred to:

- (1) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; 93 L.J.K.B. 97; 130 L.T. 418; 88 J.P. 53; Digest Supp.
- (2) *Marles v. Trant (Philip) & Sons, Ltd. (No. 2)*, [1953] 1 All E.R. 651; [1954] 1 Q.B. 29; 3rd Digest Supp.
- (3) *B. & B. Viennese Fashions v. Losane*, [1952] 1 All E.R. 909; 3rd Digest Supp.
- (4) *Cope v. Rowlands*, (1836), 2 M. & W. 149; 6 L.J.Ex. 63; 150 E.R. 707; 12 Digest (Repl.) 305, 2345.
- (5) *Wetherell v. Jones*, (1832), 3 B. & Ad. 221; 1 L.J.K.B. 139; 110 E.R. 82; 12 Digest (Repl.) 306, 2352.
- (6) *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513; [1939] A.C. 277; 108 L.J.P.C. 40; 160 L.T. 579; 11 Digest (Repl.) 421, 719.
- (7) *Smith v. Mawhood*, (1845), 14 M. & W. 452; 15 L.J.Ex. 149; 153 E.R. 552; 12 Digest (Repl.) 305, 2346.
- (8) *Forster v. Taylor*, (1834), 5 B. & Ad. 887; 110 E.R. 1019; sub nom. *Foster v. Taylor*, 3 L.J.K.B. 137; 12 Digest (Repl.) 305, 2343.
- (9) *Cleaver v. Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 12 Digest (Repl.) 271, 2082.
- (10) *Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; *affg.*, [1937] 2 All E.R. 243; [1937] 2 K.B. 197; 106 L.J.K.B. 712; 157 L.T. 50; Digest Supp.

Action.

The plaintiffs, St. John Shipping Corporation, claimed £2,000, being the balance of freight allegedly due under a contract of carriage dated Oct. 18, 1955, in relation to the carriage of a cargo of bulk wheat in their steamship St. John from Mobile, Alabama, U.S.A., to Liverpool. The defendants, Joseph Rank, Ltd., were indorsees of bills of lading covering part of the cargo of wheat. The defendants had paid part of the freight due in respect of their part of the cargo but had withheld the balance in the circumstances which are described in the judgment.

Ashton Roskill, Q.C., and *Basil Eckersley* for the plaintiffs.
John Wilmers for the defendants.

Cur. adv. vult.

Oct. 29. **DEVLIN, J.**, read the following judgment: In 1932 Parliament enacted the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, which by s. 44 and s. 57 made it an offence to load a ship so that her load line was submerged. The temptation to overload a freighter and so to submerge her

- A marks is that the more she carries the more she will earn for the same expenditure on the voyage. So Parliament, when prescribing a fine as the punishment for an offence against s. 44, related it to the earning capacity of the ship. The maximum fine was not to exceed the court's estimate of the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion; and was also not to exceed £100 for every inch or fraction of an inch by which the load line was submerged. I suppose that in 1932 £100 was considered an outside figure of earning capacity per inch, but freights now are very different from what they were then.

When the master of the plaintiffs' ship *St. John* was prosecuted at Birkenhead under the Act and on Nov. 28, 1955, found to have overloaded his ship by more than eleven inches, he was fined the maximum of £1,200. But the amount of cargo by which the ship was overloaded was 427 tons and the extra freight earned was £2,295. So the ship came very well out of this situation; and she and other ships will doubtless continue to come very well out of similar situations until the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, is amended.

- I can see that it is a situation that must cause some concern to cargo owners whose property is at risk. The ship was carrying a cargo of about ten thousand tons of grain from Mobile, Alabama, U.S.A., to Birkenhead. The defendants held a bill of lading for about 3,500 tons of this quantity on which the freight due was nearly £19,000. The defendants, apparently in association with the charterers, decided that some additional punishment should be inflicted on the plaintiffs and that it should take the form of withholding the £2,295 extra freight.
- The defendants have withheld £2,000, for which sum they are being sued in this action; and another cargo owner has withheld £295 and is being sued for it in an action that depends on this one.

- This explains how this dispute has arisen. I have not got to decide whether the defendants are morally justified in trying to make good deficiencies in the criminal law; nor is any justification of that sort put forward in the case. The defendants' case in law is that since the plaintiffs performed the contract of carriage, evidenced by the bill of lading, in such a way as to infringe the Act, they committed an illegality which prevents them from enforcing the contract at all; the defendants say they were not obliged to pay any freight, and so cannot be sued for the unpaid balance. If this is right and if all the consignees had exerted to the full their legal powers, the effective penalty for the plaintiffs' misdeed would have been the loss of the whole freight of more than £50,000.

- I do not regard an offence against the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, as a trivial matter, particularly if it is committed deliberately, and if the safety of lives at sea is involved. It is an offence for which the master of a British ship (the plaintiffs' ship was registered in Panama) could be imprisoned*. The agreed statement of facts, on which this case is being tried, does not say that the overloading in the U.S.A. was deliberate; for the purposes of the defendants' argument that finding is not required. There is, however, material in the agreed case which would make such a finding not at all improbable. The vessel was not overloaded when she left her loading port on Nov. 2, 1955; she had then three-eighths of an inch to spare. But it seems plain that she was not then sufficiently bunkered to take her across the Atlantic. On Nov. 5 she called at Port Everglades, Florida, for bunkers and the six hundred tons which she then took on caused her load line to become submerged by about ten inches. It is hard to believe that that fact was not appreciated at the time. As she went across the Atlantic her load was lightened by the consumption of bunkers, but on the other hand she passed into the winter zone and the net result was that

* See s. 1 (1) of the Merchant Shipping Act, 1937; 23 HALSBURY'S STATUTES (2nd Edn.) 1063.

when she arrived in the Mersey her load line, as I have said, was submerged by A
more than eleven inches.

It is a misfortune for the defendants that the legal weapon which they are
wielding is so much more potent than it need be to achieve their purpose.
Believing, rightly or wrongly, that the plaintiff had deliberately committed a
serious infraction of the Act and one which has placed their property in jeopardy, B
they wish to do no more than to take the profit out of his dealing. But the
principle which they invoke for this purpose cares not at all for the element of
deliberation or for the gravity of the infraction and does not adjust the penalty
to the profits unjustifiably earned. The defendants cannot succeed unless they
claim the right to retain the whole freight and to keep it whether the offence was
accidental or deliberate, serious or trivial. The application of this principle to a
case such as this is bound to lead to startling results. Counsel for the defendants C
does not seek to avert his gaze from the wide consequences. A shipowner who
accidentally overloads by a fraction of an inch will not be able to recover from
any of the shippers or consignees a penny of the freight. There are numerous
other illegalities which a ship might commit in the course of the voyage which
would have the same effect; counsel for the plaintiffs has referred me by way of
example to s. 24 of the Merchant Shipping (Safety Convention) Act, 1949, which D
makes it an offence to send a ship to sea laden with grain if all necessary and
reasonable precautions have not been taken to prevent the grain from shifting.
He has referred me also to the detailed regulations for the carriage of timber*—
similar in character to regulations under the Factories Acts, 1937 and 1948—
which must be complied with if an offence is not to be committed under s. 61 of
the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. If E
counsel for the defendants is right, the consequences to shipowners of a breach
of the Act of 1932 would be as serious as if owners of factories were unable to
recover from their customers the cost of any articles manufactured in a factory
which did not in all respects comply with the Factories Acts. Carriers by land
are in no better position; again counsel does not shrink from saying that the
owner of a lorry could not recover against the consignees the cost of goods F
transported in it, if, in the course of the journey, it was driven a mile an hour
over its permitted speed. If this is really the law, it is very unenterprising of
cargo owners and consignees to wait until a criminal conviction has been secured
before denying their liabilities. A service of trained observers on all our main
roads would soon pay for itself. An effective patrol of the high seas would
probably prove too expensive, but the maintenance of a corps of vigilantes G
in all principal ports would be well worth while when one considers that the
smallest infringement of the statute or a regulation made thereunder would
relieve all the cargo owners on the ship from all liability for freight.

Of course, as counsel for the defendants says, one must not be deterred from
enunciating the correct principle of law because it may have startling or even
calamitous results. But I confess that I approach the investigation of a legal H
proposition which has results of this character with a prejudice in favour of the
idea that there may be a flaw in the argument somewhere.

Counsel for the defendants puts his case under three main heads. In the first
place he submits that, notwithstanding that the contract of carriage between the
parties was legal when made, the plaintiffs have performed it in an illegal manner
by carrying the goods in a ship which was overloaded in violation of the statute. I
He submits as a general proposition that a person who performs a legal contract
in an illegal manner cannot sue on it, and he relies on a line of authorities of
which *Anderson, Ltd. v. Daniel* (1) ([1924] 1 K.B. 138) is probably the best known.
He referred particularly to the formulation of the principle by ATKIN, L.J., in
the following passage (*ibid.*, at p. 149):

“ The question of illegality in a contract generally arises in connection with

* I.e., the Timber Cargo Regulations, 1932 (S.R. & O. 1932 No. 110).

- A its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner."
- B

As an alternative to this general proposition and as a modification of it, counsel submits that a plaintiff cannot recover if in the course of carrying out a legal contract made with a person of a class which it is the policy of a particular statute to protect, he commits a violation of that statute.

- C Secondly, he relies on the well-known principle—most recently considered, I think, in *Marles v. Philip Trant & Sons, Ltd.* (No. 2) (2) ([1953] 1 All E.R. 651)—that a plaintiff cannot recover money if in order to establish his claim to it, he has to disclose that he committed an illegal act. These plaintiffs, he submits, cannot obtain their freight unless they prove that they carried the goods safely to their destination, and they cannot prove that without disclosing that they carried them illegally in an overloaded ship.
- D

Thirdly, he relies on the principle that a person cannot enforce rights which result to him from his own crime. He submits that the criminal offence committed in this case secured to the plaintiffs a larger freight than they would have earned if they had kept within the law. A part of the freight claimed in this case is therefore a benefit resulting from the crime and in such circumstances the plaintiffs cannot recover any part of it.

- E I am satisfied that counsel's chief argument is based on a misconception of the principle applied in *Anderson, Ltd. v. Daniel* (1), which I have already cited. In order to expose that misconception, I must state briefly how that principle fits in with other principles relating to illegal contracts. There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or not the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this.
- G In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.
- H

- I The principle enunciated by ATKIN, L.J., and cited previously ([1924] 1 K.B. at p. 149) is an offshoot of the second principle that a prohibited contract will not be enforced. If the prohibited contract is an express one, it falls directly within the principle. It must likewise fall within it if the contract is implied. If, for example, an unlicensed broker sues for work and labour, it does not matter that no express contract is alleged and that the claim is based solely on the performance of the contract, that is to say, the work and labour done; it is as much unenforceable as an express contract made to fit the work done. The same reasoning must be applied to a contract which, though legal in form, is

performed unlawfully. JENKINS, L.J., in his illuminating judgment in *B. & B. Viennese Fashions v. Losane* (3) ([1952] 1 All E.R. 909 at p. 913), has shown how illogical it would be if the law were otherwise. In that case the regulations required that the seller of utility goods should furnish to the buyer an invoice containing certain particulars. The plaintiff made a contract of sale for non-utility goods, to which the regulations did not apply; but he purported to perform it by delivering to the buyer without objection utility garments to which the regulations did apply; and he did not furnish the invoice. If the court enforced his claim for the price of the garments, it would have in effect been enforcing a contract for the supply of utility garments without furnishing an invoice, which, had it originally been made in that form, would have been prohibited. Whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute?

Counsel for the defendants' proposition ignores this test. On a superficial reading of *Anderson, Ltd. v. Daniel* (1) and the cases that followed and preceded it, judges may appear to be saying that it does not matter that the contract is itself legal, if something illegal is done under it; but that is an unconsidered interpretation of the cases. When fully considered, it is plain that they do not proceed on the basis that in the course of performing a legal contract an illegality was committed; but on the narrower basis that the way in which the contract was performed turned it into the sort of contract that was prohibited by the statute.

All the cases which counsel for the defendants cited in support of his submission show, I think, that this is the true basis. Some of the earlier cases on which he relied—those in which the principle was first being formulated—show this most clearly; and I take as an example of them *Cope v. Rowlands* (4) ((1836), 2 M. & W. 149). In this case the plaintiff brought an action for work and labour done by him as a broker and the plea was that he was not duly licensed to act as a stock-broker pursuant to the statute. The statute imposed a penalty on any unlicensed person acting as a broker. PARKE, B., declared the law to be as follows (*ibid.*, at p. 157) [the italics below are those in the report]:

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition . . . And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract*."

After considering the language of the Act, PARKE, B., went on to say (*ibid.*, at p. 159) that the language

" . . . shows clearly that the legislature had in view, as *one* object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken . . . to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action . . . is brought."

Now this language—and the same sort of language is used in all the cases—shows that the question always is whether the statute meant to prohibit the contract which is sued on. One of the tests commonly used, and frequently mentioned in the later cases, in order to ascertain the true meaning of

A the statute is to inquire whether or not the object of the statute was to protect the public or a class of persons, that is, to protect the public from claims for services by unqualified persons or to protect licensed persons from competition. Counsel for the defendants, while saying that, if necessary, he would submit that the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, was passed inter alia to protect those who had property at sea, was

B unable to explain the relevance of this consideration to his view of the law. If in considering the effect of the statute the only inquiry that has to be made is whether an act is illegal, it cannot matter for whose benefit the statute was passed; the fact that the statute makes the act illegal is of itself enough. But if one is considering whether a contract not expressly prohibited by the Act is impliedly prohibited, such considerations are relevant in order to determine the

C scope of the statute.

This then is the principle which I think is to be derived from the class of cases which counsel for the defendants cited. Not unnaturally, he cited those cases in which the result at least was consistent with the proposition for which he was contending. Had he cited those cases in which the claim succeeded because the statute was held not to imply a prohibition of any contract, he would, I

D think, have seen the fallacy in his argument. For that submits the point to the crucial test. The plaintiff does an illegal act, being one prohibited by the statute, but he does it in performance of a legal contract, since the statute is construed as prohibiting the act merely and not prohibiting the contract under which it is done. If in such a case it had been held that it did not matter whether the contract was legal or not since the mode of performing it was illegal, counsel's

E argument would be well supported; but in fact the contrary has been held. I take as an example of cases of this type, *Wetherell v. Jones* (5) ((1832), 3 B. & Ad. 221). The plaintiff sued for the price of spirits sold and delivered. The statute 6 Geo. 4 c. 80 s. 124* provided that no spirits should be sent out of stock without a permit. The court held that the permit obtained by the plaintiff was irregular because of his own fault and that he was therefore guilty of a violation of the law, but that the statute did not prohibit the contract. LORD TENTERDEN, C.J.,

F stated the law as follows (*ibid.*, at p. 225):

"Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where

G an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the per-

H formance of something to be done on his part."

The last sentence in this judgment is a clear and decisive statement of the law; it is directly contrary to the contention which counsel for the defendants advances, which I therefore reject both on principle and on authority.

So counsel's wider proposition fails. Counsel for the plaintiffs is right in his

I submission that the determining factor is the true effect and meaning of the statute and I turn therefore to consider counsel for the defendants' alternative proposition that the contract evidenced by the bill of lading is one that is made illegal by the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. I have already indicated the basis of this argument, namely, that the statute being one which according to its preamble is passed to give effect to a convention "for promoting the safety of life and property at sea", it is therefore passed for

* Repealed by the Spirits Act, 1880; the repealed Act of 1825 was concerned with duties on spirits.

the benefit of cargo owners among others. That this is an important consideration is certainly established by the authorities. But I follow the view of PARKE, B., in *Cope v. Rowlands* (4), which I have already cited*, that it is one only of the tests. The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive.

Two questions are involved. The first—and the one which hitherto has usually settled the matter—is: does the statute mean to prohibit contracts at all? If this be answered in the affirmative, then one must ask: does this contract belong to the class which the statute intends to prohibit? For example, a person is forbidden by statute from using an unlicensed vehicle on the highway. If one asks oneself whether there is in such an enactment an implied prohibition of all contracts for the use of unlicensed vehicles, the answer may well be that there is, and that contracts of hire would be unenforceable. But if one asks oneself whether there is an implied prohibition of contracts for the carriage of goods by unlicensed vehicles or for the repairing of unlicensed vehicles or for the garaging of unlicensed vehicles, the answer may well be different. The answer may be that collateral contracts of this sort are not within the ambit of the statute.

The relevant section, s. 44 (1) of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provides that the ship “. . . shall not be so loaded as to submerge . . .” the appropriate load line. It may be that a contract for the loading of the ship which necessarily has this effect would be unenforceable. It might be, for example, that the contract for bunkering at Port Everglades which had the effect of submerging the load line, if governed by English law, would have been unenforceable. But an implied prohibition of contracts of loading does not necessarily extend to contracts for the carriage of goods by improperly loaded vessels. Of course if the parties knowingly agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute, since it falls within the first of the two general heads of illegality I noted above where there is an intent to break the law. The way to test the question whether a particular class of contract is prohibited by the statute is to test it in relation to a contract made in ignorance of its effect.

In my judgment contracts for the carriage of goods are not within the ambit of this statute at all. A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or “necessary inference”, as PARKE, B., put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case—perhaps of such triviality that no authority would have felt it worth while to prosecute—a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have

* See p. 688, letter F, ante.

A contrived to get it. It is questionable how far this contributes to public morality. In *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.* (6) ([1939] 1 All E.R. 513), LORD WRIGHT said (at p. 523):

B “Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.”

C It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done.

D I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear. I have felt justified in saying as much because to any judge who sits in what is called the Commercial Court it must be a matter of special concern. This court was instituted more than half a century ago so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it.

E I think also that it is proper in determining the scope of the statute to have regard to the consequences I have already described and to the inconveniences and injury to maritime business which would follow from upholding the defendants' contention in this case. In the light of all these considerations I should not be prepared to treat this statute as nullifying contracts for the carriage of goods unless I found myself clearly compelled by authority to do so. I can find no such authority in the cases which counsel for the defendants has cited nor even any analogous cases in which the law has been stretched as far. Of course the construction of each Act depends on its own terms, but I can find no authority in which any Act has been given anything like so wide an effect as counsel wants the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, to be given. In the statutes to which the principle has been applied what was prohibited was a contract which had at its centre—indeed often filling the whole space within its circumference—the prohibited act; contracts for the sale of prohibited goods, contracts for the sale of goods without accompanying documents when the statute specifically said that there must be accompanying documents; contracts for work and labour done by persons who were prohibited from doing the whole of the work and labour for which they demanded recompense. It is going a long way further to say that contracts which depend for their performance on the use of an instrument which has been treated in a forbidden way should also be forbidden. In the only case which I have seen where the contention appeared to go as far as that the claim failed. The relevant facts in *Smith v. Mawhood* (7) ((1845), 14 M. & W. 452), appear sufficiently from the judgment of ALDERSON, B., where he also dealt with the contention (*ibid.*, at p. 464):

“But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, &c. painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with;

and there is no addition to his criminality if he makes fifty contracts for the sale of tobacco in such a house. It seems to me, therefore, that there is nothing in the Act of Parliament* to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites."

A contract for the sale of tobacco was therefore not to be considered void merely because the premises in which the tobacco was sold did not comply with the law. So it might be said that a contract for carriage of goods is not to be considered void merely because the ship in which they are carried does not comply with the law. But I recognise that each case must be determined by reference to the relevant statute and not by comparison with other cases. I reach my conclusion—in the words of LORD WRIGHT in *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.* (6) ([1939] 1 All E.R. at p. 524) on

"... the true construction of the statute, having regard to its scope and its purpose, and to the inconvenience which would follow from any other conclusion."

In view of the importance of this question, I have thought it right to determine it on general grounds rather than on the particular wording of s. 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. But I must note that counsel for the plaintiffs also particularly relies on the wording of sub-s. (2) of that section. This sub-section, to which I have already referred,† is the one which says that the fine is to be such

"... as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion."

Counsel submits that this shows that the statute contemplated that notwithstanding the breach of it, there would be an "earning capacity" and therefore that contracts for the payment of freight must be intended to remain alive. I note that a similar point was taken in *Forster v. Taylor* (8) (1834), 5 B. & Ad. 887 at p. 889, but it was not necessary for the court to deal with it.

I turn now to counsel for the defendants' second point. He submitted that the plaintiffs could not succeed in a claim for freight without disclosing that they had committed an illegality in the course of the voyage; or, put another way, that part of the consideration for the payment of freight was the safe carriage of the goods and therefore they must show that they had carried the goods safely. In the passage I have quoted‡ from the judgment in *Wetherell v. Jones* (5) LORD TENTERDEN, C.J., carefully distinguished between an infringement of the law in the performance of the contract and a case where "the consideration and the matter to be performed" were illegal. There is there a distinction of the sort that I have just been considering, a distinction between a contract which has as its object the doing of the very act forbidden by the statute and a contract whose performance involves an illegality only incidentally. It may be therefore that the second point is the first point looked at from another angle. However that may be, there is no doubt that the plaintiffs cannot succeed if their claim for freight involves showing that they carried the goods in an overloaded ship.

But in my judgment, the plaintiffs need show no more in order to recover their freight than that they delivered to the defendants the goods they received in the same good order and condition as that in which they received them. Indeed, they are entitled to recover their freight without deduction (but subject to counterclaim) if the goods they delivered were substantially the same as when loaded (see SCRUTTON ON CHARTERPARTIES (16th Edn.), art. 144, p. 391). It

* Excise Licence Act, 1825, 6 Geo. 4 c. 81; repealed by the Customs and Excise Act, 1952, s. 320 and Sch. 12.

† See p. 685, letter A, ante.

‡ See p. 689, letter F, ante.

A may be true that it is a term of the contract of carriage that the goods should be carried safely. Article III of the Hague Rules provides, for example, in r. 2, that

“the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.”

But no one has ever heard of a claim for freight being supported by a string of witnesses describing the loading, handling, stowing, keeping, caring for and discharging the goods. The truth is that if the goods have been delivered safely, it must follow that they have been carried safely. If therefore they are proved to have been delivered undamaged, the shipowner need prove no more. The law is that they shall be carried safely—not that they should not be exposed to danger on the voyage. If the plaintiffs had to prove that they were not exposed to danger on the voyage, then no doubt they would also have to prove that the ship complied with all the safety regulations affecting her; but in the claim for freight they need only prove safe delivery. This point fails.

C On counsel for the defendants' third point, I take the law from the dictum of FRY, L.J., in *Cleaver v. Mutual Reserve Fund Life Assn.* (9) ([1892] 1 Q.B. 147 at p. 156), that was adopted and applied by LORD ATKIN in *Beresford v. Royal Insurance Co., Ltd.* (10) ([1938] 2 All E.R. 602 at p. 605):

“... no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.”

I observe in the first place that in the Court of Appeal in the same case LORD WRIGHT, M.R., doubted whether this principle applied to all statutory offences ([1937] 2 All E.R. 243 at p. 254). His doubt was referred to by DENNING, L.J., in *Marles v. Philip Trant & Sons, Ltd. (No. 2)* (2) ([1953] 1 All E.R. at p. 658). The distinction is much to the point here. The Merchant Shipping (Safety and Load Line Conventions) Act, 1932, imposes a penalty which is itself designed to deprive the offender of the benefits of his crime. It would be a curious thing if the operation could be performed twice—once by the criminal law and then again by the civil. It would be curious, too, if in a case in which the magistrates had thought fit to impose only a nominal fine their decision could in effect be overridden in a civil action. But the question whether the rule applies to statutory offences is an important one which I do not wish to decide in this case. The dicta of LORD WRIGHT, M.R., and DENNING, L.J., suggest that there are cases where its application would be morally unjustifiable; but it is not clear that they go as far as saying that the application would not be justified in law. I prefer, therefore, to deal with counsel for the defendants' submission in another way.

H The rights which cannot be enforced must be those “directly resulting” from the crime. That means, I think, that for a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title. That cannot be said in this case. The amount of the profit which the plaintiffs made from the crime, that is to say, the amount of freight which but for the overloading they could not have earned on this voyage, was £2,295. The quantity of cargo consigned to the plaintiffs was approximately thirty-five per cent. of the whole and, therefore, even if it were permissible to treat the benefit as being divisible pro rata over the whole of the cargo, the amount embodied in the claim against the defendants would not be more than thirty-five per cent. of £2,300. That would not justify the withholding of £2,000. The fact is that the defendants and another cargo owner have between them withheld money, not on a basis that is proportionate to the claim against them, but so as to wipe out the improper profit on the whole of the cargo. I do not, however, think that the defendants' position would be any better if they had deducted no more than the sum attributable to their freight on a pro rata basis. There is no warrant under the principle

for a pro rata division; it would be just as reasonable to say that the excess freight should be deemed to attach entirely to the last 427 tons loaded, leaving the freight claim on all the rest unaffected. But in truth there is no warrant for any particular form of division. The fact is that in this type of case no claim or part of a claim for freight can be clearly identified as being the excess illegally earned.

In *Beresford v. Royal Insurance Co., Ltd.* (10) the court dismissed the claim of a personal representative who claimed on policies of life insurance which had matured owing to the assured committing suicide in circumstances that amounted to a crime. Counsel for the defendants in this case submitted that the only benefit which the assured or his estate derived from the claim was the acceleration of the policies and that notwithstanding that some of the policies had been in force for a considerable time and therefore, I suppose, had a surrender value before the suicide was committed, the plaintiff was not allowed to recover anything. So in the present case, he submits, the commission of the crime defeats the whole claim to freight notwithstanding that the earning of the greater part of it was irrespective of the crime.

The comparison does not seem to me to be just. In *Beresford v. Royal Insurance Co., Ltd.* (10), but for the crime committed by the assured, no part of the policy moneys could have been claimed in that form, that is to say, as money repayable on the happening of the event insured against, or at that time. That does not necessarily mean that, so far as public policy was concerned, the plaintiff could recover nothing if, for example, assuming the contract permitted it, he had sued for the return of premiums. I have not been referred to any observation in the case which would suggest that an action in that form would fail on the grounds of public policy. The claim which the court was considering under the policy depended entirely on proof of death and the death was a crime. In the present case the right to claim freight from the defendants was not brought into existence by a crime; the crime affected only the total amount of freight earned by the ship.

The result is that there must be judgment for the plaintiffs for £2,000. But the defendants will not have fought the action altogether in vain if it brings to the attention of the competent authorities the fact that s. 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, is out of date and ought to be amended. I have already noted that for a similar offence a British master can be imprisoned and it must be very galling for those concerned to see a foreign master do the same thing without the law providing any effective deterrent.

Judgment for the plaintiffs.

Solicitors: *Constant & Constant* (for the plaintiffs); *Bentleys, Stokes & Lowless* (for the defendants).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

A

NOTE.

MAXTED v. MAXTED.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 5, 1956.]

B

Court of Appeal—Notice of appeal—Service—Petition for presumption of death and for dissolution of marriage—Respondent's whereabouts unknown—Service by advertisement in local newspaper.

Divorce—Practice—Service—Notice of appeal—Dispensing with service—Petition for presumption of death and for dissolution of marriage.

C

[As regards the time for serving notice of appeal, and extension of time, see 12 HALSBURY'S LAWS (3rd Edn.) 420, 421, para. 938.]

Motion.

The petitioner applied for leave to appeal out of time and for directions as to the service of notice of appeal against an order made by Mr. Commissioner CHARLESWORTH on Sept. 25, 1956, dismissing a petition for a decree presuming the death of her husband and dissolving her marriage with him.

D

J. C. Mortimer for the petitioner.

J. C. Mortimer said that the respondent's whereabouts had not been known since 1940. The petitioner's solicitor had advertised for the respondent before the petition. Service of the petition had been by advertisement. Counsel asked that service of notice of appeal might be dispensed with.

E

DENNING, L.J.: Is there not a precedent as to what happens when you come to the Court of Appeal?

J. C. Mortimer: I have not been able to find one.

DENNING, L.J.: Apparently the practice is for an advertisement to be issued giving notice of the proceedings in this court.

F

J. C. Mortimer: Would your Lordship give a direction as to the advertisement of the proceedings? I would ask also for an extension of time, as my time expires on Nov. 6.

DENNING, L.J.: We think there should be service in this case by advertisement, any details as to the nature and extent of the advertisement to be determined by the registrar. We will extend your time accordingly for three weeks. What form did the advertisement take before?

G

J. C. Mortimer: It was a block advertisement, once in a local paper in Alnwick and once in a daily or Sunday paper of general circulation.

DENNING, L.J.: Was Alnwick the last place where he was heard of?

H

J. C. Mortimer: Yes, it was the last matrimonial home.

DENNING, L.J.: Who pays for the advertisement?

J. C. Mortimer: I have no doubt the legal aid fund.

DENNING, L.J.: We think one advertisement in the local newspaper will be sufficient.

I

Solicitors: *Woodcock, Ryland & Co.*, agents for *Wade & Son*, Alnwick (for the petitioner).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re DICEY (*deceased*).
JULIAN v. DICEY.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), October 3, 4, 5, November 1, 1956.]

Equity—Election—Gift by testatrix of two freehold houses to plaintiff and of residue to defendant—Testatrix having only life interest in the houses—Defendant entitled, on death of testatrix, to a half share of the beneficial interest in the houses—Whether defendant put to his election.

A testatrix occupied and was entitled for her life to two freehold houses in B. Road. Subject to that life interest the defendant was absolutely beneficially entitled to a half share in the proceeds of sale of the two houses, and the plaintiff and his brother were similarly entitled to a quarter share each therein. The testatrix had no other property in B. Road. By cl. 4 of her will she devised to the plaintiff "my two freehold houses in [B.] Road, Walthamstow", and she gave another freehold house (which she did own) and her residuary estate to the defendant. The plaintiff's brother received no benefit under the will. The testatrix having died, the plaintiff claimed that the defendant was bound to elect whether he would take under or against the will. The defendant contended that he was not put to his election because (a) cl. 4 of the will was of so uncertain a character as not to give rise to an election at all and purported to dispose only of such interest (if any) in the two houses in B. Road of which the testatrix was competent to dispose, and (b) that he could not give effect to the devise of the two houses, as he was not the absolute owner of them.

Held: it being clear in the light of the admissible evidence that the testatrix intended to devise to the plaintiff the whole freehold interest in the two houses in B. Road, the defendant was put to his election, notwithstanding that he could not secure that the devise of the two houses in B. Road should take effect exactly according to its terms, whether he (a) would take the other freehold house and the residuary estate given to him by the testatrix' will and give up his half share of the proceeds of sale of the two houses in B. Road to the plaintiff or (b) would keep his half share of the two houses in B. Road and compensate the plaintiff out of the testatrix' own property which she had given to the defendant by her will.

Re Lord Chesham ((1886), 31 Ch.D. 466) considered; *Brown v. Gregson* ([1920] A.C. 860) explained and distinguished; *Fytche v. Fytche* ((1868), L.R. 7 Eq. 494) applied.

Decision of DANCKWERTS, J. ([1956] 2 All E.R. 74) affirmed.

[As to the doctrine of election where there is a claim under a will, see 14 HALSBURY'S LAWS (3rd Edn.) 589, para. 1092, and as to the need of there being a clear intention to dispose of property over which the testatrix has no disposing power, see *ibid.*, 592, para. 1097; and for cases on the subject, see 20 DIGEST 403-407, 1413-1438 and 421-423, 1517-1532.]

Cases referred to:

- (1) *Cooper v. Cooper*, (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 20 Digest 404, 1419.
- (2) *Streatfield v. Streatfield*, (1735), Cas. temp. Talb. 176; 25 E.R. 724; 20 Digest 434, 1620.
- (3) *Noyes v. Mordaunt*, (1706), Gilb. Ch. 2; 25 E.R. 2; sub nom. *Noys v. Mordaunt*, 2 Vern. 581; Prec. Ch. 265; 20 Digest 433, 1661.
- (4) *Re Chesham (Lord)*, *Cavendish v. Dacre*, (1886), 31 Ch.D. 466; 55 L.J.Ch. 401; 54 L.T. 154; 20 Digest 423, 1535.
- (5) *Wollaston v. King*, (1869), L.R. 8 Eq. 165; 38 L.J.Ch. 61, 392; 20 L.T. 1003; 20 Digest 404, 1418.

- A (6) *Whistler v. Webster*, (1794), 2 Ves. 367; 30 E.R. 676; 20 Digest 426, 1564.
 (7) *Codrington v. Codrington*, (1875), L.R. 7 H.L. 854; 45 L.J.Ch. 660; 34 L.T. 221; 20 Digest 406, 1433.
 (8) *Lissenden v. Bosch (C.A.V.), Ltd.*, [1940] 1 All E.R. 425; [1940] A.C. 412; 109 L.J.K.B. 350; 162 L.T. 195; 33 B.W.C.C. 21; 2nd Digest Supp.
 (9) *Brown v. Gregson*, [1920] A.C. 860; 89 L.J.P.C. 195; 123 L.T. 465; 20 Digest 439, 1654.
 B (10) *Douglas' Trustees v. Douglas*, (1862), 24 D. 1191.
 (11) *Fytche v. Fytche*, (1868), L.R. 7 Eq. 494; 19 L.T. 343; 20 Digest 441, 1666.

Appeal.

- C Appeal by the defendant, Charles Dicey, from an order of DANCKWERTS, J., dated Mar. 27, 1956, and reported [1956] 2 All E.R. 74. The plaintiff, James Julian, a beneficiary under the will of the testatrix, Selina Dicey, applied to the court by originating summons, dated Nov. 3, 1955, for the determination, among others, of the questions (i) whether the property referred to in cl. 4 of the will as "my two freehold houses in Beresford Road, Walthamstow, aforesaid" consisted of the two freehold dwelling-houses known respectively as Nos. 68 and 70, D Beresford Road, Walthamstow, Essex, and, if not, of what property it consisted; (ii) whether the devise to the plaintiff of the said dwelling-houses wholly or partially failed; and (iii) whether the defendant, Charles Dicey, was bound to elect whether he would take under or against the will of the testatrix. DANCKWERTS, J., held that the property which the testatrix purported to devise to the plaintiff was clearly identifiable as Nos. 68 and 70, Beresford Road, and, despite E the fact that the defendant was entitled only to a half share of the beneficial interest in the proceeds of sale of the houses, that he was put to his election.

J. Hamarvi Hames for the defendant.

S. C. Silkin for the plaintiff.

Cur. adv. vult.

- F Nov. 1. ROMER, L.J., read the judgment of the court: This appeal has raised, in a somewhat unusual form, the problem, not commonly encountered today, of the equitable rule of election under a will. The testatrix, Mrs. Dicey, who died in 1954, by cl. 4 of her will made four years earlier, devised to her grandson, James Julian, the respondent to this appeal, "my two freehold houses in Beresford Road, Walthamstow"; and she gave a freehold house which she G owned and the residue of her estate, real and personal, to her son, the appellant, Charles Dicey.

- The following facts were proved in evidence (and their admissibility is not open to challenge): (i) the testatrix' husband, who died intestate in 1938, had been the owner in fee simple of two houses in Beresford Road, Walthamstow, namely, H Nos. 68 and 70; (ii) after Mr. Dicey's death a family arrangement was come to (all written record of which was lost as a result of enemy action) whereby the rents and profits of the two houses should belong to Mrs. Dicey, the testatrix, during her life but, subject to that life interest, the two houses (or their proceeds of sale) should belong as to one-half to the defendant and as to one-quarter each to the plaintiff and his brother, Charles Julian (who is not a beneficiary under Mrs. Dicey's will and is not a party to these proceedings); (iii) the testatrix, I Mrs. Dicey, during the rest of her life after her husband's death in fact received the rents and profits of Nos. 68 and 70, Beresford Road; and (iv) neither the testatrix nor her late husband ever had any interest in any other houses in Beresford Road.

In these circumstances the question has arisen whether the defendant, Charles Dicey, must elect either for or against the will; so that (in the former case) he must, as a term or condition of accepting the freehold house and his mother's residue, renounce in the plaintiff's favour his half interest in the proceeds of sale of the two houses; and (in the latter case) he must, as a term or condition of

retaining his half interest in the houses, make compensation to the plaintiff for depriving him of that interest out of the testatrix' free property which she had devised and bequeathed to him. A

The first contention on behalf of the defendant was to the effect that the language of cl. 4 of the will was of so uncertain a character as not to give rise to election at all. It is quite true that the testatrix has not specified by number the two houses in Beresford Road whereas the rest of her dispositions (other than of residue) specifically describe or identify their subject-matter. Counsel for the defendant has accordingly contended that the gift in cl. 4 in favour of the plaintiff is wholly ineffective for all purposes (including that of raising any obligation of election in the defendant) either because it fails fairly to apply to Nos. 68 and 70, Beresford Road, at all or because, on its true interpretation, it only purported to give to the plaintiff such interest in those properties (if any) of which the testatrix was competent to dispose. B C

Counsel for the defendant referred us to one or two authorities in support of this part of his argument. We hope he will forgive us if we do not refer to them in this judgment but express briefly our entire concurrence with DANCKWERTS, J., in rejecting the contention. We are willing to assume that, if the gift should be construed as counsel for the defendant suggests, then the conclusion would be in accordance with his argument. But it is in our judgment clear, in light of the admissible evidence to which we have alluded, that by cl. 4 of her will Mrs. Dicey purported and intended to devise in the plaintiff's favour the freehold interest in Nos. 68 and 70, Beresford Road, Walthamstow—an interest which, on her death, belonged in equity as to one-quarter to the devisee already, as to another quarter to his brother and as to the remaining half to the defendant. D E

Counsel for the defendant's second argument is, we think, of more substance and difficulty. It is to the effect that in such a case as the present the defendant is relieved of any obligation to elect because he cannot, if he elects to take the property given to him by the will, by any means in his control provide that the devise of Nos. 68 and 70, Beresford Road, should take effect strictly according to the terms of cl. 4 of the will. By that clause the fee simple interest in the two houses is given to the plaintiff. The defendant's present interest in the houses is an absolute beneficial interest in one-half of their proceeds of sale. The most that he can achieve by a renunciation of his present interest in favour of his nephew is to secure for the plaintiff an absolute beneficial interest in three-fourths of the proceeds of sale of the houses, an interest not only less in extent but different in quality from the gift which the will purported to confer on the respondent. In other words, it is counsel's contention that election only arises when the person on whom the obligation falls can, if he elects in favour of the will, secure that the relevant provisions of the will take effect precisely according to their terms. We must confess for our part that, if this contention is well-founded, then the so-called rule of equity known as election appears to be bereft of much of its title to be described as equitable. For the obligation to elect would depend on the chance of the existence of some interest in the property, which the will purports to devise, in a third party (not himself a beneficiary under the will and not therefore in any event called on to elect) however small such interest might be. Further, the result in such a case as the present would be unaffected by the circumstance that in the event of election against the will there would be no difficulty at all in the way of making adequate compensation to the disappointed devisee or legatee. F G H I

It appears, however, that no case has yet been before the courts in which the precise point now raised has been determined. It becomes accordingly necessary to consider the true character of the rule. *Cooper v. Cooper* (1) ((1874), L.R. 7 H.L. 53), in the House of Lords, concerned a testatrix on whom had been conferred a limited power of disposition over an estate known as Pain's Hill. The testatrix having in her lifetime effectively appointed the estate equally in favour of her three sons, purported to appoint it by will to her eldest son giving benefits

- A to her other surviving son and her two grandchildren, the issue of the third son, who had predeceased the testatrix and died intestate. It was conceded that her appointments by will were inoperative, and the eldest son then called on his brother and the two grandchildren (who took their deceased father's appointed share) to elect. The brother submitted so to do, but the two grandchildren resisted the claim. It was held that they were bound to elect. LORD CAIRNS, B L.C., thus stated the matter at the beginning of his speech (*ibid.*, at p. 62):

“My Lords, in that state of things, the testatrix not owning Pain's Hill, and having no disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the Pain's Hill estate. And before I examine the effect which that principle would have upon the appellants in this case, I would take the liberty of reminding your Lordships of two expressions of the general rule of the court on this subject, the one contained in the case of *Streatfield v. Streatfield* (2) ((1735), *Cas. temp. Talb.* 176) and expressed by LORD TALBOT, and the other in the case of *Noys v. Mordaunt* (3) ((1706), 2 Vern. 581), expressed by Lord Keeper COWPER. LORD TALBOT says (*Cas. temp. Talb.* at p. 182): ‘When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys v. Mordaunt* (3), there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made;’ and Lord Keeper COWPER says, in the earlier case of *Noys v. Mordaunt* (3) (2 Vern. at p. 582), ‘In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other.’”

- In *Re Lord Chesham, Cavendish v. Dacre* (4) ((1886), 31 Ch.D. 466), the question arose in the case of a purported disposition by a tenant for life of heirlooms. It was held by CHITTY, J., that no question of election arose since the tenant for life could by no means either in his lifetime or by his will make any disposition of the heirlooms so that his purported disposition of them must in any event and for all purposes be wholly ineffective. But in the course of his judgment (the correctness of which has never since been doubted) that very learned judge more than once expressed the principles to be applied in such cases. Thus (*ibid.*, at p. 472):

“It is clear that if he takes under the will he must confirm the will so far as he can, and must give up to the disappointed legatees any beneficial interest that he can dispose of in the chattels . . .”

- The language, on the face of it, indicates that the obligation is limited by the extent to which the beneficiary electing for the will is able to give effect to its other relevant disposition. It is not suggested that the obligation depends on the power of such beneficiary to secure that the other relevant disposition takes effect according to its exact terms. Again the judge says (*ibid.*, at p. 473):

- “The principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates . . .”

And (*ibid.*, at p. 474):

“In *Wollaston v. King* (5) ((1869), L.R. 8 Eq. 165 at p. 174) JAMES, L.J., then Vice-Chancellor, after stating that he had endeavoured to extract from the cases a principle, adopted the rule laid down by the Master of the Rolls in *Whistler v. Webster* (6) ((1794), 2 Ves. 367) in the following general terms, viz.: ‘That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby

any disposition is made showing an intention that such a thing shall take place ”.”

And finally (31 Ch.D. at p. 474):

“ In *Codrington v. Codrington* (7) ((1875), L.R. 7 H.L. 854) LORD CAIRNS states the law thus (ibid., at p. 861): ‘ By the well-settled doctrine which is termed in the Scotch law the doctrine of “ approbate ” and “ reprobate ”, and in our courts more commonly the doctrine of “ election ”, where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them ’.”

Though the language last cited might at first sight appear to go somewhat further in support of the contention of counsel for the defendant, it is clear in our judgment in its context that it does not lay down, and was not thought by CHITTY, J., to lay down, any rule to the effect that the obligation to elect was limited to cases in which the party so bound, if he chose to accept the will, was able by his renunciation to make the other relevant provisions take effect precisely according to their terms.

If the matter, then, rested on these cases alone, there could be no doubt, in our view, that the conclusion of DANCKWERTS, J., was correct.

VISCOUNT MAUGHAM pointed out in *Lissenden v. C.A.V. Bosch, Ltd.* (8) ([1940] 1 All E.R. 425 at p. 428), that the English rule is the same as the Scots rule of approbation and reprobation: and in its simplest terms the rule would amount to no more or no less than this—that one who is given a benefit under a will but whose property the testator purports to give to someone else must make up his mind whether he will take under (or approbate) the will or whether he prefers to adhere to his already existing proprietary claim and renounce (or reprobate) the testamentary disposition. If the rule can properly be stated in these simple terms, then, in the former event the obligation of him who approbates the will must be, by renouncing his outside interest, to let the will wholly take effect so far (to adapt CHITTY, J.’s language) as the renunciation of that outside interest permits him so to do. But counsel for the defendant drew our attention also to another case in the House of Lords, *Brown v. Gregson* (9) ([1920] A.C. 860), and certain language used by the noble Lords in their opinions in that case does at first sight appear to support his argument. In that case a Scottish testator left the residue of his property in trust to be divided amongst his seven children directing that this provision was to be accepted in full of legitim with certain ancillary and consequential provisions. The testator settled the share of a daughter (Mrs. Gregson) on her for life with remainder to her children. Part of the testator’s estate consisted of land in the Argentine. It was found (see ibid., at p. 862) that the law of that country which governed the disposition of immovables there only permitted a testator to dispose by will of one-fifth of his immovables in Argentine, the remaining four-fifths passing to his children as of right on his death. Furthermore, that law did not permit trusts or contracts which would restrict the free disposal of land by its owner: nor could a testator appoint heirs to his heirs of such land, and the heir who became owner could not bind himself not to dispose of that land. Mrs. Gregson claimed legitim and forfeited her interest under the will and her children claimed that the other six children of the testator should surrender to the trusts of the will the shares of land which passed to them under the Argentine law as a condition of taking their share of the residue of the property of the testator in Scotland. In the circumstances, the majority of the House held that the Scottish rule of approbation and reprobation was excluded: since it was not possible in conformity with the local Argentine law for one who sought to claim under the will to give effect by any means to the testator’s intention in the Argentine. There was a complete impossibility of making the

- A Argentine lands or their proceeds available to the use of the settlement save by some wholly independent and original transaction which, if it did not offend at least against the spirit of the Argentine law, would be wholly distinct and different in character from the testator's dispositions. Thus, in course of his opinion, VISCOUNT HALDANE—and these were the passages particularly relied on by counsel—had said of the view of the Court of Session which he affirmed
- B (*ibid.*, at p. 866):

“The Court of Session held that the heir was not put to any election, because the court must be satisfied, in order to put him to it, that it was in his power, by waiving his objection to the will, or refusing to make a claim adverse to it, to perfect the right of those who would make title under the will.”

- C Again, he said (*ibid.*, at p. 868):

“He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is

D *prima facie* entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock.”

Then, after referring to the cases of *Cooper v. Cooper* (1) and *Re Lord Chesham* (4), he concluded as follows (*ibid.*, at p. 870):

- E “If this be so, the question in the present case is simply whether the law governing the title to the testator's Argentine land permits the appellants to comply with the directions of the trust disposition. It seems to me clear that it does not. It is said that the appellants could sell their land or convey it to the trustees under the disposition. But they could not by doing so bring it effectively under the scheme of the instrument. If they were to try to do so the trustees would either not get the land itself, or would get it free from any binding trust. The law of the Republic strikes at such a transaction
- F as the settlement directs, and does not allow the title to be made which the testator directed. It is plain that it is this law which must govern the validity, not only of the disposition but of the trusts sought to be engrafted on the title to the Argentine land, and of the directions to be carried out with regard to it. In this state of matters, to say that the appellants were
- G bound to elect, or that they are reprobating the instrument by not doing what the law will not allow them to do, appears to me, both on principle and authority, to be wrong.”

To the same effect was the language of VISCOUNT FINLAY, who, in the course of his speech, rejected, as LORD HALDANE had done, the suggestion that sufficient effect could be given to the testator's intentions by a sale of the Argentine land

- H and a settlement of the proceeds. He said ([1920] A.C. at p. 875):

“The immediate sale of the land and the settlement of the proceeds of the sale of the land is something quite different from the interest in the land in specie for which the testator provided until the trustees should think a sale expedient.”

- I We do not think it necessary to cite further from LORD FINLAY's speech, but he made citations (*ibid.*, at p. 877) particularly from another Scottish case of *Douglas' Trustees v. Douglas* (10) ((1862), 24 D. 1191), which included the reference in the rubric:

“Opinions, that a party cannot be said to reprobate a deed who is not put to his election by the will, express or implied, of the granter of the deed, and who is not free to approbate, and capable of approbating *cum effectu*.”

From these passages counsel for the defendant contended the law to be that election did not arise unless the party electing under the will was in a position

quoad the other relevant disposition to make it precisely effective: and he so sought to translate the two Latin words cum effectu. A

In our judgment, however, the speeches in *Brown v. Gregson* (9) must be read in the context of the special and peculiar circumstances presented by Argentine law. In our view, the basis of the decision was that, by reason of that law, those claiming under the will were wholly disabled from making the testator's dispositions concerning Argentine land effective at all or by any relevant means. B
LORD HALDANE, who, as we have said, referred to the judgment of CHITTY, J., in *Re Lord Chesham* (4), nowhere indicates any criticism of the general principles which CHITTY, J., had expounded. Moreover, LORD HALDANE had, at the beginning of the paragraph from which we have made the second citation of his speech, indorsed the view which CHITTY, J., had expressed that the obligation of him who elected under the will was to make the other relevant disposition C
effective "so far as he was able"; for LORD HALDANE had there said of the doctrine of election ([1920] A.C. at p. 868):

"It is a principle which the courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument."

It is further to be observed that the suggested limitation of the doctrine of election to cases in which the person whose property is given away can, by abandoning his own title to or interest in that property, enable the purported gift to take full effect according to its precise terms is inconsistent with the manner in which the doctrine has been applied by long established authority. It was recognised in *Cooper v. Cooper* (1) and was expressly decided in *Fytche v. Fytche* (11) ((1868), L.R. 7 Eq. 494) that if two or more persons are called on to elect each of them has not only an individual obligation but an individual right to elect and can exercise it independently of the way in which the right may be exercised by the other or others. The significance of this in relation to counsel for the defendant's argument is apparent from the following illustration. A testator gives Blackacre or the proceeds of its sale to A. Blackacre in fact belongs to B, C and D as joint tenants and the testator gives legacies to each of these persons. Each of them has a separate and individual right and obligation to elect for or against the will notwithstanding that the gift to A can only take full effect according to its terms if B, C and D all elect in favour of the will. In other words, a class is not exempted from the principle of election merely because each can contribute only a part of the total subject-matter of the gift which the testator has purported to effect. For the above reasons we are of opinion that the appeal fails and must be dismissed. D
E
F
G

Appeal dismissed.

Solicitors: *Craigen, Wilders & Sorrell* (for the defendant); *Montlake & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

NOTE.Re RIGLAR (*deceased*).RIGLAR *v.* SIBLEY AND OTHERS.

B

[CHANCERY DIVISION (Upjohn, J.), October 17, 1956.]

Family Provision—Practice—Title of proceedings—Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6 c. 45)—Intestates' Estates Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 64), s. 8 and Sch. 4.

C

On an application under the Inheritance (Family Provision) Act, 1938, where the deceased had died after the coming into force of the Intestates' Estates Act, 1952*, the question arose whether it was proper to include in the title of the proceedings such words as "In the matter of the Intestates' Estates Act, 1952", having regard to Sch. 4 to that Act, which set out the Act of 1938 as amended, s. 6 (1) of which provided: "This Act may be cited as the Inheritance (Family Provision) Act, 1938".

D

Nigel Warren for the plaintiff.

Oliver Lodge for the defendants.

E

UPJOHN, J., said that Sch. 4 to the Intestates' Estates Act, 1952, set out the full text of the Act of 1938 as amended, which provided, in s. 6 (1), that the Act was to be cited as the Inheritance (Family Provision) Act, 1938. It was, therefore, incorrect to intitle these applications "In the matter of the Intestates' Estates Act, 1952"; but, as there might for some time be cases coming before the court to which the Act of 1938 in its original form still applied, it would be convenient that cases to which the amended Act applied should be intituled "In the matter of the estate of . . . deceased, and in the matter of the Inheritance (Family Provision) Act, 1938, as amended".

F

Solicitors: *Charles Russell & Co.*, agents for *Kitson & Trotman*, Beaminster (for the plaintiff); *Clement G. Lawrence*, agents for *Geare & Williamson*, Crewkerne, and *Stunt & Son* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

* That Act came into force on Jan. 1, 1953.

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hallett and McNair, JJ.),
November 12, 1956.]

*Criminal Law—Indictment—Settling of indictment—Notification of alterations
and additions—Inspection by prosecution and accused.*

[As to restrictions on preferring indictments, see 10 HALSBURY'S LAWS
(3rd Edn.) 382, para. 692.]

LORD GODDARD, C.J., said: The Attorney-General has informed the court that some diversity of practice exists with regard to the settling of indictments and affording inspection of them before trial. It is desirable that the practice both at assizes and sessions should be uniform, and also that an accused person should, when practicable, be informed before trial of any charges included in the indictment additional to, or varying from, those on which he has been committed. Accordingly, the court, in collaboration with the Attorney-General, has prepared a Practice Note which I am about to read and which we hope will be published in the reports and legal journals and should be followed by those whose duty it is to prepare indictments.

1. The prosecution are entitled to require that the terms of an indictment should be settled by counsel. Clerks of assize and of the peace can require it to be settled by counsel when they think fit. The necessity and cost of employing counsel will be a matter for the taxing officer.

2. Where an indictment, or draft indictment, settled but not signed, contains counts which differ materially from, or are additional to, the charges on which the accused was committed for trial, the clerk of assize or clerk of the peace shall, except where the indictment has been settled by counsel for the prosecution, notify the prosecution and the accused of the fact and, where the indictment has been settled by counsel for the prosecution, notify the accused of the fact as soon as may be.

3. On or after commission day at assizes, or the day before the sessions open at the Central Criminal Court, or at quarter sessions, or earlier at the discretion of the clerk of assize or clerk of the peace, facilities shall be given to the prosecution and to the accused to inspect the indictment, or the draft indictment if the indictment has not then been signed. If on those days the indictment is not drafted, such facilities shall be given as soon as possible.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

WILLIAMS v. GREATREX.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 24, 25, 26, 29, 1956.]

Specific Performance—Lapse of time—Contract for sale of building land—Purchase to be completed within two years—Plots to be conveyed to purchaser as buildings erected—Purchaser having entered on two plots, no building completed on them for many years—Delay attributable partly to antagonistic conduct of vendor—Action by purchaser for specific performance after ten years—No abandonment of contract.

Sale of Land—Time of the essence—Building land—Contract not completed for ten years—Time not made essence of the contract—Specific performance granted.

By an agreement in writing dated May 28, 1946, the purchaser, who was a builder, agreed to buy from the defendant vendor an area of land, which was intended to be laid out in building plots, and to erect houses on the plots. On paying a deposit and giving notice, the purchaser was to be entitled to enter on a plot in order to build on it, and the vendor was to convey the plot on payment to him of the balance of its price; the purchase of all plots was to be completed within two years. In June, 1946, building having been carried out on two plots, conveyances of them were executed, but the vendor refused to initial a correction of the conveyances and proceedings had subsequently to be brought to compel him to hand over the conveyances. In October, 1946, the purchaser paid a deposit on two more plots, Nos. 3 and 4, and was given a receipt, but the vendor never presented the purchaser's cheque for the deposit. The purchaser entered on plots 3 and 4, put in the foundations of a house, built walls three feet high at the back and six feet high at the front and fenced all four plots with a fence of concrete posts and wire, the total cost of the work done on plots 3 and 4 being £500. In April, 1947, the vendor told the purchaser that neither the building on plots 3 and 4 nor the land belonged to him and ordered him off the land. Partly because of the antagonistic attitude of the vendor and partly owing to inability to obtain the building licences which were then necessary, the purchaser discontinued work on plots 3 and 4. Towards the end of 1948 he erected a garage and shed on these plots and afterwards used the garage. In 1953 it was discovered that the whole area of land was subject to a charge to a bank, and an action had to be brought against the vendor to procure the release of the first two plots from the charge. In 1955 the purchaser re-commenced building work on plots 3 and 4. In December, 1955, the vendor entered into a contract for the sale of plots 3 and 4 to a third party. In 1956 the purchaser brought an action for specific performance of his contract with the vendor for the sale to him of plots 3 and 4.

Held: the purchaser was entitled to specific performance of the contract notwithstanding the ten years' delay because (i) the time for completion specified in the contract was not of the essence of the contract, (ii) he was not barred by laches since he had an equitable title to plots 3 and 4 by virtue of the contract and had entered into possession of them, and (iii) there had not been abandonment of the contract by him.

Dictum of LORD REDESDALE in *Crofton v. Ormsby* ((1806), 2 Sch. & Lef. 583) applied.

Appeal dismissed.

[As to lapse of time in relation to specific performance, see 31 HALSBURY'S LAWS (2nd Edn.) 401-405, paras. 470-474; and for cases on the subject, see 42 DIGEST 524-528, 885-927.]

Cases referred to:

- (1) *Crofton v. Ormsby*, (1806), 2 Sch. & Lef. 583; 31 Digest (Repl.) 84, 810.
- (2) *Mills v. Haywood*, (1877), 6 Ch.D. 196; 30 Digest (Repl.) 501, 1434.

- (3) *Stickney v. Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664; 40 Digest 113, 912. A
- (4) *Clarke v. Moore*, (1844), 1 Jo. & Lat. 723; 31 Digest (Repl.) 248, 1225.
- (5) *Sharp v. Milligan*, (1856), 22 Beav. 606; 52 E.R. 1242; *affd.* (1857), 23 Beav. 419; 53 E.R. 165; 30 Digest (Repl.) 425, 691.
- (6) *Shepherd v. Walker*, (1875), L.R. 20 Eq. 659; 44 L.J.Ch. 648; 33 L.T. 47; *subsequent proceedings*, (1876), 34 L.T. 230; 30 Digest 432, 751. B
- (7) *Tilley v. Thomas*, (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 40 Digest 112, 895.
- (8) *Roberts v. Berry*, (1853), 3 De M. & G. 284; 22 L.J.Ch. 398; 20 L.T.O.S. 215; 43 E.R. 112; 40 Digest 82, 636.

Appeal.

The vendor appealed against an order of His Honour JUDGE TEMPLE MORRIS made in Cardiff and Barry County Court on July 20, 1956, ordering specific performance of a contract for the sale of land by the vendor to the purchaser which was entered into on May 28, 1946. The vendor contended that the purchaser was not entitled to specific performance on the ground that: (i) the contract had provided for completion in two years and time was of the essence of the contract; and (ii) the purchaser had been guilty of laches, since he had taken no action to enforce any right until ten years after the execution of the contract. C D

Meurig Evans for the vendor.

D. Pennant for the purchaser.

DENNING, L.J.: This is an action for the specific performance of a contract made ten years ago. Ten years is a very long time to wait before bringing an action for specific performance, and we must closely examine the facts to see whether the claim should now be admitted. E

On May 28, 1946, the vendor owned a considerable area of land then part of a farm called Walters Farm at Barry. It was proposed to develop it in thirty-four plots for building purposes. A builder, the purchaser, had built two houses on plots numbered 1 and 2. The vendor agreed to sell to the purchaser thirty-four plots over the following two years, including plots 1 and 2 which had already been built on. We are concerned with plots 3 and 4 only. The remaining thirty plots have gone out of the case. F

In cl. 1 of the contract of May 28, 1946, the vendor agrees to sell and the purchaser agrees to buy all the land. Clause 2 provides: G

“The purchaser shall erect on the said piece or parcel of land not less than thirty-four bungalows or houses”,

and shall pay the vendor in respect of each plot fronting the road £100 and any other plot £80.

Clause 3 is very important: H

“On notice to the vendor of the purchaser's intention to purchase any of the said plots and payment of a deposit of ten per cent. of the purchase price in respect thereof the vendor will allow the purchaser to enter on the said plot for the purpose of erecting any buildings thereon and on payment of the balance of the purchase money will execute a proper conveyance to the purchaser of the said plot but so that the purchase of all the said thirty-four plots shall be completed within two years from the date hereof.” I

The contract was executed on May 28, 1946. Two houses had already been built on plots 1 and 2 and conveyances were duly executed in June of that year, but there was much trouble afterwards about them. It appeared that there was some discrepancy in the measurements. The conveyances were sent back to the vendor to have corrections initialled. He refused to initial them. Eventually an action had to be brought in the county court to compel him to

- A hand over conveyances. They were obtained towards the end of 1948. Some years later, in 1953, it was discovered that the whole of the land had been throughout subject to a charge in favour of the bank. The bank was ready to release these plots 1 and 2 from the charge, but nevertheless the vendor would not release them. An action had to be brought against him in the Chancery Division to get those two plots released from the charge. That took from 1954 to 1955.
- B Not till then was the position straightened out.

Those two plots have only a slight bearing on the case. They show that the vendor was a most difficult man, who refused to implement his contracts, as he should have done. Having said that, I put those plots on one side and turn to the plots which concern us particularly, namely, plots 3 and 4.

- C May 28, 1946, was the date of the main contract. A few months later, in October, 1946, the purchaser, through a solicitor, paid a cheque for £20 to the vendor as a deposit on the purchase of plots 3 and 4. By a receipt dated Oct. 11, 1946, after dealing with another matter which is not material here, there is this statement: "Further acknowledgment of receipt of £20 being deposits on purchase of plots 3 and 4." The cheque was handed over and the receipt given as there stated. The vendor never cashed the cheque; he kept it in his pocket,
- D I think, for some ten years. But that cannot alter the fact that it was received. Thereupon a sub-contract came into being in respect of plots 3 and 4, which I regard as a binding contract, separate from the main contract and sufficient in itself, whereby the vendor agreed to allow the purchaser to enter on the said plots for the purpose of erecting any buildings thereon.

- E After the deposit was paid, the purchaser entered on plots 3 and 4 and did much work. He had already been to great expense in carrying a sewer up to the edge of the land—he had made that sewer for the purpose of developing the whole estate—but, in addition, on plots 3 and 4 he put in foundations of a house; he built walls to a height, at the front of some six feet, and at the back of some three feet; and he put a concrete post and wire fence right round the whole plots, 1, 2, 3 and 4; he fenced them in as his own. The cost of the work on
- F plots 3 and 4 was something in the region of £500. The purchaser had not got a written licence from the local authority, but he had an oral intimation from the surveyor that he could go ahead.

Then, in April, 1947, there was an important incident. The vendor, whose character I have already indicated, went on the land and ordered the purchaser off. I will read the judge's description of it:

- G "On a Sunday in the early spring of 1947—and this, perhaps, is the most important date in the case—the vendor came to the land and ordered the purchaser off the land, and he said, with a lot of bad language, that the purchaser was not a builder, never had any intention of building on the land and neither the land nor the bungalows belonged to him."

- H The building thereupon stopped; the purchaser did not go on with it. One reason was because the vendor had shown this antagonistic and obstructive attitude. Another reason (which arose later on) was that building licences were not granted. There is evidence that the purchaser was applying for licences as late as July, 1947; but the authorities said they were not prepared to give licences for the erection of dwellings by private persons. So the work stopped.

- I Nevertheless the purchaser at long intervals did a few things on the land: towards the end of 1948 he put up a garage and a shed, and there is some evidence that he used the garage; but, apart from that, little or nothing was done for many years until 1955. By that time the position of plots 1 and 2 had been cleared up and the licensing position had become easier. So in 1955 the purchaser entered on plots 3 and 4 again to do work. He put in a service road with a view to building there again; and he also put in another garage, as the first one had fallen down. Then people approached him asking him if they could purchase these plots. In particular, a certain Mr. D. Brinley Williams approached the

purchaser about it, saw the brickwork which he had done on the plots and wanted to buy this land. The purchaser intimated that there were difficulties about it. So Mr. D. B. Williams, not having been able to buy it from the purchaser, went along to the vendor and offered to buy it from him. On Dec. 5, 1955, Mr. D. B. Williams entered into a contract with the vendor whereby the vendor agreed to sell him these plots 3 and 4 for £450, more than twice as much as the original price in 1946. Having agreed to buy them, he entered on the land and started to pull down some of the brickwork which was already there. That stirred the original purchaser into action. In the beginning of 1956 he brought an action for specific performance against the vendor, asking for a conveyance of these plots 3 and 4. The county court held that he was entitled to specific performance. There is an appeal to this court.

It is said by counsel for the vendor that time was of the essence of the contract of May, 1946, and that, if the purchase of any plots was not completed within the two years then stated, there could be no further claim in respect of any such plots. He said that it was a commercial transaction and that, therefore, time should be considered of the essence. I cannot agree to that argument. It seems to me that this was a contract for the purchase of land, in which the parties, through their own common solicitor, put forward the period of two years as their target for completion; but, as usual in cases of the sale of land, that was only a target: it was not a thing which was of the essence of the matter. Our legal procedure is well adapted to meet such a situation. If either side wanted to bring the other up to the mark, all he had to do was to give him reasonable notice requiring him to complete. Neither side did so and therefore time is not by itself a bar to the action.

The second point is delay or laches. Counsel for the vendor said there had been too much delay to enable the purchaser to get specific performance. On this point it is necessary to remember that, when the deposit was paid, there was a binding contract—binding on the vendor—whereby he let the purchaser into the land for the purpose of erecting the buildings. It was binding even though the vendor kept the cheque in his pocket. It was a contractual licence which the vendor could not repudiate at will. It created an equity. The purported repudiation by the vendor in April, 1947, was entirely inoperative. He could not renounce a binding contract in that way. The purchaser did not accept the repudiation as a rescission of the contract. He stopped building, but he did not take down his fence. He still remained in possession of the land, and, being in possession under a contractual licence, he had an equity to remain there.

But then it is said: When the vendor repudiated this contract, surely the purchaser ought to have taken him to court; he ought to have brought an action for specific performance then and there to compel him to perform his contract. I confess that argument did appeal to me at one time in the course of the case. A very long time elapsed without his taking the vendor to court. But I think the answer to it is this: Once the purchaser went into possession of the land, having the contractual right to be there, he had not only an equity to be there. He had more. He had the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he did not lose his rights simply by not proceeding at once for specific performance.

In *Crofton v. Ormsby* (1) ((1806), 2 Sch. & Lef. 583), LORD REDESDALE, Lord Chancellor in Ireland, said (*ibid.*, at p. 603):

“ The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so, it would tend to upset a great deal of property in this country, where parties often continue to hold under an

- A equitable contract for forty or fifty years, without clothing it with the legal title. I conceive, therefore, that possession having gone with the contract, there is no room for the objection . . . But, in the present case, there is nothing but a resting on the equitable estate by a person in possession, without clothing it with a legal title, which I think never was held to be that sort of laches that would prevent relief."
- B Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar.
- C Counsel for the vendor has argued that possession is only an excuse for delay in cases where the whole agreement is substantially completed: as, for instance, when, under an agreement for a lease, the tenant goes into possession and pays rent and all that is necessary is that a formal lease should be granted. He said no case had ever gone so far as the one before us. That may be so. Nevertheless I think the principle which LORD REDESDALE has stated applies. The fact of possession is enough.
- D Next, counsel for the vendor said that there must be acquiescence by the owner, and he referred to *Mills v. Haywood* (2) ((1877), 6 Ch.D. 196 at p. 202). I think there was sufficient acquiescence here. Although in one sense the vendor objected—he turned the purchaser off the land and made it clear he did not want him there—nevertheless in another sense he acquiesced: he did nothing to see that the fence was removed or to take down the garage. If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so.
- E I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts would protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.
- F I ought perhaps to mention the point of illegality. Counsel for the vendor said that the work done on the plots in 1946 and 1947 was illegal because there was no written licence. In my opinion that was nothing to do with the vendor and he cannot take advantage of it.
- G The only remaining question is one of abandonment. It is said that, by stopping work and not continuing with his building, the purchaser abandoned the contract. The judge has negatived it and I agree with him. The purchaser was put in a very difficult position by the conduct of the vendor first of all, in regard to plots 1 and 2; and then by his conduct in coming and turning him off the land. He was put in such a difficult position that it is quite understandable that he did not feel it wise to take legal proceedings at an earlier stage. He only brought them when they were forced on him by the re-sale by the vendor. After all, he had a contract under which he had an equity and under which he was in possession. That is binding on the vendor and on anyone who agreed to take
- H from the vendor with knowledge of the contract or with knowledge of such facts that he ought to have realised there was such a contract. Mr. D. B. Williams certainly comes into that category. Neither the vendor nor Mr. D. B. Williams has a right as against the better equity of the purchaser. Mr. D. B. Williams never got the legal estate; so it does not matter that the contract with the purchaser was not registered.
- I I find myself in agreement with the county court judge and would dismiss the appeal.

HODSON, L.J.: I entirely agree. I think the judgment of the learned county court judge was perfectly correct. This case has taken a very considerable time to hear, both in the county court and in this court; but the facts are really in essence simple.

The first question depends on the agreement of May 28, 1946, whereby the vendor agreed to sell to the purchaser a plot of land, and on that the first question

is whether the time mentioned is an essential term; because in para. 3 the intention is stated that the purchase of all the thirty-four plots, i.e., all those the subject-matter of the agreement, shall be completed within two years of the date thereof. Two years has long since passed, and if two years was an essential term of the contract, the purchaser could not succeed in getting the contract performed.

This agreement is severable in that it provides for the completion of several separate contracts, one individual contract in respect of each of these thirty-four plots of land. Plots 1 and 2 have been dealt with already; I do not propose to refer to their unhappy history; their sale has been completed; and with regard to the last surviving thirty plots the contract has been abandoned by both parties; the purchaser has given up the idea of ever getting the other thirty plots. The contest has been about what are called plots 3 and 4; a separate contract is contemplated in respect of each of those two plots, as appears from the words used in para. 3, that

“The vendor will allow the purchaser to enter on the said plot for the purpose of erecting any buildings thereon and on payment of the balance of the purchase money will execute a proper conveyance to the purchaser of the said plot.”

Then follows the provision that the intention is that the purchase of all the plots shall be completed within two years.

In my opinion that contract is an ordinary contract for the sale of land and is not subject to the considerations which apply to commercial contracts dealing with special subject-matter and where particular considerations apply having regard to market variations and diminution in the value of property through effluxion of time, and so forth.

Nor are we concerned with a case where a special provision has been made to make time of the essence of the contract. The ordinary rule of equity, therefore, applies as stated by LORD PARKER OF WADDINGTON in *Stickney v. Keeble* (3) ([1915] A.C. 386), when dealing with a contract for the sale and purchase of real estate. He pointed out (*ibid.*, at p. 415) that at law the time fixed by the parties for completion had always been regarded as essential. He continued (*ibid.*):

“In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.”

If time was not originally of the essence of the contract, no notice was ever given by the vendor to complete the contract, so as to make it essential for the purchaser to agree to buy within a reasonable time. Indeed, as counsel for the vendor pointed out, he could hardly do it, because his attitude had been for a very long time that he wanted nothing more to do with the purchaser and would not touch him in business in any circumstances whatever. The position is that, as the county court judge held, on the basis of this contract the purchaser paid his deposit. The deposit cheque had rather a curious history, because the vendor kept the cheque representing the deposit in his pocket. The purchaser never

- A got his money back and he did not know that the vendor had refused to apply the proceeds of the cheque that the purchaser had drawn in favour of the solicitor in the first instance. Relying on the contract, the purchaser went into possession of the property and did such acts as were necessary and relevant in order to show that he was in possession. I need not deal with all those facts; my Lord has already recited them. I myself attach great importance to the putting round
- B these plots 3 and 4 of a fence. What more can a man do ordinarily, if he buys or agrees to buy a piece of freehold land, in order to show that it is his land and mark it off from the neighbouring land than put a fence round it in that way? This is not the case of a man who had taken a lease and had to pay rent. He has nothing further to do. Land is not capable in the ordinary way of being reduced into possession except in such manner by the inclusion of it in a boundary
- C fence. That is the first thing one is likely to do in any event and perhaps in many cases it may be the only thing one does. In this case the purchaser did a bit more: he started some building; he put up some sheds and did some road works. But the fence, to my mind, was sufficient intimation that he was claiming possession of that land.

- It has been said that he cannot rely on his acts of possession because he has
- D to come to court with clean hands, and, so far as the building work was concerned, he was working without a licence, and, therefore, he cannot rely on that. It is unnecessary to express any opinion on that. Nobody raised any defence of illegality against him and I doubt very much whether such a defence would have succeeded. But, so far as putting up a fence to mark his boundary is concerned, at any rate it has not been shown to us that that would have been
- E in any event an illegal act, whatever regulations were in force at that time. The regulations have not been shown to us in detail and perhaps the point was not pressed very hard.

What is the position if the purchaser was in possession? In FRY, L.J.'s book on SPECIFIC PERFORMANCE (6th Edn.) (not, of course, edited by him), para. 1110 reads:

- F "Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court . . ."
- G The authority for that proposition is stated to be that of LORD REDESDALE in *Crofton v. Ormsby* (1) ((1806), 2 Sch. & Lef. 583), to which reference has been made. The passage continues:
- " . . . for the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected.
- H "1111. Therefore, where a tenant holds under a contract for a lease, pays his rent, and has possession of the property and the enjoyment of all the benefits given him by the contract, the effluxion of time will not be a ground for resisting its enforcement."

- Authorities for the last sentence referred to in the footnote are *Clarke v. Moore* (4) ((1844), 1 Jo. & Lat. 723); *Sharp v. Milligan* (5) ((1856), 22 Beav. 606, affirmed 23 Beav. 419); *Shepherd v. Walker* (6) ((1875), L.R. 20 Eq. 659), which deal with tenancies. Counsel for the vendor sought to distinguish those cases because he said the situation was very different when a tenant in possession under the lease was paying a rent, and the landlord took the rent over a period of years; it would be absurd not to allow the tenant to complete his title when all he required was a formal document, namely, the lease. He said that this case was entirely different; but to my mind the principle is exactly the same, and each case must depend on how much it is necessary for the person seeking specific
- I

performance to do to establish the possession, and the nature of the possession which he can establish must depend on the subject-matter. A

COTTON, L.J., in *Mills v. Haywood* (2) ((1877), 6 Ch.D. 196) commenting on *Clarke v. Moore* (4) one of the lease cases to which we were referred, said (6 Ch.D. at p. 202):

"In such a case as, e.g., where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right." B

Now, that brings me really to the last point in this case, because counsel for the vendor says: "It is all very well, but, possession or no, nobody could accuse the vendor of ever having acquiesced in anything, because his attitude throughout has been one of defiance and protest and indeed abuse of the purchaser whenever he saw him." I do not agree. I do not attach any particular significance to what took place in April, 1947, when the vendor tried to frighten the purchaser off the place by abusing him and telling him to get off the land. The purchaser never did get off the land. He stopped building, but there were various reasons for doing that. One was that he could not get a licence at that time. But he never got off the land. He kept on using the land; he kept his fence there; he kept his sheds there and used the land so far as it was capable of being used in the circumstances throughout; and, so far as the attitude of the vendor is concerned, I think the position is that he substantially acquiesced. However much he breathed fire and slaughter, he did not do anything about it. The evidence is not very clear about this, but he was living on the farm or spent part of his time on the farm of which this land was part, and, from his evidence, he certainly must have known what was going on during, at any rate, part of this long period during which the purchaser delayed in bringing his action and taking steps to get the land conveyed to him. The vendor has done nothing to bring the thing to a head. I think, therefore, that the position is that he has acquiesced in the purchaser's remaining in possession throughout, and there are no laches on the part of the purchaser which could defeat him in this action for specific performance. C D E F

MORRIS, L.J.: I have reached the same conclusion. The important part of the agreement for present purposes is contained in cl. 3. It seems to me that the agreement was a severable one in the sense that, when the purchaser intimated a desire to acquire and to accept a particular plot, that plot became the subject of a separate contract. Clause 3 (which my Lord read) provides that the vendor G

"on payment of the balance of the purchase money will execute a proper conveyance to the purchaser of the said plot . . ."

The words "the said plot" show that it was contemplated that there would be or certainly might be individual conveyances, and indeed those conveyances might be from the vendor direct to an ultimate purchaser of a plot, i.e., a purchaser from the present purchaser. H

The purchaser undoubtedly gave a notice in reference to plots 3 and 4, the plots in issue in this litigation. The learned judge said:

"I find as facts that the purchaser gave notice; he paid his deposit; he went into possession; he remained in possession and the only thing which prevented him from completing the purchase was the conduct of the vendor when he ordered him off the land." I

The learned judge then proceeded to consider the legal position, starting by a reference to the general principles as stated in 31 HALSBURY'S LAWS OF ENGLAND (2nd Edn.) p. 401 et seq. I think it is abundantly clear that the purchaser did give notice; it is quite clear that he paid his deposit. He had a receipt for

A the deposit, and it was not until 1956 that it was learned that the cheque that was paid by his solicitor to the vendor had not been presented but had been kept by the vendor. It is true that at some intermediate stage somebody looking at the accounts in the solicitor's office, for the purpose presumably of audit or of preparing accounts, realised the position in regard to the cheque; but neither the purchaser nor Mr. Cohen, his solicitor, knew that the cheque had not been presented.

B I think it is further clear that the purchaser went into possession; and he went into possession as a result of the agreement that he made. His possession was only referable to the agreement, and it was possession to which he was entitled under the agreement after he had given notice to the vendor and had paid a deposit of ten per cent. As from that time it seems to me that he was the equitable owner of plots 3 and 4. Under the words of the contract, he was under obligation to pay the balance of the purchase price and entitled to a conveyance within a period of two years from May 28, 1946.

C Counsel for the vendor submits that the stipulation as to time which is found in cl. 3 was a stipulation that was of the essence of the contract, and that, as the balance of the price was not tendered before May, 1948, it was thereafter too late for the purchaser to become entitled to a conveyance, or, in other words, to clothe his equitable ownership with legal ownership. I do not find myself able to accept the submission that time was of the essence of this contract. The principle relating to this matter is stated in para. 1075 of *FRY ON SPECIFIC PERFORMANCE* (6th Edn.) at p. 502, as follows:

E “Time is originally of the essence of the contract, in the view of a court of equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.”

In para. 1077 it is stated:

F “In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so; it is not enough that a time is merely mentioned during which or before which something shall be done.”

We were referred to *Tilley v. Thomas* (7) ((1867), 3 Ch. App. 61). LORD CAIRNS, L.J., said (*ibid.*, at p. 67):

G “A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as TURNER, L.J., said in *Roberts v. Berry* (8) (1853), 3 De M. & G. 284), there is nothing in the ‘express stipulations between the parties, the nature of the property, or the surrounding circumstances’, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.”

H That passage was in substance repeated and reinforced by LORD ATKINSON in *Stickney v. Keeble* (3) ([1915] A.C. 386 at p. 401). There is clearly nothing in this contract that in terms makes time of the essence of the contract; there is not a clear stipulation to that effect. Of course, there may be contracts in cases where land is going to be used for the purpose of trade or commerce or where there is the element of fluctuation in value or where minerals may become worked out: in such contracts, as the authorities show, there may be indications that time is of the essence of the contract, even though it is not in so many words stated to be of the essence of the contract. I entirely agree with my Lords that there is nothing here to show that time was of the essence of the contract, with the result that, once the date of May, 1948, was passed it was too late for the purchaser to ask for specific performance. It is quite clear that time

was not later made of the essence of the contract by the vendor. He never did anything in the way of giving a notice so as to make time of the essence. He did not do that because of his whole attitude in the case. A

It remains to consider, therefore, whether the delay in this case was evidence of abandonment on the part of the purchaser or whether the delay was such as to make it inequitable for a court of equity to decree specific performance of the contract. I fully agree with the conclusions my Lords have reached, on an analysis of the evidence, that it cannot be said that there was an abandonment here by the purchaser of this contract. B

In regard to possession, the purchaser clearly went into possession with the full assent of the vendor and undoubtedly he was in possession in the spring of 1947, when the incident took place to which much prominence has been given. The vendor went on to the land, made rather a scene, told the purchaser that he was not a builder, that he had no intention of building and ordered him off the land. He could not, however, order the purchaser off the land; the land belonged to the purchaser; he was the equitable owner of it; and it seems to me that what the vendor then said, when analysed, did not really amount to more than abuse of the purchaser, who appears to have acted with considerable restraint. It was very disconcerting for the purchaser to be told that he had never paid a deposit on plots 3 and 4. The purchaser went to his solicitor and reported the conversation, but was, not unnaturally, reassured by his solicitor, who said: "I have paid and we have got the receipt." The solicitor had paid. There was no knowledge that the cheque had not then been presented. The receipt was in existence. C D

After that date, the purchaser renewed his applications for building licences. That appears clearly from the letter of July 31 written from the borough engineer to the purchaser's concern. The letter says: E

"In reply to your letter of July 26, I have to say that your applications have been submitted to the Welsh Board of Health on three separate occasions, namely July 8, 1946, Apr. 25, 1947, and May 14, 1947, and on each occasion the Welsh Board of Health has intimated that they are not prepared to advise that the ban on the issue of licences for the erection of dwellings of this area by private persons should be raised in the particular case." F

The date May 14 was presumably after the time when there was a scene on the land and certainly the date July 26 was after such time. Later history has been recited. It was necessary to bring the county court proceedings relating to the deeds of plots 1 and 2; and, after those county court proceedings were terminated, the purchaser built a garage on part of plots 3 and 4. Until then he had spent some £500 in the preparation of plots 3 and 4 and when dealing with plots 1 and 2 he had earlier spent money on a sewer which was far more than he would have spent if he had not contemplated building on plots additional to plots 1 and 2. In 1955, after compliance by the vendor with an order made by ROXBURGH, J., the purchaser extended the service road, spending over £100 in so doing; and at a later date he put up a garage which is described as the red garage on the plan. All this time the fence with concrete posts remained on the land. I cannot see any evidence that the purchaser abandoned plots 3 and 4, and, though the delay seems considerable, many reasons in part led up to it which are directly attributable to the attitude of the vendor. G H

If the delay was not such as to amount to abandonment, it does not seem to me that there are any reasons which make it inequitable for the court in this case to decree specific performance, notwithstanding the lapse of time. I therefore do not see any reason to disturb the findings of the learned judge. I

Appeal dismissed.

Solicitors: *Rhys Roberts & Co.*, agents for *S. Garelick & Co.*, Cardiff (for the vendor); *Myer Cohen & Co.*, Cardiff (for the purchaser).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A BACCUS S.R.L. v. SERVICIO NACIONAL DEL TRIGO.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), October 26, 30, 31, 1956.]

Constitutional Law—Foreign sovereign state—Immunity from suit—Department of foreign sovereign state being separate legal entity—Waiver of immunity—Steps taken in action without authority of foreign sovereign state.

B On Sept. 4, 1954, the plaintiffs, an Italian company, issued a writ against the defendants, a body which had corporate status by the laws of Spain, claiming damages for breach of a contract for the sale of rye to the plaintiffs. The Spanish Ambassador, a former Minister of Agriculture, deposed that the defendants were a department of the Spanish Ministry of Agriculture, notwithstanding their separate juristic personality, and that C., the head of the department, was a Spanish civil servant subordinate to the Minister of Agriculture. The defendants' solicitors, acting on instructions obtained from C. in Spain, entered an unconditional appearance to the writ on Oct. 20, 1954, issued a summons for security for costs on Jan. 19, 1956, and obtained a consent order for security for costs against the plaintiffs on Jan. 30, 1956.

C In authorising these steps in the action C. acted without knowledge that any right to sovereign immunity would thereby be prejudiced, and without the knowledge of the Minister or any representative of the State of Spain able to waive sovereign immunity from suit. On appeal against an order, made on the defendants' application, setting aside the writ and all subsequent proceedings in the action on the ground that the defendants were entitled to sovereign immunity from suit as a department of the State of Spain,

Held (SINGLETON, L.J., dissenting): the defendants were entitled to sovereign immunity from suit for the following reasons—

(i) they were, on the evidence, a department of the State of Spain, and were none the less so because they had been invested with corporate powers for the purpose of enabling them to carry out their statutory functions under the supervision of the Spanish Minister of Agriculture, and

(ii) the defendants' immunity had not been waived since the steps taken by the defendants in the action were taken on the authority of C., who acted in ignorance of any right to immunity being thereby prejudiced and without the authority from a proper representative of the Sovereign State of Spain that was necessary to enable the defendants to submit to the jurisdiction.

The Jassy ([1906] P. 270) and *Re Republic of Bolivia Exploration Syndicate, Ltd.* ([1914] 1 Ch. 139) approved.

Per PARKER, L.J.: the defendants are not a company limited by shares, in which the state holds the whole or a controlling interest, and they are not a body which for that or some other reason is wholly distinct from the state.

H If that were so, then to grant sovereign immunity to such a body would be a real extension of the principle (see p. 736, letter H, post).

Appeal dismissed.

[As to the immunity from suit of departments of a foreign sovereign state, see 7 HALSBURY'S LAWS (3rd Edn.) 267, para. 569, text and note (p).]

I As to waiver of this immunity, see 7 HALSBURY'S LAWS (3rd Edn.) 267, para. 571, text and notes (s) and (t); and for cases on the subject, see 11 DIGEST (Repl.) 634, 635, 590-595.]

Cases referred to:

(1) *Krajina v. Tass Agency*, [1949] 2 All E.R. 274; 2nd Digest Supp.

(2) *Ulen & Co. v. Bank Gospodarstwa Krajowego (National Economic Bank)*, (1940), 24 N.Y.S. 2d. 201.

(3) *The Porto Alexandre*, [1920] P. 30; 89 L.J.P. 97; 122 L.T. 661; Digest Supp.

- (4) *Compania Naviera Vascongado v. Cristina S.S., The Cristina*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp. A
- (5) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 11 Digest (Repl.) 628, 516.
- (6) *The Exchange*, (1812), 7 Cranch. 116.
- (7) *Coale v. Société Co-op. Suisse des Charbons, Basle*, (1921), D.C. 21 F. 2d. 180. B
- (8) *United States v. Deutsches Kalisyndikat Gesellschaft*, (1929), D.C. 31 F. 2d. 199.
- (9) *Oliver American Trading Co. v. Government of United States of Mexico*, (1924), 2 Cir. 5 F. 2d. 659, 661.
- (10) *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, (1930), 2 Cir. 43 F. 2d. 705. C
- (11) *Mason v. Intercolonial Ry. of Canada*, (1908), 197 Mass. 349.
- (12) *The Jassy*, [1906] P. 270; 75 L.J.P. 93; 95 L.T. 363; 41 Digest 815, 6761.
- (13) *Re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139; 83 L.J.Ch. 226; 109 L.T. 741; 11 Digest (Repl.) 629, 524.
- (14) *Compania Mercantil Argentina v. United States Shipping Board*, (1924), 93 L.J.K.B. 816; 131 L.T. 388; Digest Supp. D
- (15) *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England*, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.
- (16) *Wadsworth v. Spain (Queen), De Haber v. Portugal (Queen)*, (1851), 17 Q.B. 171; 8 State Tr. N.S. 53; 20 L.J.Q.B. 488; 117 E.R. 1246; sub nom. *R. v. London (Lord Mayor), Wordsworth v. Spain (Queen), De Haber v. Portugal (Queen)*, 18 L.T.O.S. 39; 11 Digest (Repl.) 622, 492. E

Appeal.

This was an appeal by the plaintiffs from an order of PEARCE, J., dated July 17, 1956, dismissing the plaintiff's appeal from an order of Master LAWRENCE, dated June 28, 1956, ordering that the writ and all subsequent proceedings in the action be set aside on the grounds that the defendants were a Department of the State of Spain and that the State of Spain through its Ambassador at the Court of St. James claimed immunity in respect of these proceedings. The facts appear in the judgment of SINGLETON, L.J.

T. G. Roche, Q.C., and *A. J. Bateson* for the plaintiffs.

M. R. E. Kerr for the defendants.

SINGLETON, L.J.: On Sept. 16, 1952, two contracts were made between the plaintiffs and the defendants. The plaintiffs are a company carrying on business in Italy. The defendants carry on business in Spain. The contracts were c.i.f. contracts in respect of the sale of twenty-six thousand tons of rye by the defendants to the plaintiffs. A term of each of the contracts is perhaps not very happily translated in the copy which we have. The translation is:

"The sale is made in accordance with the terms of the Genoa international contract for sale of cereals No. 5 being a copy of the international contract bearing the same number. For any divergence which may arise in the fulfilment or construction of the contract contrary to the aforesaid terms, both parties submit to the jurisdiction of the technical courts at London."

Until the court asked for sight of the original documents, no one seems to have noticed on the head of the form the words "Ministerio de Agricultura". At least, no one attached importance to the words. There was no reference to them in the affidavits or in argument.

A Only about eight thousand tons out of the twenty-six thousand tons embraced by the two contracts were shipped, and disputes arose between the parties. The plaintiffs claimed damages for breach of contract.

B On July 7, 1954, there was an application on behalf of the plaintiffs for leave to serve the writ outside the jurisdiction, under the provisions of R.S.C., Ord. 11, r. 1. In support of that application, Mr. Bresch, the solicitor for the plaintiffs, swore an affidavit in which he referred to the contracts and to the clause, which I have just read, which purports to give jurisdiction to "the technical courts at London". In his affidavit, Mr. Bresch says:

C "This* would appear however to be immaterial because by the second sentence of the said clause the parties expressly submitted to the jurisdiction of the 'technical courts at London'. This expression is again not quite accurate because there are no such 'technical courts at London', but it is fairly clear that the clause contains a submission to such court at London as actually exists and this can only be the High Court of Justice, more particularly the commercial judge thereof. In any case the said clause discloses the intention that the contracts should be governed by English law."

D Leave to serve out of the jurisdiction was given, and on Sept. 9, 1954, the writ was served. The writ claims damages for breach of contract. The indorsement continues:

E "The plaintiffs are a limited company formed under the laws of the Republic of Italy and registered there. They reside outside the Scheduled Territories as defined by the Exchange Control Act, 1947, at the address stated below."

This is an address in Rome.

F On Oct. 20, 1954, an appearance was entered for "Servicio Nacional del Trigo (a corporate body according to the laws of Spain) the defendants in this action". The appearance was entered by Messrs. Vernor Miles & Clark, who are solicitors for the defendants in these proceedings. More than a year later, on Nov. 19, 1955, the statement of claim was delivered. On Jan. 19, 1956, the defendants issued a summons for security for costs. There had been a good deal of correspondence, and the summons, which was returnable on Jan. 30, 1956, asked for security for costs on the ground that the registered office of the plaintiffs is situate outside the jurisdiction of this court.

G In a letter of Dec. 1, 1955, the defendants' solicitors pointed out that the costs would be heavy because of the heavy expenses of translation of the documents and the voluminous correspondence in Italian and Spanish. On Jan. 30, 1956, an order was made by consent for security for the defendants' costs in the sum of £150, and that amount was lodged accordingly. Thereafter, on Apr. 18, 1956, a summons was issued on behalf of the defendants praying

H "for an order that all further proceedings in this action be stayed and that the writ and statement of claim herein be set aside on the ground that the said defendants are a department of the State of Spain and that the State of Spain, through its Ambassador at the Court of St. James, claims sovereign immunity in respect of the institution and/or continuance of this action; and for such other order as this Honourable Court shall think fit."

I The master made an order as prayed and his order was upheld by PEARCE, J. The plaintiffs appeal against this order which set aside the writ and the statement of claim.

The question before this court may be said to be twofold. The first question which arises is: Are the defendants entitled to sovereign immunity? The second

* Mr. Bresch was referring to the fact that the words set out at p. 716, letter I, ante, did not refer to any easily identifiable contract, and were presumably too vague to incorporate any terms in the contract between the plaintiffs and the defendants.

question is: If so, have they waived the right to claim that they are entitled to sovereign immunity by submitting to the jurisdiction of this court? A

Before dealing with the principles involved, I refer to the affidavits which give all the information the court has as to the creation and position of the defendant company; I refer now to the affidavits fairly fully in order to avoid returning to them from time to time in the course of my judgment.

The first affidavit is that of Mr. Rafael Valls, a member of the Spanish Bar, B
Permanent Delegate of the General Council of the Bar of Spain, and also a member of the Middle Temple. His affidavit, sworn on behalf of the defendants, states:

"2. The 'Servicio Nacional del Trigo' (National Wheat Service) is a Department of the State of Spain being a Department of the Spanish Ministry of Agriculture. It was brought into being as a Department of the State by Decree Law on Aug. 23, 1937. Articles 1 and 2 of the said Decree C
Law read respectively thus:

"Article 1. The production and distribution of wheat and principal similar products are governed by the rules set out in this Decree Law and supplementary enactments, and the acquisition, distribution and prices thereof are regulated hereby.

"Article 2. In order to carry into effect the above objects, and for purposes of study and submission of proposals for their fulfilment, there is created hereby an organisation to be styled 'Servicio Nacional del Trigo' as a department of the Commission of Agriculture and Agricultural Labour, of the Technical Junta of the State or Department which eventually takes its place. [The Technical Junta of the State was the Provisional Spanish Nationalist Government*.] D

"3. By Law of Jan. 30, 1938, the Central Administration or Government of the State was organised and eleven Ministries were created of which the Ministry of Agriculture was one. E

"4. By Decree of Apr. 6, 1938, the Ministry of Agriculture was organised. Article 1 of the Decree reads thus: 'Article 1. The Ministry of Agriculture comprises an Undersecretariat and the National Services of: Agriculture F
(and three other heads.) Article 2 enacts that the Undersecretariat . . . shall exercise the functions which appertain to it and those which are conferred upon it by Delegation . . . The following shall be a direct department of the Undersecretariat . . . Servicio Nacional del Trigo.'

"5. By Order of the Minister of Agriculture dated May 30, 1938, the Undersecretariat itself was organised. Article 1 provides thus: 'Article 1. G
The Services which by Decree are dependent upon the Undersecretariat of the Department, are . . . organised in the ordinary sections as hereinafter set out . . . 4. Servicio Nacional del Trigo.'

"6. Finally the Servicio Nacional del Trigo was reorganised by order of the Ministry of Agriculture of Nov. 19, 1953. The following Articles confirm that the Servicio Nacional del Trigo is a Department of the State." H

Mr. Valls' translation of art. 2 of the Order of 1953 was later corrected in an affidavit of the ambassador. Mr. Valls' affidavit, as corrected, continues:

"Article 2. The Servicio Nacional del Trigo is an organisation which is a Department of the Ministry of Agriculture having legal personality for the carrying into effect of such acts and transactions as may be required for the development and execution of its objects. I

"The Servicio Nacional del Trigo, unless expressly decreed otherwise by this Ministry shall also be dependent upon [I think that means 'be a department† of'] the General Commissariat of Supply and Transport in respect of such activities of the Servicio as may fall within the orbit of this commissariat.

* Formed during the Spanish Civil War.

† See p. 723, letter E, post.

A "Article 4—The buying and selling of wheat appertains exclusively to the Servicio Nacional del Trigo in respect of the importation and exportations of that product decreed by the government. It shall also carry out these transactions in relation to other cereals when the superior authority so directs it.

B "I say therefore that the Servicio Nacional del Trigo is a Department of the State of Spain."

That is the first affidavit sworn by Mr. Valls. Having set out certain articles from the relevant decrees, he claims that the Servicio Nacional del Trigo is a Department of the State of Spain, and he also speaks of it as having legal personality for the carrying into effect of certain acts and transactions.

C The next affidavit is that of the Ambassador of the State of Spain at the Court of St. James. His Excellency deposes:

"1. The defendant herein named Servicio Nacional del Trigo is a Department of the State of Spain, being a Department of the Spanish Ministry of Agriculture.

D "2. I am informed and verily believe that the Servicio Nacional del Trigo entered an appearance to this action on Oct. 20, 1954, but that the statement of claim was not delivered until [Nov. 19, 1955], and I have seen the correspondence which passed between the plaintiffs' and the defendants' solicitors in this action as well as the summons for security for costs issued by the defendants' solicitors on Jan. 19, 1956, and the order by Master LAWRENCE made on Jan. 30, 1956 . . . I am informed by my government and verily believe that the said entry of appearance and all subsequent events concerning the said department in this action (as referred to in the documents exhibited) have taken place without the knowledge or authority of the Minister of Agriculture (who was then responsible for the said department and is still responsible for it at this date) and without the knowledge or authority of the Cabinet or of the Head of the Spanish State. The said Minister (apart from the Head of the State and the Cabinet) is the only person with authority to decide whether or not the Ministry of Agriculture or any department thereof shall waive its claim to sovereign immunity by submitting to the courts of any other state. In the premises I am informed and verily believe that if the steps taken by or on behalf of the said defendants constitute a prima facie submission to the jurisdiction of this Honourable Court or a waiver of the sovereign immunity from the process of this Honourable Court attaching to the said defendants, then such submission and waiver have taken place without any authority by or on behalf of the State of Spain.

H "3. It is contrary to the dignity sovereign immunity and public policy of the State of Spain to allow a foreign court to adjudicate upon the rights and obligations of the state or of any of its departments or to be compelled to submit to the jurisdiction of a foreign court or to permit a continuation of proceedings instituted against the state or any of its departments in a foreign court.

I "4. The State of Spain does not consent to these proceedings or to the continuation thereof and has never consented thereto. Such continuation would constitute a violation of the sovereign immunity of the State of Spain which I have no doubt this Honourable Court will not countenance."

I feel quite sure that the ambassador is right in saying that the courts of this country would not knowingly do anything which they understood to be a violation of the sovereign immunity of the State of Spain; but the position in this case is somewhat unusual. The State of Spain has set up for its own purposes something which is described in different ways, and in the affidavit of Mr. Valls it is described as a legal personality.

The affidavit of the ambassador continues:

"5. In these circumstances I am instructed by my government on behalf of the State of Spain respectfully to petition this Honourable Court to stay all further proceedings in this action forthwith and to set aside the writ and statement of claim herein, and I hereby respectfully do so."

The next affidavit is filed on behalf of the plaintiffs and sworn on May 1, 1956, by Mr. José Colas, Doctor of Law of the University of Madrid and a member of the Spanish Bar, who claims that he is conversant with the law and constitution of Spain. After stating his qualifications he deposes:

"2. I have been asked to advise on the status of the Servicio Nacional del Trigo, an autonomous body created in the year 1937 for the specific function of regulating the production and distribution of wheat and similar products."

"I say that the said autonomous body carries out a particular service under the supervision and control of the Spanish Ministry of Agriculture, but has a legal personality of its own entitled to enforce any right acquired in the exercise of its functions, and also is liable in respect of any liability incurred in the exercise of the same."

"The Servicio Nacional del Trigo is one of the public bodies described in Spanish Law as 'Organismos autonomos', which I say must be translated as 'Autonomous bodies'."

"The characteristics of these 'autonomous bodies' are:—"

"(a) Independent legal personality. I refer to the following provisions:—Decree Law of Aug. 23, 1937, Official Bulletin of Aug. 25, 1937 . . . 'The Servicio Nacional del Trigo has complete juridical personality for the carrying into effect of those functions which are designated under this Decree-Law . . ."

"The Servicio Nacional del Trigo shall also possess, in the carrying into effect of the purposes set out under this Decree-Law, all the privileges granted by the Law in force to such Farmers Syndicates which assume the protection of the Law of Jan. 28, 1928."

"Under the said Law of Jan. 28, 1928, Article 3: 'Farmers Syndicates have legal personality as provided in Article 38 of the Spanish Civil Code' (Aranzadi 1937, p. 872)."

"Article 38 of the Spanish Civil Code: 'Juridical persons may acquire and own any kind of property, and in the same way contract obligations and take civil and criminal action in conformity with the law and regulations governing their existence'."

"(b) Power to contract in its own name. The Servicio Nacional del Trigo as an independent body acquires rights and enters into contracts and financial transactions. I refer to Article 4 of the Decree of Nov. 19, 1953:—"

"'The buying and selling of wheat appertains exclusively to the Servicio Nacional del Trigo in respect of the importation and exportation of that product as approved by the government. It shall also carry out these transactions in relation to other cereals when it may be so ordered by the superior authority'."

"Article 8 of the same Decree:—'The Servicio Nacional del Trigo, having already obtained the necessary authorisation of the Council of Ministers, may arrange, subject to the legal conditions, for the credit operations which may be necessary for carrying out its commitments'."

Then, having set out facts in support of the statement he makes that the defendant had its own independent administration, the deponent concludes:

"3. For the above reasons I say that the Servicio Nacional del Trigo has full juridical personality and is competent to enter contracts and to commence and defend actions in the English courts."

A There may be some question as to what is the meaning of the expression "has full juridical personality". I would take it that it means the defendant is a legal entity—that it has most, if not all, the rights that a limited company would have in this country. It is said in the affidavits of those who depose on behalf of the defendants that at the same time it is a Department of the Ministry of Agriculture of the State of Spain.

B In reply to Mr. Colas's affidavit, there was a further affidavit sworn by Mr. Valls on May 11, 1950, in which he says:

C "The status of the Servicio Nacional del Trigo is clearly defined in Article 2* of the Order of the Ministry of Agriculture of Nov. 19, 1953, which I have recited in para. 6 of my affidavit sworn herein on Apr. 13, 1956. As an organisation dependent upon and forming part of the Ministry of Agriculture it is not autonomous or independent, although it has been granted juristic personality for carrying into effect its purposes subject to the decision and control of the Minister of Agriculture (as is explained in paras. 5 and 6 hereof) in respect of actions in which it may be a party. It is autonomous only in the sense that as a Department of the Ministry of Agriculture it has its own administrative organisation."

D The deponent sets out in para. 5 of his affidavit certain further details, which apply if there is a suit against the defendants in Spain and which I need not read, and continues:

E "6. The procedure referred to in para 5 hereof is the procedure which would be applicable if the Servicio Nacional del Trigo were involved in proceedings in the Spanish Municipal Courts, and such proceedings could only be instituted or defended by the Servicio Nacional del Trigo with the express authority of the Minister of Agriculture. In the case of foreign proceedings, which additionally involve delicate questions of policy as to whether or not a Department of the Spanish State should submit to the jurisdiction of the courts of another state, it is equally only the appropriate Minister (apart from the Cabinet or the Head of the State) who has authority to decide whether a Department of his Ministry should take part in such proceedings or not. I say this from my own knowledge of the constitutional practice in such matters as counsel to the Spanish government over the past twenty years. Accordingly, in the present case only the Minister of Agriculture (apart from the Cabinet or the Head of the State) had authority to decide whether or not the Servicio Nacional del Trigo should submit to the jurisdiction of this Honourable Court."

G Mr. Colas swore another affidavit on May 28, 1956, in para. 3 of which he deposes:

H "I say that the Servicio Nacional del Trigo is an autonomous body with juristic personality, special resources different and distinct from those of the state, and an independent budget, and is able to enter into contracts and institute and defend actions of any kind in the courts of Spain or abroad. The said autonomous body is subject to the control or supervision of the Ministry of Agriculture, and also to the control of the Commissariat of Supply and Transport in so far as the activities or the supervision of the said service are included within the functions of the service (art. 2, para. 2 of Order Nov. 19, 1953*). It is not therefore correct to say that the Servicio Nacional del Trigo is autonomous only in the sense that it has its own administrative organisation, because it is effectively exercising the functions of an autonomous body."

* Article 2 is set out at p. 718, letter I, ante.

He next refers to art. 156* of the order of Nov. 19, 1953.

The ambassador swore another affidavit on June 4, 1956, in which he says:

"I have been informed by Mr. Valls that at the hearing of the summons dated Apr. 18, 1956,† a number of questions arose in connection with my affidavit sworn on Apr. 17, 1956‡, and I now propose to deal with these.

"2. I stated in para. 2 of my affidavit that I was informed and verily believed that the Servicio Nacional del Trigo entered an appearance to the action on Oct. 20, 1954, and that the statement of claim was delivered on [Nov. 19, 1955], and that I had seen the correspondence exhibited to this affidavit marked 'M.P.R.S.H.1'. This information was supplied to me by [the defendants' solicitors].

"3. In para. 2 of the said affidavit I also referred to certain information given to me by my government. In accordance with international protocol this information was supplied to me by the Minister of Foreign Affairs upon information in this case supplied to the said Minister of Foreign Affairs by the Minister of Agriculture to whom I have referred in the said paragraph.

"4. I am also informed by [the defendants' solicitors] that this Honourable Court would like to be informed about the circumstances in which the Servicio Nacional del Trigo gave instructions for an appearance to be entered in this action without the knowledge of the Minister of Agriculture or the Council of Ministers or the Head of the State notwithstanding the fact that the Servicio Nacional del Trigo is a Department of the Ministry of Agriculture. The information supplied to me in the manner referred to in para. 3 hereof on this point is as follows:—

"The Servicio Nacional del Trigo had never previously been concerned in proceedings in England and on receipt of the writ ordering it to appear within eighteen days from Oct. 4, 1954, in default whereof judgment would be given against it, it was somewhat at a loss as to what to do. This procedure is entirely unfamiliar in Spain where there is no question of entering an appearance since a defendant is not required to do anything before delivering a defence once a statement of claim has been delivered to him. There being no time to comply with the normal formalities prescribed by art. 156* of the order of Nov. 19, 1953, and art. 15§ of the regulation of July 27, 1943 (translations whereof are set out in the affidavit of Mr. Valls sworn on May 11, 1956) which in practice apply to all litigation in which any Department of the State is involved, including foreign proceedings, the Head of the Department Servicio Nacional del Trigo (Delegado Nacional Senor Cavero) took it upon himself to safeguard the position by giving instructions to [the defendants' solicitors] to take the necessary steps to preserve the position. I am informed by [the defendants' solicitors] and verily believe that this was taken to mean that an appearance should be entered in the usual way. Neither the Minister of Agriculture nor the Council of Ministers nor the Head of the State nor I myself was aware of this and the Delegado Nacional had no authority to give these instructions for the reasons indicated in para. 2¶ of my previous affidavit.

"Thereafter the Servicio Nacional del Trigo did not hear further as to this matter which had apparently been allowed to remain dormant for a considerable time until [the defendants' solicitors] asked for instructions to

* Article 156 provides that the State Legal Service shall represent the defendant in any lawsuit to which it is a party.

† This was the defendants' summons to stay the proceedings.

‡ This affidavit is set out at p. 719, letter C, to p. 720, letter A, ante.

§ Article 15 contains further details as to procedure in the case of a suit against the defendant in Spain.

¶ Paragraph 2 is set out at p. 719, letter D, ante.

A enable a defence to be prepared over a year later. For the first time the matter then came to the notice of the Minister of Agriculture and after inquiries my government thereafter gave instructions to me to ask this Honourable Court to set these proceedings aside on the grounds referred to in my previous affidavit. I am informed in the manner referred to in para. 3 hereof and verily believe that the application for security for costs was not made with the knowledge or consent of the Minister of Agriculture or of the Council of Ministers or the Head of the State but was made upon instructions given by the said Delegado Nacional upon his being advised by [the defendants' solicitors] that such an application was invariably made in cases where the plaintiffs resided outside the jurisdiction of this Honourable Court.

B
C "5. I am informed by [the defendants' solicitors] and verily believe that at the hearing before Master LAWRENCE certain questions arose in regard to the status of the Servicio Nacional del Trigo particularly in connection with the translation of art. 1 of the order of May 30, 1938* and art. 2 of the order of Nov. 19, 1953†, relating to the constitution of the said Servicio Nacional del Trigo, in which it is referred to as being 'dependent upon' the Under-secretariat and Ministry of Agriculture. As a former Minister of Agriculture from the year 1941 to the year 1945 and a member of the Spanish Bar I am able to deal with these matters from my own knowledge. The words which have been translated as 'dependent upon' are in Spanish 'dependiente del' in art. 2 of the order of Nov. 19, 1953, and 'dependientes de' in art. 1 of the order of May 30, 1938. The Spanish word 'dependencia' means 'department' or 'branch' and the words 'dependiente del' or 'dependientes de' are synonymous with 'es una dependencia de' meaning 'is a department of'.

E
F "6. I am also able to confirm as a former Minister of Agriculture that the Delegado Nacional is a civil servant who is a direct subordinate of the Minister of Agriculture and that the Servicio Nacional del Trigo forms an integral part of the Ministry of Agriculture."

Those are the affidavits put before us in order to give us as accurate a picture as the deponents thought they could give of the position of the defendants.

G It is interesting to notice that the translation before us which shows the contract to be signed "On behalf of the sellers World Commerce Corporation S.A."‡, and indorsed "Seen and approved by Servicio Nacional del Trigo", has underneath these latter words "illegible signature". I asked on Friday last who it was who had signed the contract. I thought we ought to know. Unfortunately, no one can say. That has not been discovered. The person who signed, having seen and approved this contract, for the defendants, must have been of some importance. The amount involved in the contract is somewhere round £600,000, it may be more or less. The words at the end of the jurisdiction clause|| are "Tribunales, technicos de Londres", which is said in the uncontradicted early affidavit of Mr. Bresch§ to have been a submission to the technical courts at London. I do not know who would have power to agree to such a term on behalf of the defendants. It is not suggested that that term of itself would be a submission to the courts of this country sufficient to deprive the defendants of their claim to sovereign immunity, if they have one; but it would be interesting

* Article 1 of the order of May 30, 1938, is set out at p. 718, letter G, ante.

† Article 2 of the order of Nov. 19, 1953, is set out at p. 718, letter I, ante.

‡ The contract states that the seller is "World Commerce Corporation S.A. . . . as agent of Servicio Nacional del Trigo."

|| This clause is set out at p. 716, letter I, ante.

§ The relevant part of this affidavit is set out at p. 717, letter C, ante.

to know who it is who signs the contract on behalf of the defendants and what his position with the defendants is or was. A

Again, when the ambassador deposes, in para. 4 of his second affidavit, that the Servicio Nacional del Trigo was somewhat at a loss as to what to do, I should be interested to know who there was to consider the matter when a writ was served on them calling for an appearance to be entered in England.

Later, on the same page of the affidavit, His Excellency refers to "the Head of the Department Servicio Nacional del Trigo (Delegado Nacional Senor Cavero)". We were told by counsel that this gentleman was head of that branch of the civil service in Spain, and that it was he who took it on himself to safeguard the position by giving instructions to the solicitors. What happened after that we do not know. I imagine that, in a case such as this, there would be a request for the solicitors to be put in funds, though I do not know. If there was such a request, what was done? Who found the money? More than a year elapsed between the service of the writ and the taking of this point as to sovereign immunity, and considerable costs must have been incurred. Again, apart from the extracts from various decrees which are referred to in the affidavits, we know nothing as to what the defendants did. We are told that they are a department of the Ministry of Agriculture; they sold or purported to sell twenty-six thousand tons of rye to an Italian company for shipment to various Mediterranean ports. What else they did and what sort of authority, general or special, anyone had, we do not know. B C D

We ought to have had further information on a matter of this kind before being asked to come to a decision. On the affidavits of the ambassador, the defendants were a department of the Ministry of Agriculture of the State of Spain: but were not a department in the ordinary sense. They were a separate legal entity, a juridical or a juristic personality. What rights to trade had they? Who conducted their operations? What authority was he given? I mention those matters because I think it would be an advantage to the court to know them. For what purpose was the defendants' organisation formed? What are its powers? Who gave instructions for the entry of an appearance? Was that something in the nature of the usual course of business? It is said that they had not had a writ in England before. There must have been, I suppose, over the years, some proceedings for or against the defendants. Who acted on those occasions? The position seems to be unusual by reason of the fact that there is the interposition of the legal entity. Counsel for the defendants said it was not described as a separate legal entity; but it is described throughout the evidence in that way, whether you call it a juridical person or a juristic person or an entity. I should think that in an organisation of that kind the ordinary running of the business would be left to those in charge. We do not know what powers the head of the department or the person who made this contract had. If a man has power to make a contract in these terms, he must be a person of some responsibility; and if Senor Cavero, the head of the department, is properly described as one of the heads of the civil service, he must be regarded as a person to whom the ordinary business of the legal entity is entrusted; and one might well think that it would be his duty to do what was necessary to protect the interests of the body over which he presided. E F G H

Now, with those thoughts in mind, I come to the authorities. No case has been cited to us which covers this case completely, on either head. One of the last, and perhaps the nearest to this case, is *Krajina v. Tass Agency* (1) ([1949] 2 All E.R. 274). The headnote reads: I

"On June 2, 1948, the plaintiff issued a writ claiming damages for an alleged libel in an article in a weekly newspaper published by the first defendants* on May 7, 1948. After entering a conditional appearance the first defendants applied to the court to set aside the writ on the ground

* The Tass Agency were the first defendants.

A that they were a department of the Soviet State and as such immune from suit. In those proceedings it was shown that in June, 1938, particulars were filed under the Registration of Business Names Act, 1916, by the second defendant, an English subject. The business was described as a telegraphic news agency, and in the particulars appended to the application it was stated 'the business name and address of the foreign firm as agent for whom the business is carried on: Tass Agency, Moscow, U.S.S.R.' On July 2, 1948, a month after the issue of the writ, further particulars under the Act were filed which showed that the second defendant had ceased to carry on the agency in August, 1946, and gave the name of another person, B. In these second particulars it was not stated that the agency was being carried on as agent for a Russian firm. By cl. 15 of the Russian statute establishing the Tass Agency it was provided that the agency should enjoy all the rights of a juridical person, and the Soviet Ambassador in Great Britain certified that the agency constituted a department of the Soviet State 'exercising the rights of a legal entity'. The master ordered the writ against the first defendants to be set aside and his decision was affirmed by BIRKETT, J. On appeal,

D Held: (i) having regard to the certificate of the ambassador that the Tass Agency was a department of the Soviet State, the burden of disproving that the agency constituted such a department was on the plaintiff; the question must be decided by Russian law; and the contents of the particulars under the Registration of Business Names Act, 1916, did not establish that the agency was an independent corporation liable to suit in the English courts;

E "(ii) although the Soviet statute provided that the agency should enjoy all the rights of a juridical person and the Soviet Ambassador had certified that the agency had the rights of a legal entity, no evidence was before the court to show what were the essential requisites of a separate juridical existence under Soviet law;

F "(iii) even if the agency was a state department having a separate entity, it did not follow that the Soviet government, by procuring its incorporation, had deprived it of the right to assert the immunity normally attaching to a department of a foreign state under international law, and accordingly, the appeal must be dismissed."

G Now, it is to be observed that in the present case, though there is evidence that the defendant organisation was a department of the Ministry of Agriculture of the State of Spain, there is also evidence, which is accepted on both sides that it was a juristic person or a legal entity under the laws of Spain. In that respect the case is different from *Krajina v. Tass Agency* (1), and the point which here arises was left open in the *Tass* case (1) although COHEN, L.J., who gave the first judgment, expressed an opinion on which is founded part (iii) of the holding I have just read.

H COHEN, L.J., said, in the course of his judgment ([1949] 2 All E.R. at p. 279):

I "It seems to me that the evidence as to the nature of Tass must depend on its constitution and must be a question of Russian law, and that we must look at the Russian statutes and to any relevant evidence that is adduced as to Russian law (and for all practical purposes in this case, that is nil) to determine whether or not Tass is a separate legal entity . . . [ibid., at p. 280] Turning to the present case, it seems to me that, on the evidence, Tass falls, so to speak, in a lower category so far as liability is concerned than does the Minister of Health. Our attention has been called to nothing which can be said to amount to a declaration that Tass is a corporation sole."

After a reference to the American case of *Ulen & Co. v. Bank Gospodarstwa Krajowego* (*National Economic Bank*) (2) ((1940), 24 N.Y.S. 2d. 201), COHEN, L.J., continued ([1949] 2 All E.R. at p. 281):

" . . . the Polish National Economic Bank had been formed as a share

company with commercial objectives, and it was plain from the whole history of the matter that the Polish State had intended to make it, not a department of state, but a commercial body which could be used by a department of state . . . We were referred to certain other cases, which I do not think I need go through in detail. The inference I should draw from these American cases is (and to this extent I do not think I should quarrel with it) that a sovereign government may so incorporate a particular department of state as to make it plain that it is to be an ordinary trading, commercial, or business activity and not to be part of the state so that it can claim immunity, but I think it would be wrong to infer from these authorities, and I should not, without further argument, be prepared to accept the view, that it necessarily followed that, because a department of state was granted incorporation, it was deprived thereby of the right to assert its sovereign immunity in foreign courts. I need not say anything more on that aspect of the question in view of the conclusion which I have reached on the main point, that the evidence does not satisfy me in this case that Tass was a separate legal entity.

"I desire to say one word more on the last point in the argument of counsel for the plaintiff that the evidence was ambiguous and self-contradictory, and that, as the onus of establishing their right to immunity is on the defendants, their application must fail. I think that turns upon what I have already said, that, in my view, the defendants do establish that Tass was, and in essence is, a department of state to the necessary extent to shift the onus of proving that they were a separate legal entity to the plaintiff. That onus, in my opinion, he has failed to discharge. For these reasons I think that the decision of BIRKETT, J., was right and ought to be affirmed."

TUCKER, L.J., said ([1949] 2 All E.R. at p. 281):

"The sole question is whether a body called the Tass Agency of Moscow has established that it is part and parcel of a sovereign independent state, namely, the Union of Soviet Socialist Republics. It is common ground that the onus of establishing that lies on them. Furthermore, it is common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured . . . [ibid., at p. 283:] On that evidence we have the statement by the Russian ambassador that the Tass Agency constitutes a department of the Soviet State—that is the Union of Soviet Socialist Republics—exercising the rights of a legal entity. There is nothing in the affidavit of Mr. Andrienko* which assists the court in any way whatever. It merely consists of a summary of the effect of the statute creating the Tass Agency. In substance, in this case, apart from the entries in the Business Names Register, we have to deal with the matter on the ambassador's certificate, drawing our inferences to the best of our ability from looking at the translation of the statute.

"The principal point made by counsel for the plaintiff is that the statement that Tass Agency constitutes a department of the Soviet State is contradicted or nullified or made ambiguous by the further statement that it exercises the rights of a legal entity. The first question is: Has counsel for the plaintiff established (and the onus is on him in this respect, having regard to the statement of the ambassador) on the material on which he had to work that by Russian law the Tass Agency is a separate legal entity? [ibid., at p. 284:] Those are the considerations to which we should have to apply our minds if we were considering this matter under English law.

* An affidavit by Mr. Andrienko, legal adviser to the Russian trade delegation in London, had been filed on behalf of the Tass Agency.

A No doubt, there are other similar considerations which may fall to be considered under Soviet law for the purpose of deciding whether or not a separate status has been acquired. We do not know what the tests in Soviet law are with regard to this matter. All we know is that this organisation exercises, or has, the rights of a legal entity, or, putting it the other way, that it enjoys all the rights of a juridical person. Whether it may be
 B sued, we do not know, nor, as I have said, do we know what are the essential requisites of a separate juridical existence in Soviet law. Therefore, I think that these passages are not sufficient to establish the submission of counsel for the plaintiff that Tass had a separate legal existence.

"I agree with COHEN, L.J., that, if that submission had been established, the plaintiff would not necessarily have succeeded in this appeal, and I should
 C desire to reserve for future consideration the question whether or not the mere fact of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent state."

In the course of my judgment in the same case I said ([1949] 2 All E.R. at p. 285):

D "So far as I can see, there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it could be so extended."

I added some words used by SCRUTTON, L.J., a good many years before in *The Porto Alexandre* (3) ([1920] P. 30 at p. 36), cited in [1949] 2 All E.R. at p. 285:

E "Now this state and other states proceed in their jurisprudence on the assumption that sovereign states are equal and independent, and that as a matter of international courtesy no one sovereign independent state will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign state; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that
 F states do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent states and their sovereigns. I think it has been well settled first of all as to the sovereign that there are no limits to the immunity which he enjoys . . . *I quite appreciate the difficulty and doubt which HILL, J., felt in this case, because no one can shut his eyes, now that
 G the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult . . . These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other states contrary to the principles of
 H international courtesy which govern the relations between independent and sovereign states. While appreciating the difficulties which HILL, J., has felt, I think it is clear that we must, in this court, stand by the decision already given, and the appeal must be dismissed."

I I drew attention to the importance of those words of SCRUTTON, L.J., used many years ago, and I added that they were more important in the year 1949 than they were at the time when they were uttered because of the increasing changes of the character referred to by SCRUTTON, L.J. The same applies today.

After the decision of the *Tass* case (1) in the Court of Appeal, a committee or commission was set up to consider these matters. I asked yesterday if anyone could find out whether the commission had reported. We were told by counsel that there had not, as yet, been any final report published.

* The passage following the asterisk occurs in [1920] P. at p. 38.

I regard a claim to extend sovereign immunity to a separate legal entity as an extension of the doctrine, or as a claim to extend the doctrine. I do not think that there ought to be a one-sided extension. A

In *Compania Naviera Vascongado v. Cristina S.S., The Cristina* (4) ([1938] 1 All E.R. 719), there are passages in two speeches which show how I view the matter. LORD MACMILLAN said ([1938] 1 All E.R. at p. 725):

"It is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hallmark of general assent and reciprocity." B C

LORD MAUGHAM, having referred to the judgment in *The Parlement Belge* (5) ((1880), 5 P.D. 197), said ([1938] 1 All E.R. at p. 739):

"As I read the judgment, which largely followed the reasoning of a remarkable judgment of MARSHALL, C.J., in the Supreme Court of the United States of America in *The Exchange* (6) ((1812), 7 Cranch. 116), two things have to be established to found the immunity, (i) that to permit the action to proceed would be incompatible with the royal dignity of the foreign sovereign or government, and (ii) that the immunity was one universally recognised in foreign countries. I would myself prefer to say 'almost universally' recognised, for a few exceptions would not, I think, affect the matter; but I hold a strong opinion that the Court of Appeal was right in insisting as a condition of immunity on the adherence of other foreign governments to the same rule as to immunity." D E

I know of no case which goes as far as the claim here made by the defendants goes. I cannot find that it has been almost universally recognised that a government which sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, can succeed in a claim for sovereign immunity in respect of the activities of that company or entity. F

The claim goes further than has been generally recognised, and, in the interests of good government and in the interests of business relationship and business dealings throughout the world, I do not think that the claim ought to be allowed on the material before us. G

In a passage to which I have referred, His Excellency the Ambassador deposes in an affidavit*, that he feels sure the English courts would not countenance any trespass on the sovereign immunity of the State of Spain. The position is wholly different, however, if a separate entity is set up and is allowed to trade, with its own people conducting its business. There is no trespass on sovereign immunity in saying that the body so created should not have the immunity granted to a foreign sovereign or to a foreign state. H

I would refer to *Ulen & Co. v. Bank Gospodarstwa Krajowego (National Economic Bank)* (2) (24 N.Y.S. 2d. 201), a decision of the Court of Appeal of the State of New York. I read part of the headnote:

"The government of the United States and the governments of friendly foreign nations are immune from suit, the domestic sovereign on the historic principle that no court has power to command the king, and the foreign sovereign on implied consent of all sovereigns as a matter of comity. I

"Theoretically, immunity of domestic sovereign from suit is a matter of right, while immunity of foreign sovereign is a matter of favor; but, since the favor is reciprocal, one immunity is, in practice, as obligatory upon the judicial branch as the other.

* See p. 719, letter I, ante.

A "A corporation organised by either a domestic or a foreign government for commercial objects in which the government is interested does not share the sovereign's immunity from suit.

B "A bank created by Republic of Poland as a state institution, but as a 'distinct legal person possessing the right of autonomous legal representation', whose stock was owned by the state, municipalities, and state and municipal enterprises, was not immune from suit on interest coupons attached to bonds issued by it and guaranteed by the Polish government."

C I recognise that on the facts that case is by no means the same as that which is before this court, but I feel that it is right that I should refer to it, and I shall read a passage or two from the judgment of CLOSE, J., who gave the judgment of the five members of the court who were sitting. After referring to certain decisions which are not wholly in point for our purpose, CLOSE, J., said (24 N.Y.S. 2d. at p. 206):

D "There appears to be no decision in either the United States Supreme Court or in the New York Court of Appeals dealing with corporations formed by foreign governments. There are several such cases, however, in the lower Federal Courts in which the same conclusion has been reached as in the case of domestic governmental corporations . . . In *Coale v. Société Co-op. Suisse des Charbons, Basle* (7) ((1921), D.C. 21 F.2d. 180), the defendant was a corporation formed by the Swiss government for the importation of coal. The charter and by-laws were subject to governmental approval. The government appointed seven of the seventeen directors, and was entitled to all the net profit above six per cent. The plaintiff sued on a contract of sale which had been signed in the defendant's behalf by the Swiss Minister. The defendant claimed immunity. The District Court held that the defendant was not immune from suit and was liable on the contract. A similar conclusion was reached in *United States v. Deutsches Kalisyndikat Gesellschaft* (8) ((1929), D.C. 31 F.2d. 199), in the case of a corporation formed and controlled by the French government for the purpose of exploiting potash mines in Alsace. It was held (31 F.2d. at p. 202) that a 'suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government'.

G "We approve the principle of these latter cases and conclude that a corporation organised by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign. There is a dispute in the present case as to whether the defendant is a corporation, but it is of no actual importance whether it be called by that name or not. It has all the characteristics of a corporation. For present purposes the most significant fact is that the bank is described in its own charter as 'a distinct legal person'. Since it is a person quite distinct from the Polish government, the reasoning employed in the foregoing authorities with respect to corporations applies with equal force to the defendant. This characteristic also distinguishes the present case from certain authorities cited by the defendant. Thus in *Oliver American Trading Co. v. Government of United States of Mexico* (9) ((1924), 2 Cir. 5 F.2d. 659, 661) where the plaintiff sued on a contract made with the National Railways of Mexico, it appeared that there was no corporation or legal person existent under that name. 'National Railways of Mexico' was merely a name for a system of railroads directly owned and controlled by the Mexican government. Accordingly it was held that the foreign government was entitled to prevail in its claim to sovereign immunity. The same feature was present in *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen* (10) ((1930), 2 Cir. 43 F.2d. 705), which involved the Swedish State Railways; and in *Mason v. Intercolonial Ry. of Canada* (11) ((1908), 197 Mass. 349) . . .

where the railroad was owned directly by the King of England. Having concluded that the defendant is not immune from suit, we do not reach the question of whether immunity was or could be waived by the provisions of the trust agreements."

That decision seems to me to make it quite clear that there is no recognised acceptance of the claim made by the defendants in this case that the sovereign immunity should extend to a corporation or to a legal entity set up by a sovereign state, even though it be a department of state. So to hold would be to extend the principle, for which I see no sound reason.

On the second point, it is claimed by counsel for the plaintiffs that even if it could be said that the defendants were entitled to have succeeded on the claim of sovereign immunity, still they had submitted to the jurisdiction of this court and so waived that right.

On looking at the facts of this case, I should have thought that they had done so. I have given the dates* and I need not give them again. The solicitors now appearing for the defendants were instructed to enter an appearance; and they entered an unconditional appearance; they were instructed to ask for an order for security for costs, and did so long before anyone thought that a defence of sovereign immunity might be set up.

The ambassador states his view of the defendants and of the powers that certain people within the ministry, or under the ministry, have. On the facts of this case the position is wholly different to that which has been considered in any other case on this branch of the law. Prima facie only certain people have authority to waive a right which is the right of the government; but if the government or the state goes outside the ordinary practice and founds a separate company or juridical or juristic person to do its business, one would expect it to leave the carrying on of the business to the body or entity which it has set up. The business would include the making of contracts and perhaps the breaking of contracts, if they had to be broken. (I do not know which side is right in this case. I have wondered why they do not have it decided in some way or another.) There is no affidavit from the gentleman who made the contract showing how he came to put the clause into the contract. There is no affidavit from the head of the department, the senior civil servant who gave instructions to the solicitors. It might well be that he was carrying out his normal duty. We do not know; it is difficult to think that whenever a writ was served on the defendants in a case like this, some one would run with it to the Minister and say: "Please, what shall I do now?" There must be something left to those running the business, and, though we have had cited to us authorities to show that in an ordinary case only a person authorised to waive diplomatic privilege can do so, I am not satisfied on the evidence in this case that the gentleman who gave instructions to the solicitors had no such power. I should have thought it was in the ordinary course of his duty to instruct solicitors to put in a defence, or to enter an appearance, or to ask for security for costs, and if that was a submission to the jurisdiction, I do not see why it should not be held that he was acting in the ordinary course in business left to him, or why it should not be held that he, on behalf of the defendants, had waived their right, or the right of the state, to claim sovereign immunity. Notwithstanding *The Jassy* (12) ([1906] P. 270), and *Re Republic of Bolivia Exploration Syndicate, Ltd.* (13) ([1914] 1 Ch. 139), I still feel that, in view of what happened in this case, the defendants ought not to be allowed to take the point, even if this was a case to which sovereign immunity would apply; for they themselves, in my judgment, had submitted to the jurisdiction. The State of Spain created the defendants as a legal entity and enabled them to trade with citizens of, or with corporate bodies in, other countries. In such a case the defendants ought to be bound by the ordinary practice. We do not know what view the head of the department took of his

* The relevant dates appear at p. 717, letters E to G, ante.

A powers. A state may create many such trading entities: if they act in the ordinary course it ought not to be open to the state to say that they were not authorised so to do. Otherwise trading and business relationships would become impossible.

Counsel for the defendants directed our attention to some words in the judgment of ASTBURY, J., in *Re Republic of Bolivia Exploration Syndicate, Ltd.* (13), viz., the passage which ends with these words ([1914] 1 Ch. at p. 156):

“Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his sovereign or legation, and it is clear that, whatever knowledge R. E. Lembcke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.”

In this case the point is taken at the instance of the Spanish government; it is taken a year or more after the defendants appear at first sight to have submitted to the jurisdiction of this court. It would be an amazing thing if it were right to say that a company or entity in the eyes of the law of Spain could, as counsel for the defendants claims, have appeared before the court of first instance, and, if they lost and if their appeal was dismissed in this court, go to the House of Lords and there successfully claim sovereign immunity.

In my judgment the appeal should be allowed, but my brethren think otherwise and the result will be to the contrary.

JENKINS, L.J.: I regret that I find myself unable to agree with the conclusions at which SINGLETON, L.J., has arrived in this difficult case. The questions in the case are, first, whether the defendants were entitled to the sovereign right of immunity from suit as a Department of the Sovereign State of Spain; and, secondly, if the defendants could otherwise claim such a right, whether they have, on the facts of this case, waived it by submitting to the jurisdiction of the court. These are the two questions. The first of them can be sub-divided into two further questions: first, are the defendants a Department of the Sovereign State of Spain, or would they be such apart from the effect of their status as a corporate body; secondly, are they disqualified from ranking as a Department of the Sovereign State of Spain by reason of the fact that they are a corporate body possessing what is called in the evidence a juristic personality, or, in other words, because they are a separate legal entity?

As to the first part of the first question, it is not disputed that, apart from the effect of their incorporation, the defendants would be a Department of the Sovereign State of Spain. The evidence which SINGLETON, L.J., has read in full shows, to my mind, quite clearly that the defendants were formed as a department of state. It is said, however, that the defendants were invested by the laws of Spain with a juristic personality or corporate status of their own, and that it is impossible for any separate legal entity, such as the defendants are, to be a department of a sovereign state. It is said that once the conclusion is reached that the defendants are a separate legal entity, corporation or juristic personality, then they cannot be a department of the state, but must by definition be an independent entity. That is the plaintiffs' argument on this part of the case, and they contend as a general proposition that immunity cannot be claimed on behalf of a separate legal entity engaged in trading activities, even though the government of the sovereign state concerned is interested in those activities.

The question is a difficult one, and there has as yet been no authority providing an answer to it. It arose in *Krajina v. Tass Agency* (1) ([1949] 2 All E.R. 274), to which SINGLETON, L.J., has referred, but, for the reasons which have appeared in his judgment, it was not necessary to decide the point, and it was reserved for future consideration. In so reserving it, COHEN, L.J., said that he would not without further argument be prepared to accept the view that it necessarily followed that because a department of state was granted incorporation it was

deprived thereby of the right to assert its sovereign immunity in foreign courts. A

On my view of the evidence, it is reasonably plain that while the defendants undoubtedly were constituted a juristic personality with powers resembling those of a natural person, they were only accorded that status for the purposes for which they were formed; and the purposes for which they were formed, to put the matter very shortly, were the importing and exporting of grain for the Spanish government in accordance with the directions of the Spanish Ministry of Agriculture and the policy from time to time laid down by the Spanish government. Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of state. Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong. In these days the government of a sovereign state is not, as a rule, reposed in one personal sovereign: it is necessarily carried out through a complicated organisation which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery. If it seemed good to a foreign state—say Ruritania—possessed of a navy, to put the affairs of the navy in the hands of a navy board—say, the Ruritanian Navy Board—and to enact that the members for the time being of this board should constitute a juridical person or corporation for the purposes of doing all things necessary for the maintenance and efficiency of the Ruritanian Navy, it seems to me impossible to suppose that an action brought against the Ruritanian Navy Board could be held not to infringe the sovereign immunity of Ruritania because, simply as a matter of convenience and administrative machinery, the duties appertaining to the affairs of the Ruritanian Navy had been put in the hands of an incorporated board. B C D E

I appreciate that the immunity here claimed is an immunity against direct impleading; so that there is at first sight force in the argument that the immunity has no application whatever because the party being sued is not the sovereign state, but is a separate legal entity or corporation which cannot in its own person claim any immunity at all. The answer to that, I think, is this, that once it is found on the evidence that the party sued is in truth a department of a sovereign state, albeit itself a corporate body, then the suit becomes, or it becomes apparent that the suit in truth is, one between the plaintiff and the foreign sovereign state, or the part of the foreign sovereign state represented by the departmental body concerned. F G

Each case must depend on its own facts, and it is not to be taken as following from what I have so far said that every corporation in which a foreign sovereign state may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign sovereign state, becomes itself a department of state. H

I think the explanation of the American case of *Ulen & Co. v. Bank Gospodarskwa Krajowego* (*National Economic Bank*) (2) ((1940), 24 N.Y.S. 2d. 201), is that the cases there considered were for the most part cases, as certainly the case itself was, in which the body in question had been set up for ordinary trading purposes and without the intention of constituting it a department of state. That was the view taken by COHEN, L.J., when he dealt in the *Tass* case (1) with the various American authorities cited to the court, and, in particular, with *Ulen & Co. v. Bank Gospodarskwa Krajowego* (*National Economic Bank*) (2). I

It is not to be assumed from what I have said that a corporate body can never be a department of state in any case in which its activities can be described as trading activities; and in that connection I would refer to this passage from the judgment of BANKES, L.J., in *Compania Mercantil Argentina v. United*

A *States Shipping Board* (14) ((1924), 131 L.T. 388), quoted in the *Tass* case (1) ([1949] 2 All E.R. at p. 276). BANKES, L.J., said (131 L.T. at p. 389):

B “The question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken in personam, and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign state.”

C Whatever the position might be in the case of an ordinary trading company or an ordinary bank in which a foreign sovereign state for reasons seeming good to it acquired shares, it seems to me impossible to hold that a body is disqualified from ranking as a department of state where it is an incorporated body whose operations consist of purchasing and selling or importing and exporting staple commodities in the interests of the public for whom the foreign sovereign state is responsible. In my view it cannot be said that the operations of the defendants in this case are comparable to ordinary private trading operations. They are operations for which responsibility has been assumed by the state, and they are being carried out by the defendants under the supervision of the state in the shape of the Spanish Ministry of Agriculture, and I think such purposes as those can properly be classed as public purposes in this connection.

D Accordingly, for the reasons I have endeavoured to state, my view on the first question is that the defendants are a Department of the Sovereign State of Spain, and none the less so because they have been invested with corporate powers for the purpose of enabling them to carry out their statutory functions under the supervision of the appropriate ministry. Accordingly, in the view I take, the claim of immunity is made good subject to the question of waiver.

E My Lord has formed the opinion that the conclusion which I have reached involves an extension of the doctrine of sovereign immunity. For my part, I cannot agree to that. The doctrine of immunity comes to no more than this, that the courts of this country will not allow a foreign sovereign to be impleaded directly, or a foreign sovereign's property to be put in jeopardy by a suit in rem. Whether a particular proceeding amounts to an impleading of a foreign sovereign within the meaning of that doctrine seems to me to be a question of fact, and probably also a question of local law, in every case. Once the general principle of immunity is recognised, the fact that a particular transaction is held to fall within the rule does not make a decision to that effect an extension of the doctrine merely because occasion for its application to precisely comparable facts has never before arisen.

F My Lord cited some passages from *The Cristina* (4) ([1938] 1 All E.R. 719). I would like to add this citation from *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* (15) ([1952] 1 All E.R. 572 at p. 586.) LORD PORTER there said:

H “One other point of substance has been mentioned. It was suggested that immunity would only be granted where the country claiming it granted reciprocal immunity to other nations*. I can find no authority for this proposition and, in any case, it was not taken either before JENKINS, J., or in the Court of Appeal, and no material fact has, therefore, been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument is not established. The question is: What is the law of nations by which civilised nations in general are bound, not how two individual nations may treat one another.”

I * Cf., now, the Diplomatic Immunities Restriction Act, 1955, s. 1, which provides for the withdrawal of personal diplomatic immunities from members of the diplomatic missions of foreign sovereign powers where reciprocal immunities are not accorded by those powers.

LORD PORTER went on to refer to LORD MAUGHAM's observations in *The Cristina* (4), which suggest a somewhat narrower view, but, at all events, this passage from LORD PORTER's speech does indicate that in his view the question was what was the law of nations by which civilised nations in general are bound. A

If the point is material, I think one must assume, although there is no positive evidence of it, that the particular civilised Sovereign State of Spain considers itself bound by the general principle of sovereign immunity. That suffices for the present purpose, and it is unnecessary to go further and inquire what view the courts of Spain would take of a claim to sovereign immunity, raised by some foreign sovereign in those courts and based on facts comparable to the particular facts of this case. B

As to the question of waiver, I confess that, at first sight and considering the matter apart from authority, it seemed to me that a formidable case had been made out, having regard to the fact that on instructions by Senor Cavero, the head of the defendants, an unconditional appearance was entered to the writ, and, later on, again on his instructions, an application was made for security for costs and an order for security was obtained. C

Counsel for the defendants referred us, however, to two cases which (if we accept them as rightly decided, as I think we should) seem to me to conclude the matter the other way. The first of those cases is *The Jassy* (12) ([1906] P. 270). D
I can give the effect of that case sufficiently by the headnote, which is:

"Process by way of arrest in a damage action in rem does not lie against a vessel the property of a foreign sovereign state and destined to its public use, and, therefore, on the application of the foreign government, and the production of a certificate from the Foreign Office as to the public character of the vessel in question, all proceedings will be stayed and no waiver of the privilege assumed, although during the temporary presence of the vessel in this country, and under a misapprehension, in order to procure her release, agents of the government to which the vessel belonged have given an undertaking to put in bail, and have entered an absolute appearance." E

SIR GORELL BARNES, P., concluded his judgment by saying ([1906] P. at p. 273): F

"The result is that the principle laid down in *The Parlement Belge* (5) ((1880), 5 P.D. 197) applies, in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool without the knowledge of the Roumanian government and under a misapprehension as to the privilege enjoyed by a sovereign state in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs." G

The other authority cited by counsel for the defendants on this point was a decision of ASTBURY, J., in *Re Republic of Bolivia Exploration Syndicate, Ltd.* (13) ([1914] 1 Ch. 139). That was a case under the Diplomatic Privileges Act, 1708, but, as counsel for the defendants said in argument, referring in particular to a passage in *The Parlement Belge* (5) (5 P.D. at p. 213), the Diplomatic Privileges Act, 1708, can be taken as declaratory of the existing law, and the degree of protection afforded to diplomatic personnel under the Act cannot be regarded as superior to the degree of protection afforded to a foreign sovereign. If anything, the protection allowed to the foreign sovereign should be more generous than that accorded to persons of inferior rank. H

The headnote of *Re Republic of Bolivia Exploration Syndicate, Ltd.* (13) I
reads:

"This diplomatic privilege can be waived, if at all, only with full knowledge of the party's rights, and (semble) with the sanction of his Sovereign or (if he is of inferior rank to a minister plenipotentiary) his official superior."

Although in that case the person concerned had done acts which undoubtedly would otherwise have amounted to submission to the jurisdiction of the court, it was held that he was not bound, for he had done so in ignorance of his rights.

A Counsel for the party claiming privilege said in argument ([1914] 1 Ch. at p. 142):

“Even if it were conceivable that a diplomatic agent can waive his privilege, which is really the privilege of his Sovereign, he can only do so intentionally, with full knowledge of his rights, and with the sanction of his sovereign or legation.”

B Applying those authorities to the present case and without reading the evidence again, it seems to me that the evidence here, and in particular the evidence of the ambassador, makes it reasonably plain that Senor Cavero knew nothing about sovereign immunity, or, at all events, had no idea that by entering an appearance the defendants would be giving up any advantage, or, in particular, any right to claim immunity, which they might otherwise have. Furthermore, Senor C
Cavero's superiors knew nothing about the matter at all until after the acts
D relied on as submissions to the jurisdiction had taken place. It seems to me, therefore, that what was done here was done by Senor Cavero without the knowledge of any of his superiors and in ignorance of his rights and without actual authority, inasmuch as I think the evidence shows that the authority of the Minister of Agriculture would in fact have been necessary to enable Senor Cavero to submit to the jurisdiction.

For the reasons that I have endeavoured to state, it seems to me that the plaintiffs fail on both branches of the case and accordingly that this appeal should be dismissed.

PARKER, L.J.: I too have come to the conclusion that this appeal should be dismissed, and I can give my reasons briefly.

E The first question which arises is whether the defendants, the Servicio Nacional del Trigo, are a Department of the State of Spain, namely, a sub-department of the Ministry of Agriculture. If they are, then I think it is clear beyond all doubt that they are entitled to sovereign immunity, and this whatever their activities may be. Whether or not they are such a department is clearly a matter of Spanish law, and His Excellency the Spanish Ambassador has sworn that they are.
F The passages are very short. In para. 1 of his first affidavit he says:

“The defendant herein namely Servicio Nacional del Trigo is a Department of the State of Spain, being a Department of the Spanish Ministry of Agriculture.”

G And in his last affidavit, after referring to the orders organising the defendant organisation and saying that the Spanish word used means a department or branch, he goes on:

H “I am also able to confirm as a former Minister of Agriculture that the Delegado Nacional is a civil servant who is a direct subordinate of the Minister of Agriculture and that the Servicio Nacional del Trigo forms an integral part of the Ministry of Agriculture.”

I Though that evidence is not conclusive, it is entitled to considerable weight; and, as TUCKER, L.J., said of immunity from suit in *Krajina v. Tass Agency* (1) ([1949] 2 All E.R. 274 at p. 281):

“It is common ground that the onus of establishing that lies on them [the defendants]. Furthermore, it is common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured.”

That is particularly true in this case: the ambassador here is not only a member of the Spanish Bar, but was also himself Minister of Agriculture from 1941 to 1945.

How then do the plaintiffs seek to displace that evidence? Mr. Colas, a Spanish lawyer, has sworn two affidavits. In neither of those does he assert that the defendants are not a department of the State of Spain. He refers to a

number of orders setting up the defendants and describing their functions. Mr. Valls, the legal adviser to the Spanish Embassy, has dealt with Mr. Colas's affidavits. For my part, on a reading of all the affidavits, it seems to me that the evidence all points to the defendants' being a department of the Ministry of Agriculture. However, Mr. Colas says, and Mr. Valls agrees with him, that the defendants are a legal personality; they are entitled to enter into contracts in their own name, and they are entitled to sue and be sued in their own name. The sole question then is, are those admitted facts inconsistent with the defendants' being, as *prima facie* they are, a department of the State of Spain? Unless those facts make it inconsistent with that, the evidence of the ambassador has not been displaced. I for my part see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of state. It would, I think, be surprising if it were so looked on in this country. Many ministers are constituted corporations sole. Some, as in the case of the Ministry of Transport, for all purposes*; some, as in the case of the Minister of Health, for limited purposes†; and I do not think anybody could say that under English law the Minister of Transport or the Minister of Health was not the Crown. Indeed, if he were not, neither of those ministers could ever claim Crown privilege.

It seems to me that TUCKER, L.J., had this in mind when, in the *Tass* case (1) which, as SINGLETON and JENKINS, L.J.J., have said, left this point open, he said ([1949] 2 All E.R. at p. 284):

"I agree with COHEN, L.J., that, if that submission had been established, the plaintiff would not necessarily have succeeded in this appeal, and I should desire to reserve for future consideration the question whether or not the mere fact of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent state. There again, it must depend on the foreign law. It may be that under some foreign systems of law such a separate existence might be considered inconsistent, but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of state for which immunity can be claimed."

Now, that being the position under English law, I think that this court is entitled to assume, in the absence of evidence to the contrary, that the Spanish law is the same. There is no evidence that under Spanish law the fact that the defendants are a legal personality is inconsistent with their being a department of the state.

I do not think that our decision involves an extension of the recognition of sovereign immunity, because on this basis the defendants are a department of the state. They are not a company limited by shares, in which the state holds the whole or a controlling interest, and they are not a body which for that or some other reason is wholly distinct from the state. If that were so, as it seems to me that was so in the American case to which SINGLETON, L.J., has referred‡, then to grant sovereign immunity to such a body would be a real extension of the principle.

That being so, the only remaining question is that of waiver. Like JENKINS, L.J., I confess that at first impression it seemed to me remarkable if the true view were that the State of Spain had not submitted to the jurisdiction. Not only was

* See the Ministry of Transport Act, 1919, s. 26 (3), as amended by the Ministers of the Crown (Transfer of Functions) Act, 1946, s. 6, Sch. 2.

† The Minister of Health is a corporation sole for the purpose of acquiring and holding land; see the Ministry of Health Act, 1919, s. 7 (3).

‡ SINGLETON, L.J.'s reference to *Ulen & Co. v. Bank Gospodarstwa Krajowego* (*National Economic Bank*) (2) (24 N.Y.S. 2d. 201) is on p. 728, letter H, to p. 730, letter A, ante.

A there an unconditional appearance entered on the instructions of the head of the defendants, Senor Cavero, himself a senior civil servant; but also, on his instructions, security for costs was asked for and obtained; and it was not until the writ had been served for some eighteen months that any steps were taken to stay the proceedings.

B I am satisfied, however, as the result of the argument of counsel for the defendants and the cases to which he has referred, that there can be no submission in such a case as this unless it is made by a person with knowledge of the right to be waived, with knowledge of the effect of our law of procedure, and with the authority of the foreign sovereign. As counsel for the defendants pointed out, proceedings against a foreign sovereign are wholly void.

C In *The Parlement Belge* (5) ((1880), 5 P.D. 197), BRETT, L.J., in giving the judgment of the court, referred at p. 213 to the judgment of LORD CAMPBELL in *De Haber v. Queen of Portugal* (16) ((1851), 17 Q.B. 171), to the fact that LORD CAMPBELL relied on the Diplomatic Privileges Act, 1708, with regard to the ambassadors and to LORD CAMPBELL's words:

D "Can we doubt that in the opinion of that great judge (LORD HOLT) the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him."

After this reference BRETT, L.J., says (5 P.D. at p. 213) that LORD CAMPBELL

E "... cites the statute thus: 'It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, or his goods distrained or seized* shall be utterly null and void' . . . The decision [that is, LORD CAMPBELL's decision] therefore is that the immunity of the sovereign is at least as great as the immunity of an ambassador . . ."

F In those circumstances it does seem to me that it requires some solemn act of the foreign sovereign to bring to life something which is otherwise completely dead; and, without referring to the cases, I think *The Jassy* (12) ([1906] P. 270) and ASTBURY, J.'s decision in *Re Republic of Bolivia Exploration Syndicate, Ltd.* (13) ([1914] 1 Ch. 139) support that view.

G So far as this case is concerned, it is true that we have not had the benefit of an affidavit from Senor Cavero, but, for my part, I cannot impute to him knowledge of the effect of entering an unconditional appearance; and, quite apart from that, it seems to me that the evidence is clear that though he is the person, the intermediary, to pass on instructions to English solicitors to deal with a case in England, he is bound to consult the appropriate Minister in regard to whether sovereign immunity should be waived or not. It is true that this does open up the rather alarming prospect that a foreign sovereign may allow proceedings to continue for years in this country before taking the point; but for my part I think that that is really a theoretical difficulty. I do not think that any person, even though he be a foreign sovereign, would be likely to be believed if in such an extreme case he were to come forward and assert that he had had no knowledge whatever of the proceedings. So far, however, as this case is concerned, I am satisfied that the point has been properly taken and that there has been no waiver.

I For these reasons I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: Bell, Brodrick & Gray (for the plaintiffs); Vernor Miles & Clark (for the defendants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* The italics are as printed in LORD CAMPBELL's citation.

Re ATKINSON'S WILL TRUSTS.
PRESCOTT v. CHILD AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), November 1, 2, 1956.]

Will—Rule in Lassence v. Tierney—Accruer clause—Prior absolute gift with trusts engrafted thereon by subsequent clause—Whether accruer clause applied to an accruing share only the engrafted trusts.

By his will, dated Jan. 13, 1898, a testator who died on Jan. 31, 1904, gave his residuary estate on trust for his great nieces, C. and E., in equal shares. He then declared that the share thereinbefore expressed to be given to C. should not vest absolutely in her but should be retained by the trustees on trust to pay the income to C. during her life and after her death on trust for her issue. Similar trusts were engrafted, mutatis mutandis, on the half share of residue expressed to be given to E. The testator's will then contained the following accruer clause: "in the event of the failure or determination of the trusts hereinbefore declared . . . concerning either of the shares in the said residuary moneys such share and the income thereof . . . shall go and accrue by way of addition to the other share in the said residuary moneys and such accruing share shall be held upon the trusts and subject to the powers and provisions herein declared . . . concerning the original share to which the same shall be added or as near thereto as circumstances will admit." E. died without issue in 1927, and after her death the income of both shares was paid to C. until C. died in 1955, also without issue. On C.'s death the absolute gift to her of her share took effect, under the rule in *Lassence v. Tierney* ((1849), 1 Mac. & G. 551). On an application to the court by a trustee of the will to determine the destination of the share which was originally given to E.,

Held: on the true construction of the accruer clause the "trusts, powers and provisions herein declared" referred to the trusts, etc., engrafted on the half shares of residue expressed previously in the will to be given absolutely to C. and E., and, therefore, after C.'s death E.'s half share belonged to her estate by virtue of the original absolute trust for her.

Dictum of LORD TOMLIN in *A.-G. v. Lloyds Bank, Ltd.* ([1935] A.C. at p. 395) applied.

[As to the rule in *Lassence v. Tierney*, see 34 HALSBURY'S LAWS (2nd Edn.) 214, para. 270; and for cases on the subject, see 43 DIGEST 643-645, 790-799, and 44 DIGEST 554-556, 3715-3724.]

As to accruer clauses, see 34 HALSBURY'S LAWS (2nd Edn.) 366-368, para. 413; and for cases on the subject, see 44 DIGEST 1215-1217, 10507-10533.]

Cases referred to:

- (1) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551 (41 E.R. 1379); 2 H. & Tw. 115 (47 E.R. 1620); 15 L.T.O.S. 557; 44 Digest 553, 3715.
- (2) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.
- (3) *Re Burton's Settlement Trusts, Public Trustee v. Montefiore*, [1955] 1 All E.R. 433; [1955] Ch. 348; 3rd Digest Supp.
- (4) *Re Grafton's Will Trusts, Roberts v. Lowe*, (Apr. 18, 1956), Unreported.
- (5) *Re Litt, Parry v. Cooper*, [1946] 1 All E.R. 314; [1946] Ch. 154; 115 L.J.Ch. 114; 174 L.T. 184; 2nd Digest Supp.

Adjourned Summons.

The plaintiff, as one of the trustees of the will of Edward Denis Atkinson, deceased, applied to the court by originating summons for the determination of

- A the question whether, on the true construction of the will and in the events which had happened on the death without issue of the testator's great nieces, Emily May Alexander and Constance Mary Child (the beneficiaries named in the trust dealing with residue), the testator's residuary trust estate was now held on trust (a) as to one moiety thereof for the personal representatives of Constance Mary Child as part of her estate, and as to the other moiety for the personal representative of Emily May Alexander as part of her estate; or (b) as to the whole thereof for the personal representatives of Constance Mary Child as part of her estate. Mrs. Alexander died on Apr. 26, 1927, and Mrs. Child died on June 26, 1955. The relevant provisions of the will appear in the judgment.

T. L. Dewhurst for the plaintiff, a trustee of the will.

- C *Oliver Lodge* for the first, second, third and fourth defendants, residuary legatees of Constance Mary Child.

M. O'C. Stranders for the fifth defendant, the personal representative of Emily May Alexander.

- D **UPJOHN, J.:** This summons raises an interesting question of construction of a common form accruer clause which is to be found in the will of the testator, Edward Denis Atkinson, who died as long ago as Jan. 31, 1904, and whose will, dated Jan. 13, 1898, was proved in the Principal Probate Registry on Mar. 22, 1904. The testator dealt with his residue in this way. After the usual administration trusts, he directed that his trustees

- E “shall stand possessed of the residue of the said moneys in trust for my great nieces Constance Pim and Emily Pim (daughters of the said Henry Pim and Fanny his wife) in equal shares.”

Then, in a new sentence, he said:

- F “Provided always and I declare that the share in the said residuary moneys hereinbefore expressed to be given to the said Constance Pim shall not vest absolutely in her but shall be retained by my trustees upon trust . . .”

- G to pay the income to Constance during her life, and after her death on trust for her children or remoter issue as she should appoint, and in default of appointment on trust for her children who should attain the age of twenty-one, in equal shares. Then the testator, by reference to those trusts, declared in similar terms in respect of the gift of the other moiety to Emily Pim. He then continued his will with the provision which gives rise to the difficulty:

- H “Provided always and I declare that in the event of the failure or determination of the trusts hereinbefore declared and contained concerning either of the shares in the said residuary moneys such share and the income thereof or so much thereof as shall not have been applied or disposed of under the trusts or powers herein contained or by law vested in my trustees shall go and accrue by way of addition to the other share in the said residuary moneys and such accruing share shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning the original share to which the same shall be added or as near thereto as circumstances will admit.”

I Both the great nieces survived the testator. Emily died in 1927, and Constance nearly thirty years later in 1955. Neither of them ever had any issue. The question is as to the disposition of the trust fund on the death of Constance.

There are three matters which are not in controversy. The first is that the original gift to Constance and Emily respectively was absolute in terms, and that the trusts were engrafted on those absolute gifts and it is, therefore, a typical *Lassence v. Tierney* (1) ((1849), 1 Mac. & G. 551) case. The second matter is

that on the death of Emily the accruer clause operated on Emily's share, and that Constance became entitled to the income thereof during her life. Had she had any children, the original and the accruing share would have gone to them. Thirdly, on the death of Constance the original gift to her of her moiety remained, and under the rule in *Lassence v. Tierney* (1) her estate takes that share absolutely. A

The whole issue in this case is: What is the true destination of the share of which Emily enjoyed the income during her life and subsequently Constance during her life? Counsel for Constance's residuary legatees submits that the accruer clause is apt and appropriate to carry Emily's share to Constance; because, putting it briefly, the accruer clause operates so as to add Emily's share to Constance's original share for all purposes, so that Emily's share must reach the same destination as Constance's share, whatever that destination may be. On the other hand, counsel for Emily's personal representative submits that the accruer clause operates only on the trusts engrafted on the original share and not on the original gift to Constance. B C

Curiously enough, there appears to be no direct reported authority in which the matter has been argued and decided, but the problem has been discussed in two cases to which I must briefly refer. The first is *A.-G. v. Lloyds Bank, Ltd.* (2) ([1935] A.C. 382), which was referred to by SIR RAYMOND EVERSHERD, M.R., in *Re Burton's Settlement Trusts, Public Trustee v. Montefiore* (3) ([1955] 1 All E.R. 433). In *A.-G. v. Lloyds Bank, Ltd.* (2) the matter was not argued, but on a very similar clause LORD TOMLIN, in the course of his speech in the House of Lords, analysed the trusts in the accruer clause and said ([1935] A.C. at p. 395): D

"... I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children." E

I think it is reasonably clear, looking at the whole of LORD TOMLIN's speech, that what he was saying was that an accruer clause such as this did not operate where there was a total failure of all the stocks, and in that case the original gift remained. F

In *Re Burton's Settlement Trusts* (3) SIR RAYMOND EVERSHERD, M.R., discussed this problem but did not express a concluded opinion on it for the reason that in that case the daughter who died first left everything by her will to her surviving sister, and, therefore, the matter was academic. However, it is fair to say that SIR RAYMOND EVERSHERD, M.R., in reliance on the words which I have quoted from LORD TOMLIN's speech, expressed a tentative conclusion which was to the same effect, namely, that an accruer clause such as this had no operation where there was a total failure of all the stocks. He concluded his observations on this part of the case in these terms ([1955] 1 All E.R. at p. 438): G

"I have found that passage [from LORD TOMLIN's speech] of some help towards my own inclination (and ... I express no final view) that a similar result should arise, if it were necessary to decide that, out of cl. 4." H

I have been informed that VAISEY, J., came to a different conclusion on a will in *Re Grafton's Will Trusts, Roberts v. Lowe* (4) ((1956), unreported). Although I am indebted to counsel for a short note of the judgment of VAISEY, J., it does not really assist me on this point. I

There is one other case to which I should refer, and that is *Re Litt, Parry v. Cooper* (5) ([1946] 1 All E.R. 314). That case establishes the proposition that it is quite possible, to put it briefly, to have a *Lassence v. Tierney* (1) type of gift in an accruer clause. I think that it is clear that in the present case *Re Litt* (5) has no direct application. It is, of course, of the essence of the rule in *Lassence v. Tierney* (1) that there must be an absolute gift to a person in the first place. That was emphasised by LORD GREENE, M.R., in his judgment in *Re Litt* (5)

A ([1946] 1 All E.R. at p. 317). The accruer clause in the present case contains no such absolute gift to a person. The only gift is to the other share. Therefore, it seems to me that *Re Litt* (5) can have no direct application to this case.

Counsel for Emily's representative forcibly contended that, if the construction for which counsel for Constance's residuary legatees contended were correct, that would have proved a very short answer in *Re Litt* (5), and the elaborate judgments going into the question whether the principle of *Lassence v. Tierney* (1) could apply to an accruer clause would have been quite unnecessary. However, although assisted by these authorities it is clear that they do not bind me, and I propose to approach this problem free from authority.

C There is quite clearly an original absolute gift to Emily and certain trusts are engrafted on it. In so far as those trusts fail, the original gift remains. Now after her life interest the only relevant trust was that the share was to go and accrue by way of addition "to the other share in the said residuary moneys". Pausing there, it seems to me that the testator is starting to say that this share is to go over to another share. Had he made it plain that it was to go over to the other share for all purposes, there could have been no doubt on the matter. Constance must have succeeded in her claim to it; but he has not done so. He then goes on to define in very precise language exactly what is to happen to the share, and he does it in these terms:

" . . . and such accruing share shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning the original share to which the same shall be added or as near thereto as circumstances will admit."

E This accruing share is to be held on certain trusts. What are those trusts? It seems to me, as a matter of construction, that the trusts, powers and provisions referred to there are trusts, powers and provisions engrafted on the original gift to Constance. I do not think, as a matter of construction, that they include the original gift to her which was in absolute terms, but only the trusts engrafted on that original gift. If that be the right conclusion, then those trusts came to an end on the death of Constance by reason of the failure of issue and, therefore, the original gift of Emily's share to her must remain, and I must declare accordingly.

Declaration accordingly.

Solicitors: *Foyer, White & Prescott* (for the plaintiff and the first, second, third and fourth defendants); *Janson, Cobb, Pearson & Co.* (for the fifth defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BHANDARI v. ADVOCATES COMMITTEE.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Tucker and Mr. L. M. D. de Silva), October 9, 10, 11, 31, 1956.]

Privy Council—Eastern Africa—Counsel—Professional misconduct—Standard of proof required by domestic professional tribunal.

In every allegation of professional misconduct involving an element of deceit or moral turpitude, it is the duty of the professional domestic tribunal investigating the allegations to apply a high standard of proof and not to condemn on a mere balance of probabilities.

Appeal dismissed.

[**Editorial Note.** The disciplinary procedure followed under the Advocates Ordinance, 1949 (No. 55 of 1949), in Kenya is similar to that followed in England under the Solicitors Act, 1888, prior to the Solicitors Act, 1919, s. 5, now replaced by the Solicitors Act, 1932, s. 5. The principle stated by the Court of Appeal for Eastern Africa and approved by the Judicial Committee (see pp. 744, 745, post) may, however, be regarded as having general application to all disciplinary tribunals concerned with professional conduct.

As to acts amounting to professional misconduct, see 31 HALSBURY'S LAWS (2nd Edn.) 297, para. 319; and for cases on the subject, see 42 DIGEST 399 et seq., particularly, 403, 404, 4575-4587.]

Appeal.

Appeal by special leave by an advocate of the Supreme Court of Kenya, Maharaj Krishan Bhandari, from an order of the Court of Appeal for Eastern Africa, dated June 11, 1955, affirming an order of the Supreme Court of Kenya, dated Mar. 22, 1955, whereby, on consideration of a report laid before it by the Advocates Committee, it was ordered that the appellant should be admonished for professional misconduct. The appellant practised in Nairobi. In June, 1954, his firm, during his absence on holiday, filed a declaratory suit in the Supreme Court of Kenya against the Attorney-General and the Principal Immigration Officer on behalf of Mrs. Shantaben and her husband, seeking a declaration that she was not a prohibited immigrant within the meaning of the Immigration (Control) Ordinance, 1948 (No. 7 of 1948), s. 5, and that her presence in the colony was lawful under a valid temporary employment pass still current and unrevoked, and, consequently, that she was not subject to a deportation order, dated Apr. 10, 1954, made under s. 9 of the ordinance. On his return from holiday, the appellant conducted this suit which on Nov. 18, 1954, was dismissed as being incompetent, but the judge agreed to consider the case on its merits, the Crown having waived all objections to procedure. He held that Mrs. Shantaben's temporary employment pass dated Nov. 6, 1951, had expired by course of law on her failure to observe her statutory duty, in July, 1953, to report to the immigration officer that she had left the employment for which the pass had been issued, that thereafter her presence in the colony was unlawful and, consequently, the deportation order was validly made.

Mrs. Shantaben gave notice of appeal from this judgment, and at the same time, swore an affidavit, which the appellant had drafted for her, in support of a notice of motion for an order of certiorari to quash the deportation order or, alternatively, for mandamus to the immigration officer to issue a dependent pass. The affidavit contained no mention of the previous proceedings or of the notice of appeal, and stated that Mrs. Shantaben's temporary employment pass was still current and valid and had not been cancelled. On Dec. 10, 1954, on the hearing before HOOPER, J., in chambers, it was pointed out to the appellant that the employment pass, being valid for three years only, had expired on July 16, 1954. The appellant stated that he would file a supplementary affidavit to correct the mistake, and, on being asked by the judge why Mrs. Shantaben

A was still in the colony after the date of the deportation order, said he would produce correspondence in his possession on this point. On Dec. 14, 1954, Mrs. Shantaben swore a supplementary affidavit in which she stated that, although the temporary employment pass expired on July 16, 1954, it was valid and current at the date of the deportation order, which was the material time for the application. She also stated that representations had been made through B her advocates to the governor against the making of the deportation order and that, to the best of her knowledge and belief, he had agreed to suspend the operation of the deportation order to allow her to institute proceedings to establish her right to stay in the colony. On Dec. 15, 1954, the appellant appeared again before HOOPER, J., and explained that he had been unable to find any correspondence on the matter but stated that the whole of the papers C relating to the governor's attitude in respect of the deportation order could be found in the file of Civil Case 675/54. On reading the file, HOOPER, J., found the judgment of the previous proceedings, together with the declaration with regard to the invalidity of the temporary employment pass and the validity of the deportation order, as well as the notice of appeal therefrom. On being asked for his explanation of these matters, the appellant stated that it was a genuine D mistake and that he had not intended to mislead. Although the appellant had mentioned incidentally the previous judgment, at no time had he given the true facts of those proceedings. HOOPER, J., dismissed the motion, and, having brought the matter to the notice of the acting registrar of the Supreme Court of Kenya, the acting registrar made an application to the respondents, the Advocates Committee, that the appellant be required to answer allegations E of professional misconduct. The respondents found and reported that the appellant had intended to deceive and mislead the court, and that, therefore, a prima facie case of disgraceful and dishonourable conduct inconsistent with his duty as an advocate had been made out. On consideration of this report, and after hearing counsel for the appellant, the Supreme Court stated their conclusions as follows:

F " Having considered all the evidence and affidavits before the Advocates Committee, and all the arguments in favour of the [appellant] addressed to us, we have come, with great reluctance, to the same conclusion at which the committee arrived, namely that the [appellant] intended to deceive and mislead the court. We think that the affidavits drawn by the [appellant] G were deliberately misleading; that the [appellant] knew his duty to disclose the judgment [of Nov. 18, 1954], and must have known that disclosure of that judgment and of the appeal against it would inevitably result in the dismissal or indefinite postponement of his application for discretionary prerogative writs; that the [appellant] did not suppress mention of the judgment [of Nov. 18, 1954] altogether, but misrepresented its effect and H refrained from making disclosure of its full contents; and that he postponed until he could postpone no longer giving the judge a reference which would enable him to discover its true contents. We think that the [appellant] may have had some muddle-headed idea in his mind that he could 'pursue concurrent remedies' or (as he told HOOPER, J.) that having failed before one judge he could apply to another on the lines of an application for habeas corpus. But we do not believe, and he does not himself aver, that the [appellant] I did not know that he was under a duty to disclose to HOOPER, J., the existence and the complete contents of the judgment of [Nov. 18, 1954]. This he refrained from doing, and we think that the way in which the affidavits are drawn shows that he did not intend to disclose the full contents of this judgment until he was forced to do so, and that the intention to mislead the court was deliberate. This amounts to professional misconduct."

The Supreme Court accordingly admonished the appellant.

D. N. Pritt, Q.C., and J. G. Le Quesne for the appellant.

D. A. Grant and A. C. B. Reid ((of the Scottish Bar) Crown Counsel, Kenya) for the respondents.

LORD TUCKER stated the facts and continued: Appeal was taken to the Court of Appeal for Eastern Africa, where, in addition to the matters previously relied on, it was contended that the Supreme Court had not applied the proper standard of proof required in a proceeding of this nature. The court rejected this contention and held that, there being concurrent findings of fact by the respondents and the Supreme Court, their functions were similar to those of any appellate court in dealing with appeals where there are concurrent findings of fact by two lower courts. Approaching the case from this angle they said:

“Two tribunals looking at the picture as a whole have come to the conclusion that the advocate never intended to make full disclosure to HOOPER, J., if he could help it, and we regret that we find it impossible to say that this conclusion or inference from the facts was unjustifiable or unreasonable.”

The appeal was accordingly dismissed.

It was contended on the present appeal that the approach of the Court of Appeal was wrong, and that this was not a case of concurrent findings of fact by two lower courts in that the Advocates Committee was not a court empowered to arrive at any determination or give any judgment, but only to report if a *prima facie* case was made out, being in much the same position as committing magistrates in indictable cases. Alternatively, it was argued that, even if the principle of concurrent findings applied, there was in this case no evidence to support a finding of concealment. It was further submitted that the Court of Appeal had laid down an erroneous standard of proof for such a case as this.

Their Lordships are of opinion that, although this case does not come literally within the well-known rule with regard to the functions of an appellate court where there are concurrent findings of fact by subordinate courts, all the reasons for the rule apply with equal, or even greater, force to cases where professional domestic tribunals are established by statute for investigating and finding the facts in cases of alleged misconduct by members of their own profession. The Advocates Committee was such a tribunal, and it had had the great advantage of seeing and hearing the appellant giving evidence at length in a case where, the facts being undisputed, the ultimate decision turned on questions of stupidity, ignorance or deliberate intent. They do not consider that the words “*prima facie* case” in s. 9 (3) (iii) of the Advocates Ordinance, 1949, have the effect of assimilating the functions of the committee to those of committing magistrates, or of in any way relieving them of the duty of determining the facts. It is clear that the committee, in fact, so acted.

Their Lordships have no doubt that the submission of “no evidence” cannot be sustained. In their opinion, a careful review of the whole case affords ample evidence to support the decision of the Supreme Court, and it is impossible to regard the information as to the previous proceedings, extracted piecemeal as it was by the judge’s questions, as constituting full and proper disclosure. This would suffice to dispose of the issues of fact, but as in the course of this appeal their Lordships have necessarily had occasion to give careful consideration to the whole of the evidence they feel it may be more satisfactory to all concerned to state that, in so doing, they have arrived at the same conclusion as the Supreme Court and would be content to adopt as their own the language of that court, quoted above*, in summarising their decision.

With regard to the onus of proof, the Court of Appeal said:

“We agree that in every allegation of professional misconduct involving an

* See p. 743, letters F to I, ante.

- A element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities."

- This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee, and there is no reason to think that either the committee or the Supreme Court applied any lower standard of proof.

- For these reasons, their Lordships have humbly advised Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

- Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellant);
C *Charles Russell & Co.* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

D

E

NOTE.

- F *Divorce—Evidence—Register of births—Photographs of register.*
Register of Births—Evidence in matrimonial causes—Photograph of register.

- Where it is necessary to prove the original entry in a register of births, and the petitioner cannot without undue expense or inconvenience travel to inspect the register, the Registrars of the Divorce Registry will give favourable consideration to an application under the Matrimonial Causes Rules, r. 25 (1), proviso (c)*
- G for leave to prove the entry by production of a photograph certified by the Superintendent Registrar or Registrar of Births and Deaths.

Nov. 13, 1956.

B. LONG,
Senior Registrar.

* Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 25 (1), proviso (c); 10 HALSBURY'S STATUTORY INSTRUMENTS 209.

KNIGHT v. LAMBRICK CONTRACTORS, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 1, 1956.]

Building—Building regulations—Excavations—“Excavation, pit or opening in the ground”—Old covered-over water tank—Existence unknown to contractor and not apparent on reasonable inspection—No barrier provided—Whether action for damages for breach of statutory duty lay—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 77.

The requirement of reg. 77* of the Building (Safety, Health and Welfare) Regulations, 1948, that every accessible part of an excavation, pit or opening in the ground, into or down the side of which a person employed is liable to fall a vertical distance of more than six feet six inches, must be provided with a suitable barrier, applies only to excavations, pits or openings made by the contractor in the course of his work on the site (see p. 747, letter I, and p. 749, letter G, post).

Quære whether a tank let into the ground and covered by slate slabs with soil and weeds on them was an “excavation, pit or opening in the ground” within reg. 77 (see p. 748, letter G, and p. 749, letter I, post).

Appeal dismissed.

[**Editorial Note.** The duty of complying with reg. 77 of the Building (Safety, Health and Welfare) Regulations, 1948, is imposed, so far as is material to the present case, on the contractor or employer by reg. 4 of the regulations; see 17 HALSBURY'S LAWS (3rd Edn.) 126.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 77, see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 239.]

Appeal.

This was an appeal by the plaintiff against a decision of PILCHER, J., dated Mar. 27, 1956, dismissing his action against the defendants for damages for breach of statutory duty under reg. 77 of the Building (Safety, Health and Welfare) Regulations, 1948. The facts appear in the judgment of PARKER, L.J.

P. R. Pain for the plaintiff, the workman.

A. S. Orr and *P. W. Medd* for the defendants, the contractors.

SINGLETON, L.J.: I will ask PARKER, L.J., to give the first judgment.

PARKER, L.J.: On Sept. 28, 1950, the plaintiff, then a man sixty-five years of age and working for the defendants, met with an accident. In due course he claimed damages against the defendants, alleging, (i) that they were guilty of a breach of duty at common law; and (ii) that they were in breach of their statutory duties under the Building (Safety, Health and Welfare) Regulations, 1948. The action was tried on Mar. 27 this year by PILCHER, J., who found for the defendants on both points. From that judgment the plaintiff appeals to this court, and the sole point taken in regard to liability is that PILCHER, J., was wrong in failing to hold that the defendants were in breach of reg. 77 of the Regulations of 1948.

The facts are in a very short compass. The defendants are building and demolition contractors, and they were engaged by the local authority to clear a site on the Foxhole Estates, Queen's Road, Weybridge, in Surrey. Part of the estate consisted of some old stables, a calf shed and a conservatory. At the time of this accident the plaintiff, with two or three other men, was engaged under a foreman called Chester in demolishing this conservatory. PILCHER, J., found that, apart from a door frame at one end, the conservatory then consisted only of two walls, a little low wall in the front about two feet high, and a fairly high wall at the back. That was all that remained, for the rafters and glass had collapsed. The plaintiff was at the front of this conservatory, and was engaged

* The relevant terms of reg. 77 are printed at p. 747, letter D, post.

A in knocking down this two-foot wall with a sledge hammer, when the ground underneath him collapsed and he fell some eight feet to the bottom of a tank. Inspection afterwards showed that there was a tank some five feet long and some three feet six inches wide under the ground in the front of the conservatory. The tank had been covered by two slate slabs, and on top of the slate slabs there was a considerable quantity of debris, soil, weeds and other matter. PILCHER, J.,

B found that prior to the accident no reasonable inspection would have revealed the presence of this tank, concealed as it was under all the debris. Apparently the plaintiff, in working there, had in some way dislodged one of the slate slabs under the debris; it collapsed into the tank and the debris and he himself followed.

PILCHER, J., found that there was no breach of duty at common law. Mr.

C Chester, the foreman, had inspected the site. He had apparently found an open well tank some fourteen yards from this conservatory and had specifically warned the plaintiff and the other men to avoid that tank. He had no reason to believe that adjoining the house there was this other tank which was completely covered over.

D So far as the breach of statutory duty is concerned, the only provision now relied on is reg. 77, the first part of which* reads as follows:

“Every accessible part of an excavation, pit or opening in the ground into or down the side of which a person employed is liable to fall a vertical distance of more than six feet six inches shall be provided with a suitable barrier to a height of at least two feet and as close as is reasonably practicable to the edge.”

E With regard to that claim PILCHER, J., said:

“Part 4 of the Building Regulations relates, as its heading shows, to ‘Excavations’ and consists of regs. 75 to 78. The plaintiff relies in this case on reg. 77. I think it is quite clear that the excavations which are dealt with by all those four regulations are excavations made by a building contractor or some independent contractor in connection with whatever building work is being done on the site.”

F Counsel for the plaintiff, in an attractive argument, points out that PILCHER, J., does not there deal specifically with the words which appear in reg. 77, and which appear for the first time in that regulation, namely, “pit or opening in the ground”. Counsel for the plaintiff says it is true that this regulation appears under a section dealing with excavation; but he submits that that does not assist if the words of the regulation in question are plain. He said that the mischief at which reg. 77 is aimed is to prevent people falling into (to use a neutral term) holes in the ground; and, looked at in that light, it matters not whether the hole is already there or whether it is a hole which has been made by the contractor in the course of his work.

G It is plain that some limit must be put on those words, “excavation, pit or opening in the ground”. Counsel for the plaintiff submits that any hole (again to use a neutral term) comes within the ambit of these regulations when it is a hole into which some one engaged on the work is liable to fall; he says that this man did fall; and that, accordingly, it is a hole within the ambit of that regulation. Such a hole might be anywhere on the land on which the workmen are engaged. Some limitation must be put on those words, and I think that, in the context in which they appear, they are limited to excavations, pits or openings made by the contractor in the course of his work on the site.

I say that for these reasons: to begin with, I think that reg. 75 is dealing with excavations made by the contractor himself. I need not read the regulation in full, but the opening words point to that; they are:

“An adequate supply of timber of suitable quality or other suitable

* The proviso is printed at p. 748, letter D, post.

material shall where necessary be provided and used to prevent, so far as is reasonably practicable and as early as is reasonably practicable in the course of the work, danger to any person employed from a fall or dislodgment of earth . . . ”

That regulation deals with the danger of earth falling on to a man and is dealing with earth falling from the side of excavations made by the contractor on the site.

The next regulation, reg. 76, is clearly directed, and directed only, to excavations made by the contractor. It says:

“ No excavation or earthwork which is likely to reduce so as to endanger any person employed the security or stability of any part of any structure, whether temporary or permanent, shall be commenced or continued unless . . . ”

certain steps are taken. It is true that in reg. 77 the further words “ pit or opening in the ground ” appear, and it is true that that is dealing with the danger to persons employed of falling into the excavation, pit or opening. I get considerable assistance from the proviso to reg. 77, which is:

“ Provided that the foregoing requirement shall not apply to any part of an excavation, pit or opening while (and to the extent to which) the absence of such a barrier is necessary for the access of persons or for the movement of plant or materials or while (and to the extent to which) it has not yet been practicable to erect such barrier since the formation of that part of the excavation, pit or opening.”

The material words are those which follow the words “ or while ” in the proviso. It seems to me that the proper inference is that that is referring to a formation by the builder or those in charge of the works. If there be any remaining doubt, the court is entitled to look at the heading of the section, which is “ Excavations ”. It is Part 4, which is dealing with operations, and in this section dealing with the operation of excavation. In the case of ambiguity the court is entitled to look at the heading, and to hold that these regulations in this Part fall under the umbrella of what may be described as the operations of excavation.

For those reasons, I am satisfied that in their context the words “ excavation or opening ” must be confined to excavations, pits or openings made by the contractor in the course of his work on the site.

That is sufficient to dispose of this case, but, even if I were wrong on that, I for myself would find it very difficult to bring this tank, covered as it was by slate slabs and debris, into any of those three categories “ excavation, pit or opening in the ground ”. While it is unnecessary to decide the case on that ground, I have, as at present advised, very grave doubts whether those words are apt to cover the tank in this case.

For those reasons I would dismiss this appeal.

JENKINS, L.J.: I agree. Counsel for the plaintiff has argued with force that reg. 77 of the Building (Safety, Health and Welfare) Regulations, 1948, read literally as it stands and without adding or subtracting anything, is apt to cover the underground tank into which the plaintiff in this case unfortunately fell. However, notwithstanding this argument, I am satisfied that it is necessary to put some limit on the meaning of the words “ excavation, pit or opening in the ground ”. These words surely cannot mean an excavation, pit or opening anywhere and of whatever origin, provided it is six feet six inches or more in depth. Nor can they mean any excavation, pit or opening of whatever origin on any building site, for then one would be left in complete uncertainty as to the extent of the area, surrounding a place where building operations were going on, which should properly be termed the site for this purpose. Some limitation, therefore, is necessary, and once one is satisfied that

- A some limitation is necessary, it is right to ascertain the proper limitation by reference to the scheme of the regulations and the other provisions which they contain. Under reg. 2 "Application of Regulations" it is provided that "(1) These regulations shall apply to the following operations"—and "the following operations" include building. Accordingly, reg. 77 is enacted in relation to building operations. Pursuing that line of argument, one finds, as counsel for the
- B defendants has pointed out, that the regulations are divided into a number of parts. Part 1 is "Interpretation and General"; Part 2 "Scaffolds and Means of Access"; Part 3, "Raising and Lowering"; Part 4, "Excavations"; Part 5 "Demolition". Each of the four last-mentioned Parts relates to things customarily done in the course of building operations, and which, if done, require some precaution or other for the safety of the persons engaged in
- C the operations. One would therefore expect the provisions relating to excavations, pits or openings to be directed to excavations, pits or openings made in the course of building operations. As counsel for the defendants pointed out, it is common, if not indeed universal, that in the course of building operations there should be some degree of excavation or that some pit or opening should be made, whereas such hazard as is involved by the possibility that some disused
- D well or vault, or other old pit or opening, should exist in ground is not peculiar to ground on which building operations are to be carried on, and is not a hazard in any sense peculiar to the carrying on of building operations. Accordingly it seems to me that the scheme of these regulations points to the conclusion that the provisions regarding excavations relate only to excavations and the like brought into being in the course of building operations. In my view that
- E conclusion is strongly borne out by reference to the fasciculus of regulations contained in Part 4 under the heading "Excavations". As PARKER, L.J., has pointed out, regs. 75 and 76 clearly relate only to excavations made in the course of the work, and they are followed by the regulation on which the plaintiff relies, reg. 77. That regulation, as counsel for the plaintiff has said, contains in itself nothing to show that it is limited to excavations, pits or openings made in
- F the course of building operations; but I agree with PARKER, L.J., that assistance is to be found in the proviso, the material words being:

"Provided that the foregoing requirement shall not apply to any part of an excavation, pit or opening . . . while (and to the extent to which) it has not yet been practicable to erect such barrier since the formation of that part of the excavation, pit or opening."

- G Those words point strongly to the conclusion that reg. 77 is concerned, and concerned only, with excavations, pits or openings made in the course of the building operations.

- H Accordingly I agree that this appeal should fail on the ground that PILCHER, J., rightly held that reg. 77 applied only to excavations, pits or openings made in the course of building operations. It is, therefore, unnecessary for the purposes of deciding this appeal to consider the question whether the particular underground tank in this case was an excavation, pit or opening in the ground within the meaning of reg. 77. There seem to me to be cogent reasons for holding that it does not fall within that language, but it is unnecessary in my view to form any concluded opinion on that point. It is to be observed that this tank was completely covered over until the unfortunate plaintiff dislodged one of the slates
- I in the course of his work. There is substantial ground for the view that the regulation cannot have been intended to apply to any excavation, pit or opening which is not open or in such a condition that there is an uncovered orifice through which some person might be liable to fall. If that were not so, it would be necessary under the regulations to fence round every pit or opening, such as, for instance, a cellar in a house, notwithstanding that the opening into it was securely covered, or believed to be securely covered, with a floor or planks, or otherwise physically covered over by a covering which while it remained would

prevent anyone falling through. I think that view is perhaps borne out by the reference in the regulation to the edge of the excavation, pit or opening. In reg. 77 are the words:

“shall be provided with a suitable barrier to a height of at least two feet and as close as is reasonably practicable to the edge”;

and reg. 78 is:

(1) Material shall not be placed or stacked near the edge of any excavation, pit or opening in the ground so as to endanger persons employed below.

(2) No load shall be placed or moved near the edge of any excavation where it is likely to cause a collapse of the side of the excavation and thereby endanger any person.”

Those references to “the edge” suggest an uncovered excavation, pit or opening in the ground. It is, however, unnecessary in my view to decide that point, so I will not take up further time on it, but will confine myself to holding that on the first of the two grounds with which I have dealt, which is the ground adopted by PILCHER, J., this appeal fails and should be dismissed.

SINGLETON, L.J.: I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff, the workman); *J. H. Milner & Son* (for the defendants, the contractors).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

R. v. EVANS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hallett and McNair, JJ.), November 12, 1956.]

Criminal Law—Sentence—Preventive detention—Previous convictions—Notice of previous convictions—Contents of notice—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 21 (1), (2), s. 23 (1), (2).

The appellant, who had previously served a sentence of preventive detention, was convicted of larceny by a magistrates' court and was committed to quarter sessions for sentence. The notice given under s. 23 (1)* of the Criminal Justice Act, 1948, stated that it was intended to prove “Convictions and sentences as follows:—Glamorgan Assizes in 1951, larceny—four cases of stealing pedal cycles. Larceny of tools. Seven years' preventive detention”. The appellant was sentenced at quarter sessions to preventive detention. He appealed on the ground that under s. 23 (1) no previous conviction could be taken into account unless notice was given that it was intended to be proved, and that he had not been given notice of such previous convictions as were envisaged by s. 21 (2)*, viz., previous convictions on at least three previous occasions on at least two of which sentences of Borstal training, imprisonment or corrective training had been imposed.

Held: the notice given was defective, since it did not give notice of three previous convictions two of which carried sentences of Borstal training, imprisonment or corrective training, and therefore the sentence of preventive detention could not stand.

Appeal allowed.

[**Editorial Note.** A defective notice may similarly render it impossible for the court to impose a sentence of corrective training or to make a supervision order (cf. p. 752, letter F, post). Although evidence of having been sentenced

* For the relevant terms of s. 21 (2) and s. 23 (1) of the Criminal Justice Act, 1948, see p. 751, letter G, and p. 752, letter A, post.

A to corrective training or preventive detention is evidence of the convictions and sentences which render the offender liable to that sentence (see s. 23 (2) of the Criminal Justice Act, 1948), yet, pending any amendment of the legislation, the notice of intention to prove the necessary three previous convictions must specify them.

B As to notices of previous convictions in connection with corrective training, preventive detention and supervision orders, see 10 HALSBURY'S LAWS (3rd Edn.) 511, para. 928; and for cases on the subject, see 3rd DIGEST Supp.

For the Criminal Justice Act, 1948, s. 21, s. 22, s. 23, see 28 HALSBURY'S STATUTES (2nd Edn.) 371, 373, 374.]

Appeal.

C Appeal against sentence by the appellant, Glyn Rhys Evans, who, on Aug. 16, 1956, was convicted at Bridgend Magistrates' Court of larceny of a pedal cycle and attempted false pretences. He was committed for sentence under the Magistrates' Courts Act, 1952, s. 29, to Glamorgan County Sessions Appeal Committee where, on Sept. 26, 1956, he was sentenced to eight years' preventive detention. He had twenty-one previous convictions, on one of which, in 1951, he had been sentenced to seven years' preventive detention.

D *E. B. McLellan* for the appellant.

I. Davies for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: Notice was given to the appellant under s. 23 (1) of the Criminal Justice Act, 1948, that it was intended to prove at his trial:

"Convictions and sentences as follows:—Glamorgan Assizes in 1951, larceny—four cases of stealing pedal cycles. Larceny of tools. Seven years' preventive detention."

F The appellant himself, who seems to know the provisions of the Criminal Justice Act, has taken the point that he was not liable to be sent to preventive detention because the provisions of s. 23 of the Act have not been properly carried out. It is a point of the highest technicality, but one to which the court unfortunately feels bound to give effect. There is a *casus omissus* in the Act which has not been appreciated.

G Section 21 (2), which is the section that allows a court to impose a sentence of preventive detention, provides:

"Where a person who is not less than thirty years of age—(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training; then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the court may determine."

I It will be observed that the requirements are that he should have been convicted on at least three previous occasions, and on two of them sentenced to Borstal training, imprisonment or corrective training. There is no provision that he should on a previous occasion be sentenced to preventive detention. The point we are about to decide will affect not only sentences of preventive detention but proposed sentences of corrective training and also of a supervision order under s. 22.

Then we turn to s. 23, which provides:

"(1) For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section [that is a supervision order], no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury.

"(2) For the purposes of this section, evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence . . . "

There is nothing here which provides that notice may be given to an offender that he has previously been sentenced to preventive detention and leave it at that, or that if once it is proved that an offender has had preventive detention then it is unnecessary to prove any previous convictions. Supposing that he disputes that he had been previously convicted, then, if it is proved that he has been sentenced to preventive detention, it is unnecessary to give any further evidence of previous convictions because the sentence of preventive detention will prove the previous convictions. Unfortunately, however, the section does not say that notice of a previous conviction which resulted in preventive detention is all that is required. Notice of three previous convictions has to be given and that, on two of them, the offender had been sentenced to Borstal training, imprisonment or corrective training. The police, whom no one is blaming because the point had never occurred to anybody before, thought, not unnaturally, that all that need be done was to give notice that the appellant had been previously sentenced to preventive detention. We have to hold, most unfortunately, that this notice is a defective notice. It is defective in not giving notice of three previous convictions on two of which the appellant had been sentenced to Borstal training, imprisonment or corrective training. Therefore, the sentence cannot stand. We are going to alter the sentence to one of imprisonment, but we cannot even make a supervision order in respect of the appellant because for the purpose of the supervision order notice again has to be given specifying the previous convictions. The only thing that we can do is to set aside the sentence of preventive detention, and the sentence on the appellant is that he should go to prison for eight years. He gets some advantage because if he behaves himself in prison he does get a longer period of remission than in the case of preventive detention. We hope that the attention of the Home Office will be called to this matter so that, if possible, an amendment to the legislation may be passed to remove the difficulty. The police authorities must be warned that it is not sufficient to give notice in the case of a man qualified for preventive detention that he has previously had a sentence of preventive detention, but the previous convictions and sentences must be set out.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; W. Rosin, Bridgend (for the Crown).*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A PADDINGTON BOROUGH COUNCIL v. WAR DAMAGE COMMISSION. ASSOCIATED LONDON PROPERTIES, LTD. v. PADDINGTON BOROUGH COUNCIL.

B [COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), October 23, 24, 26, 29, 1956.]

Compulsory Purchase—Compensation—Interest in war-damaged hereditament—

War damage involving total loss—Determination of War Damage Commission to make cost of works payment under War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 20 (3) (b)—Proposal for rebuilding premises with certain alterations approved by War Damage Commission—Estimated cost of reinstatement in accordance with approved plans less than that of rebuilding property in its original form—Market value of proposed building greater than that of original building—Whether compensation assessed on basis of value with approved rebuilding—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 53 (1) (a).

D *War Damage—Cost of works—Determination to pay cost of works instead of value payment—Right to make determination before repair work done—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 20 (3) (b).*

E Between 1940 and 1944 property owned by the claimants sustained war damage of such a kind as to be deemed to involve total loss for the purposes of the War Damage Act, 1943, and under s. 7 of the Act the appropriate payment would have been a value payment. The War Damage Commission, acting pursuant to a Treasury direction and under powers given to them by s. 20 (3) (b), determined that a cost of works payment should be made in respect of the damage. Acting on this determination the claimants submitted plans for rebuilding the premises with certain alterations which would result in a simpler and somewhat smaller building but one which would have a greater market value. Proposals, including plans for rebuilding on this basis, were accepted by the commission. The estimated cost of the new building was £49,000, whereas the estimated cost of rebuilding the destroyed property in its original form was £56,300 on the basis of 1939 prices. On Nov. 5, 1946, a compulsory purchase order in favour of the local authority was made in respect of an area including the property and was confirmed by the Minister of Health in July, 1947. On May 9, 1950, a notice to treat was served on the claimants. The damage had not been made good at that date. On the questions (i) whether compensation for the compulsory acquisition should be assessed under s. 53 (1) of the Town and Country Planning Act, 1947*, which would apply if the "appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase . . . be a payment of cost of works", and (ii) whether, if s. 53 (1) applied, the value of the land for the purposes of compensation should be determined on the basis that the former building was identically reinstated or on the basis that the new building was erected, so that, having regard to para. (a) of s. 53 (1), the value would be that which the land would have borne if the whole of the damage "had been made good" before the date of the notice to treat,

I **Held:** (i) the compensation payable to the claimants by the local authority should be assessed on the basis laid down in s. 53 (1) of the Town and Country Planning Act, 1947, because (a) the determination that the case was one for a cost of works payment could properly be made by the commission under s. 20 (3) (b)* of the War Damage Act, 1943, before any work of

* The relevant provisions of s. 53 (1) of the Act of 1947 are set out at p. 757, letter E, post; for s. 20 (3) (b), see p. 758, letter F, post.

repair had been done, and (b), as the commission had properly determined (pursuant to that enactment and the Treasury direction) before the notice to treat was served that a cost of works payment should be made, that type of payment was the appropriate payment within s. 53 (1) of the Act of 1947, notwithstanding that, if the test laid down by s. 7 of the Act of 1943 had had to be applied to the exclusion of s. 20, a value payment would have been payable; and

(ii) although normally the value of an interest for the purpose of compensation under s. 53 (1) (a) was its value on the basis that the damaged building had been reinstated in its former state, yet in the particular circumstances of the present case the value of the land was that which it would bear if the rebuilding proposed to and accepted by the commission for determining the cost of works payment had been effected.

East End Dwellings Co., Ltd. v. Finsbury Borough Council ([1951] 2 All E.R. 587) considered.

[**Editorial Note.** The basis of identical reinstatement for assessing compensation under s. 53 (1) (a) of the Town and Country Planning Act, 1947, is rejected in the present case, but it is important to note that this rejection is the consequence of the particular circumstances, as, e.g., that the War Damage Commission had agreed plans for a more modern and less costly rebuilding. Particular emphasis is laid by LORD EVERSHERD, M.R., at p. 764, letters E to H, post, on the limit of the decision. The principle of such determinations as that of the Lands Tribunal in *Hyman Stone v. Sheffield Corpn.* ((1954), 4 P. & C.R. 426), where the tribunal held that "making good" within s. 53 (1) (a) involved an identical reinstatement of a demolished building is, to this limited extent, overruled by the present decision.

As to the assessment of compensation on compulsory acquisition of war damaged land where the war damage payment is cost of works, see 10 HALSBURY'S LAWS (3rd Edn.) 129, para. 214.

For the Town and Country Planning Act, 1947, s. 53, see 3 HALSBURY'S STATUTES (2nd Edn.) 1094.

For the War Damage Act, 1943, s. 7, s. 8, s. 14, s. 20, see 26 HALSBURY'S STATUTES (2nd Edn.) 477, 478, 486 and 493.]

Cases referred to:

- (1) *Associated London Properties, Ltd. v. War Damage Commission, Paddington Borough Council & Church Commissioners for England*, (June 16, 1954), Unreported.
- (2) *East End Dwellings Co., Ltd. v. Finsbury Borough Council*, [1951] 2 All E.R. 587; [1952] A.C. 109; 115 J.P. 477; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the Lands Tribunal (SIR WILLIAM FITZGERALD, President, C. H. BAILEY, Esq., and SIR GRATTAN BUSHE), under the Lands Tribunal Act, 1949, s. 3 (4), on the requisition of Associated London Properties, Ltd. (referred to hereinafter as "the claimants") and of Paddington Borough Council (referred to hereinafter as "the local authority"), on a reference and two appeals which the parties agreed should be heard together. The reference was an application by the claimants for the assessment of compensation, under the Acquisition of Land (Assessment of Compensation) Act, 1919, and the Town and Country Planning Act, 1947, for the compulsory acquisition of their interest in property known as Irvine Court, No. 37, Porchester Terrace, Paddington, by the local authority. The appeals were by the local authority from (a) the determination of the War Damage Commission on the kind of payment to be made

A under the War Damage Act, 1943, in respect of the property, and (b) the determination of the commission in regard to the amount of the payment.

The following statement of facts and contentions of the parties is taken from the Case. The tribunal found the following facts to have been proved. The property comprised two blocks of residential flats erected before 1914, and was held by the claimants under leases for a term of years expiring on Mar. 25, 2020.

B The reversion expectant on the term of years was vested in the Church Commissioners for England. The property suffered war damage on three separate occasions, namely, Oct. 25, 1940, Feb. 18, 1944 and Mar. 14, 1944. The war damage was such as to be deemed to involve total loss for the purposes of the Act of 1943. The War Damage Commission considered that the property was immediately before the occurrence of the war damage structurally not appreciably less sound
C than when it was erected and in design, layout and amenities reasonably similar to property of the same type erected since 1914 and would, therefore, fall within the class of case in which the commission had been directed by the Treasury under the provisions of s. 20 (1) of the Act of 1943 to exercise the powers conferred on them by s. 20 (3) (b) in the event of the war damage to property being made good. On May 4, 1945, the War Damage Commission sent to the claimants a
D document in a form known as "Form Val. 4". After May 4, 1945, interviews took place between representatives of the claimants and the commission on the assumption that there would be a cost of works payment, and the claimants were invited by the commission to prepare and submit proposals for rebuilding and to obtain tenders for the work. The claimants procured the appropriate plans and specifications for the rebuilding and incurred considerable expense in
E so doing. The commission and the claimants agreed the plans which provided for reinstatement with alterations involving the omission of former ornamentation and a lesser cubic content. On Nov. 5, 1946, a compulsory purchase order in favour of the local authority was made in respect of an area which included the site of Irvine Court. The order was duly confirmed by the Minister of Health on July 31, 1947. On May 9, 1950, the local authority served notice to treat.
F On Jan. 19, 1951, the War Damage Commission issued, in connection with the property, a formal determination of the amount of the converted value payment in a form known as "Form Val. 8". The actions of the commission were explained in a letter dated Apr. 16, 1953, addressed to the claimants' solicitors.

The claimants contended before the tribunal: (i) that the War Damage Commission, by their document of May 4, 1945, or by their document Val. 8 of
G Jan. 19, 1951, must be deemed to have given their final determination that a cost of works payment was appropriate; (ii) that the compensation payable by the local authority fell to be assessed in accordance with the provisions of s. 53 of the Town and Country Planning Act, 1947; and (iii) that the words "made good" in s. 53 should be construed as extending to "making good with
H alterations", as provided for in s. 8 (3) of the War Damage Act, 1943, and were not limited to identical reinstatement of the original building.

The local authority contended before the tribunal: (a) that the appropriate payment under the Act of 1943 in respect of the war damage to the property was a value payment; (b) that the compensation payable to the claimants did not
I fall to be assessed on the basis laid down in s. 53 of the Act of 1947; and (c) in the alternative, that, in assessing compensation under s. 53 of the Act of 1947, the value of the property must be taken to be the value which it would have if the damage had been made good by an identical reinstatement and not with alterations or additions.

The War Damage Commission contended before the tribunal: (i) that by virtue of the document Val. 4, the correspondence between the parties, and the facts referred to previously concerning the interview of May 4, 1945, and subsequent agreement of plans proposed, the commission had finally determined that the

kind of payment to be made in due course under the Act of 1943 in respect of the war damage to the property was a cost of works payment under s. 20 of the Act of 1943, in accordance with the Treasury direction, and had become bound by such determination; (ii) that the determination was made and had become binding before the date of the compulsory purchase order; and (iii) that, although at the date of the determination none of the war damage to the property had been made good, the commission then had power to make such binding determination.

The tribunal came to the conclusions that in the use of the document Val. 4, which was a stereotyped printed form, a mistake had been made by the War Damage Commission in that the document stated that the war damage did not involve total loss, whereas it was now clear, and the tribunal could accept the fact, that the war damage did involve total loss; and that it was clear from the correspondence and the actions of the commission that what the commission intended to convey in that document was that, although the hereditament suffered total loss, the payment was to be a cost of works payment by virtue of the Treasury direction. The tribunal further decided that the document Val. 4 was a final determination by the commission. From the evidence the tribunal had no doubt whatever that the commission intended to treat the property on the footing of what was known as a cost of works payment, and the evidence further confirmed the tribunal in the opinion that it was never the intention of the commission to retreat from this determination. The tribunal, therefore, decided that the compensation payable to the claimants by the local authority should be assessed on the basis laid down in s. 53 of the Act of 1947. In interpreting the words "had been made good" in s. 53 (1) (a), the tribunal, following a former decision of their own*, held that "making good" involved an identical reinstatement of the demolished building.

The question for the decision of the Court of Appeal was whether, on the above finding of facts, the tribunal's decisions were correct in law. The tribunal did not proceed further with the assessment of the compensation pending the decision of the Court of Appeal.

Harold Williams, Q.C., and *G. D. Squibb, Q.C.*, for Paddington Borough Council (the local authority).

A. Capewell, Q.C., *J. R. Willis, Q.C.*, and *D. G. Widdicombe* for the claimants.

Denys B. Buckley and *N. C. H. Broune-Wilkinson* for the War Damage Commission.

LORD EVERSHERD, M.R.: The proceedings which are now before the court raise two short and distinct points of construction under s. 53 (1) of the Town and Country Planning Act, 1947. In form both questions seek a review of a decision of the Lands Tribunal on a Case Stated for this court dated July 5, 1956. The parties before us are: (i) Paddington Borough Council [referred to hereinafter as "the local authority"]; (ii) Associated London Properties, Ltd. [referred to hereinafter as "the claimants"]; and (iii) the War Damage Commission. Their respective interests in the two questions will appear as I proceed with my judgment.

The first question asks whether, in the events which have happened as they relate to certain property in London known as Irvine Court, Porchester Terrace (which was the subject of heavy war damage during the years 1940 to 1944), s. 53 (1) has any present application. The Lands Tribunal held that it had, and on this question the local authority are the appellants and the substantial respondents to this appeal are the claimants, who were the owners of the property until it was compulsorily acquired by the local authority. The War Damage Commission are also respondents to this appeal and some arguments have been addressed to the court on their behalf by counsel.

* See the case cited in the Editorial Note, p. 754, ante.

- A On the second question, which arises only if we should be against the local authority on the first, the claimants are in the role of appellants. The question turns on the meaning of four words in s. 53 (1) (a), namely, "had been made good", which the Lands Tribunal, expressly following a previous decision of their own, interpreted as equivalent to "had been reinstated", that is, so as to put the building into the condition that it formerly had before the damage.
- B On this matter the local authority are in the position of respondents and the War Damage Commission have no concern with it.

In *Associated London Properties, Ltd. v. War Damage Commission, Paddington Borough Council & Church Commissioners for England* (1) ((1954), unreported), which came before this court on June 16, 1954, on appeal from the Chancery Division of the High Court, the question was one of the propriety of the court making certain declarations in relation to the same subject-matter, before the issues involved had been before the Lands Tribunal. We were of opinion that in the circumstances the declarations sought by the then plaintiffs (the claimants) ought not to be made since they would either be *bruta fulmina* or would embarrass, if not usurp, the statutory function of the Lands Tribunal. In the course of my judgment in that case I indicated a view on the question now before us (which was not then directly raised) adverse to the local authority. I have, I hope, attended to the arguments on the present appeal with an open mind: but having heard them I confess that my previous impression has been confirmed. I think that the Lands Tribunal were right on the first question which is now before us and that the appeal on this question fails.

- E The relevant words of s. 53 (1) of the Act of 1947 are:

"Where an interest in land the value of which is to be ascertained in accordance with the provisions of s. 51 of this Act is an interest in a hereditament . . . which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under s. 20 (2) (b) of that Act, be a payment of cost of works—(a) the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat . . ."

- The date of the notice to treat in this case was May 9, 1950, and it is agreed by the parties that that is the relevant date to which we must direct our minds. I, therefore, can pose the question by reference to that date as follows: On May 9, 1950, what would, apart from the compulsory purchase order (which had been made in 1946) and its consequences, have been the appropriate payment in respect of this hereditament? On the face of the document called Val. 4 (a form issued by the War Damage Commission in 1945), it had been stated in plain terms to the claimants that the payment which the War Damage Commission would make would be a cost of works payment, and on the face of the document the reason assigned for this conclusion was that the damage had not resulted in a total loss*. This statement by the War Damage Commission was in all relevant respects confirmed by a later document called Val. 8, but as that was not issued

* Paragraph 1 of the letter referred to as "Val. 4" of May 4, 1945, reads: "Inspection of this property now indicates that the war damage up to Mar. 30, 1945, did not involve 'total loss' as defined in the War Damage Act, 1943 (see extract on the back of this letter). The test for 'total loss' does not relate solely to the amount of the damage and even complete destruction does not necessarily make a building a 'total loss' under the Act."

The extract referred to sets out s. 7 (2) of and Sch. 2, para. 1, to the Act of 1943.

until after May 9, 1950, I leave it out of account. It is, however, quite clear now, and admitted by all the parties, that, in fact, the premises suffered a total loss with the necessary result that, according to s. 7 of the War Damage Act, 1943, and on the assumption that that section stood alone, the appropriate payment would undoubtedly have been a value payment. It should be stated that for practical purposes a cost of works payment is greater than a value payment in otherwise comparable circumstances. The question, however, what payment is appropriate to be made is not, in my judgment, solely dependent on s. 7. The War Damage Act, 1943, contains certain provisions, the short effect of which is to vary the prima facie effect of s. 7 pursuant to directions which, it was contemplated, would be given by the Treasury with a view to the public interest on such matters as housing, the shortage of building material, and matters of that kind*. There is, indeed, a reference in s. 53 (1) of the Town and Country Planning Act, 1947, to the case where the prima facie result would have been a cost of works payment, but a value payment becomes the appropriate payment since it is against the public interest under the contemplated Treasury direction that the damaged premises should be restored. That is the reference in the words "apart from any direction given by the Treasury under s. 20 (2) (b) of [the War Damage] Act". Having regard to the comparative amount of cost of works and value payments, that provision is obviously one favourable to the private owner. We are concerned, however, with the converse case; that is, where there has been a total loss and where, therefore, prima facie, under s. 7 of the Act of 1943, a value payment would be the appropriate payment.

The case with which we are concerned has arisen by an application, or what was intended undoubtedly to be an application, of s. 20 (3) of the War Damage Act, 1943. Section 20 (1) empowers the Treasury to give directions to be observed by the War Damage Commission. Section 20 (3) reads:

"For the purpose of giving effect to any such directions, the commission shall have power . . . (b) where war damage in respect of which a value payment would otherwise be appropriate is made good in the public interest, to make in respect thereof a payment of cost of works . . ."

I will now turn to the facts of this case. It is abundantly made clear that this was a case in which the War Damage Commission would, apart from the compulsory purchase, have made a cost of works payment, pursuant to the Treasury direction, and under the statutory powers given to them by s. 20 (3) (b) of the Act of 1943. The Treasury direction (which is one of the exhibits to the Case Stated) was issued in October, 1943. The War Damage Commission informed the claimants of that direction and what effect they proposed to give to it, at the same time explaining how it came about that the form Val. 4, although indicating the propriety of a cost of works payment, based it on the erroneous premise that this was not a case of total loss. It is further clear that the claimants acted on the basis of what the War Damage Commission had told them; in particular, they proceeded to the expense of having proper plans prepared for the making good of the damage and of submitting them for acceptance to the War Damage Commission. It is true that all these matters of fact which I have mentioned came into existence before the date of the notice to treat and before the local authority were, therefore, directly concerned in the property; but the local authority were informed of the whole story very soon after the date of the notice to treat. In any case it may be said that, for some purposes at least, their position cannot be better than that of a successor in title to the claimants.

* See s. 20 of the War Damage Act, 1943; 26 HALSBURY'S STATUTES (2nd Edn.) 493.

A In the circumstances I shall not refer at this stage to any of the annexures or exhibits, but confine myself to reading two passages from the Case Stated. The first is in para. 11, where the tribunal observe:

B "We also came to the conclusion that it was clear from the correspondence and actions of the War Damage Commission that what the War Damage Commission intended to convey in this document [Val. 4] was that although the hereditament suffered total loss the payment was to be a cost of works payment by virtue of the said Treasury direction."

Then para. 13 reads:

C "From the evidence which was adduced before us we have no doubt whatever that the War Damage Commission intended to treat the said property on the footing of what is known as a cost of works payment, and the evidence further confirmed us in the opinion that it was never the intention of the War Damage Commission to retreat from this determination."

D In my judgment, the conclusions of the tribunal, which I have just read, are fully and amply confirmed and justified by the facts as we now know them to be.

E In that state of affairs, what is the answer to the question which I have earlier posed? * As a matter of common sense, I have no doubt at all that the right answer is that the appropriate payment at the relevant date, in the light of all that had occurred, would have been a cost of works payment. That is what the War Damage Commission had said; they had said it pursuant to a Treasury direction, and they had allowed the claimants to act on what they had been told to their own detriment. The same conclusion would, I think, be plainly in accordance with justice. For at the date of the notice to treat the situation of the claimants was that they entertained these negotiations with the War Damage Commission and, in collaboration with the commission, had caused to be prepared plans for the reconstruction and had submitted them for acceptance—and, indeed, the plan had been virtually accepted by the War Damage Commission. I have already referred to the circumstance that the reference in s. 53 (1) of the Town and Country Planning Act, 1947, to the Treasury direction, although it is not a reference to the Treasury direction with which we are concerned, indicates that the section was intended not to be unfavourable to the property owner. If I am right in my view of the common sense and of the justice of the case, then, in my judgment, the answer as a matter of construction ought to be in line with justice and common sense unless the language of the statute prohibits such a conclusion. In my judgment, it does not prohibit such a conclusion.

G The argument for the local authority, in the last analysis, rests, as counsel put it, on the view that the question which type of payment, cost of works or value, would be appropriate within the meaning of s. 53 (1) of the Act of 1947 depends on what he called the statutory test to be found, and found exclusively, in s. 7 of the Act of 1943. I do not take that view. It seems to me that, if Parliament had intended that the matter should be determined by reference only to s. 7, it would have been perfectly simple so to have stated. So far from doing so, Parliament has, by the express interpolation of a reference to s. 20 of the War Damage Act, 1943, indicated that s. 7 of that Act is not the only matter to which reference must be made. It is true that in one sense of the term a cost of works payment was not appropriate in this case because the work had not been done; but that is true in every case where a cost of works payment has to be made. It is, in fact, never made until the work is done.

I Reliance was placed, naturally enough, on the exact language of s. 20 (3) (b) of the War Damage Act, 1943, which I have already read†: "where war damage in respect of which a value payment would otherwise be appropriate *is made*

* See p. 757, letter H, ante.

† See p. 758, letter F, ante.

good", then—and great stress is laid on this—but not before then does the power arise to make a cost of works payment. My first answer to that point is that it is strictly true of all cases of cost of works payments that they never are proper to be made until the damage has been made good. I rely also, however, on the words "would otherwise be appropriate", which indicate that at, and immediately before, the time of the making good, when the cost of works payment would fall to be made, some other payment, namely, a value payment, *would otherwise be appropriate*. Put the other way round, the argument of counsel for the local authority would be a great deal stronger if s. 20 (3) (b) had read: "Where war damage in respect of which a value payment *is* appropriate is made good". I think that the language chosen shows that the appropriateness is to be determined not by reference exclusively to the question whether or not the damage in fact has been made good at the time to which attention has to be directed.

I have already made the point that s. 53 (1) of the Act of 1947, by its reference to s. 20 (2) (b) of the Act of 1943, shows that the test which s. 53 requires to be made is not one exclusively referable to s. 7, but must have taken into account the ordinary practical common-sense effect in particular cases of Treasury directions. I add to that consideration this: there can be no doubt at all, as counsel for the War Damage Commission pointed out to us, that the War Damage Act, 1943, contemplated that the commission would make determinations on which the parties concerned would act and alter their position before the actual moment arose when one form of payment or another fell to be made. I need not take time by referring to all the sections to which counsel alluded, but I give one example which he took from s. 14. That is the section which deals with payment made where partially damaged land is compulsorily acquired, and sub-s. (1) reads:

"Where the appropriate payment in respect of war damage to a hereditament would apart from this provision be a payment of costs of works, if land constituting or forming part of the hereditament . . . is acquired compulsorily . . . then, notwithstanding any previous determination of the kind of payment to be made in respect of the damage to the hereditament . . ."

certain consequences will follow. I think that it is plain to demonstration that the War Damage Act, 1943, and its provisions for making war damage payments would not in practice be workable unless, at some stage previous to the actual date when payment can be called for, an effective determination has been made by the War Damage Commission. I think that assumption underlies s. 53 (1) of the Act of 1947, and on the facts of this case, when regard is had to the Treasury direction and all the other matters to which I have referred, I can come to no other conclusion than that the payment which the War Damage Commission would properly have made, that is to say, the payment which would have been the appropriate payment, had it not been for the compulsory acquisition, would have been a cost of works payment. For those reasons I am of the opinion that the Lands Tribunal were right on this matter, and I would dismiss this appeal.

The result is that it is necessary for this court now to proceed to a decision on the second question. The facts of this case are of a somewhat special kind. It appears that the former edifice on 37, Porchester Terrace had been erected in a style which deferred to the so-called Victorian preference for all kinds of embellishment, a style which is now aesthetically regarded as outmoded; and, accordingly, negotiations by correspondence took place between the War Damage Commission and the claimants with a view to substituting in the new building a small reduction in content and also a style which would be considerably simpler and would, therefore, be appreciably less costly, but, having regard to changed tastes and so forth, would have a greater value in the market. So much is clearly

A demonstrated by a short reference to two of the letters. Sir Thomas Bennett, who was acting as architect for the claimants, wrote on June 13, 1945, to the regional technical adviser of the War Damage Commission:

B “We confirm Mr. Bennett’s interview . . . in which the following arrangement was accepted for the rebuilding of Irvine Court, Paddington:
1. The War Damage Commission has issued a cost of works authority [and the number is given] dated May 4, 1945.”

That is a reference to Val. 4, although the effect of it is perhaps somewhat euphemistically stated. The writer goes on to say: “2. The buildings which were damaged have been accepted equal to post 1914 buildings”. The writer then states what the original building consisted of, and says:

C “4. The estimated cost given by Messrs. Gardiner & Theobald for rebuilding [that is, restoring this former edifice] on a cost of works basis on 1939 prices is £56,300.”

In para. 5 he states of what the new building will consist and that it is estimated to cost £49,000, and para. 6 reads:

D “We confirm that you have accepted rebuilding on the lines indicated in para. 5, as the most economical method of replacing the destroyed property.”

I observe that the saving is £7,300. The regional manager, in his reply of Dec. 5, clearly accepted that view:

E “Your proposals for the rebuilding of the above property have now been considered, and it is agreed that the scheme set out in the details provided by Messrs. Gardiner & Theobald can be accepted as making good with alterations and additions.”

F That last formula is an oblique reference to s. 8 of the War Damage Act, 1943, to which I shall presently refer. The letter goes on:

G “It is further considered that the cost of rebuilding the blocks of flats in modern construction and design on the site . . . in accordance with the drawings and brief specifications submitted, would be within the permissible amount, and the commission will in due course be prepared to consider detailed proposals . . .”

The letter then says that in view of the size of the contract the rebuilding should be put out to competitive tender.

H The result of those letters, which were subsequently acted on, makes it plain that I can now somewhat expand what I have already said in my answer to the question raised in the first appeal as follows, namely, that at the relevant date the payment which would have been made, the payment which it was proper to make and which was appropriate to be made, was the sum of £49,000, being the sum which would have been paid, at 1939 price levels, for the making good of the damage, not by way of exact restoration of the Victorian building, but by way of substituting a modern, more economical building. The significant feature of the case, however, is that such a modern building in the market, although it cost less, would be worth a good deal more than the building which it would have replaced, the former edifice. The issue between the parties is this: Is the value which, under s. 53 (1) (a) of the Act of 1947, the claimants are now entitled to receive from the local authority the present market value, ascertained in accordance with the Act, which this building would have had if the damage had been made good in accordance with the proposals in the letter which I have read?

Making good the damage in a way which modifies the original design is within the terms and contemplation of s. 8 of the War Damage Act, 1943. Section 8 (2) reads: A

“ If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof . . . ” B

There follows a proviso which has come into play in this case:

“ Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated.” C

There is then a definition of the words “ permissible amount ” which I need not read, but which will recall what was stated in the regional manager's letter. If the matter had stood there alone it would, to my mind, have not been open to reasonable doubt that in this case the formula in s. 53 (1) (a) of the Town and Country Planning Act, 1947, “ if the whole of the damage had been made good ”, would mean “ had been made good in the way which was agreed by the omission of certain of the former embellishments ”. The matter does not, however, rest solely on s. 8 (2). Section 8 (3) goes on to provide: D

“ If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount.” E

The effect of that sub-section is to comprehend the case where the owner desires, when rebuilding, to add considerable additions to what was there before; for example, if he proposes, in place of a building of three stories, to build a new one of five or six. In such a case the obligations of the War Damage Commission do not include payment to him in respect of these additions which he may wish to make on his own initiative. In other words, the obligation of the War Damage Commission is limited, to put it simply, to so much of the new building as, so to speak, represents the old building. The effect of s. 8 (3), however, is to create the difficulty that the phrase “ make good ” clearly, in the context, includes the building of something additional, and substantially additional, to what was there before. I agree with counsel for the local authority that the words “ had been made good ” are not technical terms, and they are nowhere defined as technical terms in the Town and Country Planning Act, 1947. On the other hand, s. 53 (1) of the Act of 1947 was obviously drawn by reference to the War Damage Act, 1943, because that Act was expressly referred to in the sub-section, and Parliament must, therefore, be taken, in framing this sub-section, to have had in mind the provision as to making good, inter alia, in s. 8 of the Act of 1943. F
G
H

In my judgment, it would be quite impossible and manifestly an unjust conclusion to suggest that, in a case in which before the compulsory purchase, before the notice to treat, an owner had intended to make good by erecting a palace in place of what had formerly been a relatively small house, the value which the acquiring authority had to pay would cover the value of the palace which would have been erected. If I am so far right, is one, therefore, forced back to construe the words “ had been made good ” as equivalent to “ had been reinstated ”, that is, put back in the form which the building formerly had ? For my part, I should be against such a conclusion unless I were compelled to that view by the terms of the Act. As a matter of common sense, it seems to me that the making good to which s. 53 (1) of the Act of 1947 refers is the making good for which the cost of works payment, ex hypothesi, would have been made. I

A That, I think, follows from the form of the sub-section itself which, as a matter of common sense, should mean that the making good of the damage means the doing of the works for which the cost of works payment would have been properly, that is appropriately, made. I think also that the justice of the case demands the same conclusion. Had it not been for the compulsory acquisition, the claimants would have been in a position to say on the facts: "We should have
 B got from the War Damage Commission a payment related to a particular reconstruction which had been agreed. We would have then got a property having a particular value". Now that the local authority had quite properly acquired compulsorily the property, the claimants could say: "Prima facie we should be compensated for that which we have lost. Why should we accept a sum based on the supposition that there would have been built on this land something which
 C everybody agrees would never have been built, and which would have been, in modern conditions, something in the nature of a white elephant?"

Am I, therefore, again compelled to fall back on the alternative construction that "made good" is equivalent to "reinstated"? I have come to the conclusion that I am not. I first rely on, and derive some little support from, the language used by the noble Lords in *East End Dwellings Co., Ltd. v. Finsbury Borough Council* (2) ([1951] 2 All E.R. 587). In that case the same sub-section (s. 53 (1) (a) of the Act of 1947) and the same words were under review by the House, but the question was of a quite different kind. Property consisting of flats which were subject to the Rent Restrictions Acts was destroyed by enemy action. The former owners and the War Damage Commission had agreed that a cost of works payment was appropriate, and, apart from the compulsory acquisition by Finsbury Borough Council, there would have been reinstated on the site a new building of the same character and, I assume, in the same form as the old building. Finsbury Borough Council claimed that the flats of which the new building, when erected (if it had been erected), would have consisted would have been subject to the Rent Restrictions Acts. The former owners claimed that the new building would have been a new building, the identity of the old rent-controlled flats would have been lost, and, therefore, the new building (if erected) would have been free from rent controls with a consequent substantial enhancement of the value of the property. The House of Lords was of the opinion that the contention of the former owners was correct, and they based their conclusion mainly on the view which they took of the words which we have now to consider, although we have to consider them for a different purpose and in another context.
 G The argument for Finsbury Borough Council, which all the noble Lords rejected, clearly amounted to this, that the phrase "if the damage had been made good" must be treated as an equivalent to "if the damage had never occurred", for it would only be on that hypothesis that the flats in the new building would have remained subject to the Rent Acts. Thus, to take an example, LORD PORTER, in the leading speech, said ([1951] 2 All E.R. at p. 592):

H "If what had been intended was to give the owner the value of his property as it existed before the war damage was done, the intention would have been easy to express by substituting, in s. 53 (1) (a) of the Act of 1947, the words 'the value which the interest would have had if the damage had not been done' for the words of the Act, viz., 'the value which it would have if the whole of the damage had been made good' . . ."
 I

To the same effect was the language of LORD MORTON OF HENRYTON and of LORD REID. It was put with characteristic lucidity by LORD ASQUITH OF BISHOPSTONE in the same way, when he said (*ibid.*, at p. 599):

"If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact

existed, must inevitably have flowed from or accompanied it . . . As some of my noble and learned friends have pointed out, if Parliament had intended the meaning contended for by the respondents, nothing would have been easier than to provide that the value should be assessed as if no war damage had occurred."

The argument of the local authority in the present case, in effect, is that the words which we are now called on to construe should be read as equivalent for present purposes to "as if the war damage had not occurred"; that is to say, by limiting "had been made good" to a form of reinstatement which again brought into being the exact building which had been there before the war damage occurred. Although the point here is a different one, it would not be right for this court, for another purpose and in another context, to say that those words did mean the very thing which the House of Lords in *East End Dwellings Co., Ltd. v. Finsbury Borough Council* (2) said that they did not. I have, therefore, come to the conclusion that the words "if the . . . damage had been made good" are equivalent to "if the work had been done for which, on the facts of the case as proved, the appropriate cost of works payment would have been made". On the facts of this case there is no doubt what that making good would have been, for all the plans were prepared, and we know exactly how the reconstruction would have taken effect; and there is here no doubt whatever, as I understand, that the building, reconstructed in accordance with the modern plans, would have had a particular value. The value is as easy to ascertain as would be the value of a new building which was an exact replica of the bombed former structure.

In arriving at that conclusion in the present case, however, I wish to make it quite clear also what I am not saying. In my judgment, the *prima facie* effect of these words is in truth a reinstatement. That is *prima facie* the proper test and will apply in all cases unless it is shown that, as a result of negotiations or whatever it may be, the proviso to s. 8 (2) of the War Damage Act, 1943, has in fact operated, so that the work which will be done is a specific type of rebuilding and so that it can be said: "Had it not been for the compulsory acquisition, this and no other would have been the work which would have been done and for which payment by way of cost of works of a specific amount would have been made". Any other view would seem to me to be highly speculative and visionary. It would be an impossible task, as the Lands Tribunal pointed out in their earlier case, if, in the absence of any such state of affairs as has been proved to have occurred here, an owner were to say: "We have not got very far with it, but we have got out a series of alternative schemes. All of these would result in splendid modern buildings. They would all have cost no more than the cost of restoration. Any one of them might very well have been agreed with the War Damage Commission and all of them would have had a result that we had a building more valuable than what we should have had if exact reinstatement had been adopted." As was pointed out by the Lands Tribunal, it would be an impossible task for a valuer to decide, among such alternatives, which might have been the favoured conclusion and what might have emerged or arisen on the ashes of the old building, and what would have been its value.

My conclusion in this case by no means invalidates the conclusion of the Lands Tribunal in their earlier decisions which they were expressly following here. In the present case, in my judgment, a very special state of facts emerges; for it has been proved beyond a peradventure that, at the relevant date, that which would have happened by way of making good would have been a specific kind of definite reconstruction for which the proper cost of works payment would have been £X. I think, therefore, that the claimants are entitled to say that the local authority are bound to pay to them, the premise being found in the claimants' favour, the value which the building would have had if the damage had been made good. I think, therefore, on this point that the appeal succeeds.

A BIRKETT, L.J.: Two points emerge in this case and they have been clearly stated by LORD EVERSHED, M.R. The first question might be put in this way: What is the appropriate payment to be made by the War Damage Commission in the special circumstances of this case? The answer to that question, I think without doubt, is "a cost of works payment", and I do not think that it could be put better than it has been put in para. 13 of the Case

B Stated:

"From the evidence which was adduced before us we had no doubt whatever that the War Damage Commission intended to treat the said property on the footing of what is known as a cost of works payment, and the evidence further confirmed us in the opinion that it was never the intention of the War Damage Commission to retreat from this determination."

C In March, 1945 (which is more than five years before the date of the notice to treat) the claimants produced plans of the property to the War Damage Commission and satisfied the commission (as the correspondence and the documents prove) that the building was of that kind which fell within the class of case in which the commission had been directed by the Treasury, under the provisions of s. 20 (1) of the War Damage Act, 1943, to exercise the powers conferred on them by s. 20 (3) (b). LORD EVERSHED, M.R., has referred to the Treasury direction and to the decision of the War Damage Commission. The question, therefore, resolves itself, in my judgment, into the plain and simple question: On May 9, 1950 (the date of the notice to treat), in all the circumstances of this case and having regard to its history, what was the appropriate payment to be made under the War Damage Act, 1943, apart from the compulsory purchase by the local authority?

E The issue has been a little complicated by a somewhat unfortunate matter. A document called Val. 4, of May 4, 1945, had been sent to the claimants, and there it was stated that the war damage did not involve total loss as defined in the War Damage Act, 1943. As a matter of fact, the damage to the property had been such that the site had been cleared. It was stated in para. 2 of that document:

"... the commission will in due course pay a claim for the reasonable cost of making good the war damage to this property (a cost of works payment) after the works have been carried out."

G The document then went on to say that the commission "can only pay a cost of works payment if the damage is in fact made good". The Lands Tribunal were quite clearly of the opinion, which they set out in their careful Case Stated, that that had been a mistake on the part of the War Damage Commission which the commission had done their utmost to put right and which had not really misled anyone. Without troubling further about this matter, I think that, on the first point, I can say that I, like the Lands Tribunal, entertain no manner of doubt that the answer to the question: What, on May 9, 1950, would have been the appropriate payment under the War Damage Act, 1943, apart from the compulsory purchase? is clearly "a cost of works payment".

H The second question which arises, namely, what, in those circumstances, is the amount of the compensation payable by the local authority under s. 53 (1) of the Town and Country Planning Act, 1947, raised many more difficulties. The Lands Tribunal decided that the words "had been made good", in s. 53 (1) (a), meant identical reinstatement. Counsel for the local authority submitted that the court ought to keep in mind, not merely the case with which we were now dealing, but also the effect on all sorts of other cases which might arise in the future, that it was a safe, salutary and wise thing to have what he called a fixed yardstick for assessing the moneys to be paid, and that, therefore, it was safe to hold fast to the rather rigid view that the words "if the whole damage had been made good" meant identical reinstatement and did not permit

additions or alterations, because otherwise uncertainties would be bound to arise. A
One has considerable sympathy with counsel in regard to that submission, but,
in my view, on this second point the decision which has been announced by
LORD EVERSHEDE, M.R., is in accordance with the very special facts of this case
and with a proper interpretation of the statutes, having regard to those facts,
and, most important of all, the decision is just and equitable.

My Lord has referred to the letters which passed on this matter between the B
claimants and the War Damage Commission, notably the letter of June 13, 1945,
where actual figures were given showing a saving of £7,300 by omissions, and the
answer of the War Damage Commission that "... the [claimants'] scheme [for
rebuilding] can be accepted as making good with alterations and additions"
and that "... the cost of rebuilding [in accordance with the claimants' scheme]
would be within the permissible amount". I regard those two letters as of great C
importance on the special facts of this case. Here it is quite clear that the
omissions, the cost of which amounted to so large a sum, were the subject of
special agreement.

Section 53 (1) (a) of the Act of 1947 reads:

"the value of the interest for the purposes of the compensation payable in D
respect of the compulsory purchase shall, subject to the provisions of this
section, be taken to be the value which it would have if the whole of the
damage had been made good before the date of the notice to treat."

With regard to the interpretation of the words "made good", as my Lord has
already pointed out, in no case is the payment made, in practice, until the damage
has been made good (which is necessarily at some considerable distance of time E
after the notice to treat). The practice is that the plans are submitted and agree-
ment is come to, the work is then done, and ultimately the payment is made. In
this case the payment which would have been made, had there been no interven-
tion by the local authority, would have been the figure which was agreed in the
letters which LORD EVERSHEDE, M.R., read, namely, £49,000. That clearly was a
making good, but not according to the submission of counsel for the local F
authority. It is not an identical reinstatement of the old Victorian building.
It was felt that it was neither desirable nor necessary to reproduce certain
features, and the plans which were submitted were for a more modern building,
more in accord with modern conditions and, indeed, making a much more
efficient and a much more valuable building, and effecting a saving of some £7,300
in building it.

Section 8 (2) of the War Damage Act, 1943, reads: G

"If the war damage is made good by reinstating the hereditament in
the form in which it existed immediately before the occurrence of the
damage, the amount of the payment shall be an amount equal to the proper
cost of the works executed for the making good thereof . . ."

Then there is an important proviso: H

"Provided that if the reinstatement of any part of the hereditament
could have been omitted without detracting from the value of the heredita-
ment, or the omission thereof would have increased its value, the amount
of the payment shall be reduced to what it would have been if that part
had not been reinstated."

I
Section 8 (3) deals with alterations or additions to the hereditament. I think
that in this case there was a making good for which the cost of works payment
which had been agreed with the War Damage Commission would have been the
appropriate payment, and that if the work had been done, on the special facts
of this case as we now know them, then that appropriate cost of works payment
would have been made. I think that it is important to observe that in this
case there are special facts, and those special facts must be considered. There

A is here a specific reinstatement with the omissions which have been agreed between the claimants and the War Damage Commission, and I think, for my own part, that is the basis on which the compensation should be assessed. I agree with the judgment delivered by LORD EVERSHED, M.R., and with the reasons given by him.

B **ROMER, L.J.:** I also agree, and there is not much that I desire to add. As between the War Damage Commission and the claimants, there can be no question but that the commission had determined, previously to the local authority's notice to treat, that the appropriate payment to be made in respect of the war damage to Irvine Court was a cost of works payment. This was found as a fact in para. 13 of the Case Stated, and is manifest from the evidence as a whole.

C The ground of the commission's determination was wrongly stated in Val. 4 and Val. 8, and it was there based, as it ordinarily would be based, on the view that the war damage did not involve a total loss. In fact, there had, undoubtedly, been a total loss and the true ground of the commission's determination was the application to the property of the relevant Treasury direction under s. 20 (3) (b) of the War Damage Act, 1943. But the mis-statement by the commission, which **D** has been fully and long since cleared up, as to the ground of the determination is of no great importance if the determination had, in fact, been validly arrived at. As to this, the local authority contend that s. 20 (3) (b) does not apply except in cases where war damage has been made good, and as the damage had not been made good in the present case the commission could not validly determine to make a cost of works payment under that sub-section. I cannot accept that **E** suggestion. It seems to me that it is implicit in the sub-section itself, and is apparent also from s. 13 and s. 14 of the Act of 1943, that the War Damage Commission have the right to determine that a case is one for a cost of works payment even though none of the work of repair has been done. As the commission did so in the present case, that became, and was at the date of the notice to treat, the appropriate payment for the purpose of s. 53 of the Town and **F** Country Planning Act, 1947, and I am, accordingly, in agreement with the decision at which the Lands Tribunal arrived on the first appeal.

The question raised in the second appeal seems to me to be a more difficult one. One form of "making good" which is visualised by s. 8 (2) of the Act of 1943 is by reinstatement of a hereditament in the form in which it existed **G** immediately before the occurrence of the damage, but excepting any part whereof the reinstatement could be "omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value". In the present case certain omissions were made in the plans because they would result in the hereditament being more valuable than would have been the case had the premises been restored exactly to their previous form. The War Damage **H** Commission agreed that the work should be done in accordance with the plans, which is not surprising inasmuch as that form of reinstatement would be considerably cheaper than the precise restoration of the building to its previous condition. The question is whether a making good in accordance with the plans can be regarded as a "making good" in the sense in which the phrase is used in s. 53 of the Act of 1947, or whether an identical reinstatement of a building in **I** its original form and nothing else is envisaged by the section.

Counsel for the local authority put the submission on behalf of his clients, I thought, in an attractive way when he said that the task of a valuer who has to make the requisite valuation for the purposes of s. 53 is not a difficult one if all that he has to do is to imagine the precise restoration of the building which has been damaged. The plans of the building would be available to him and he would merely exercise his professional experience with regard to the value of a hereditament which was built up in exact accord with its original condition. It would, however, be a matter of difficulty, if not impossibility, for him to be asked

to allow his imagination to range over a large number of suggested alterations and additions to the building resulting in what might be, in effect, a different kind of building altogether. Accordingly, when one finds, as counsel said that one did in s. 8 of the Act of 1943, that the phrase "made good" is used in two different senses, namely, restoration alone and restoration with additions and alterations, and the court has to choose which sense to attribute to the phrase in s. 53 of the Act of 1947, the relative ease of the surveyor's function if the building is restored to its exact form, contrasted with the difficulties which he would have if the second suggestion were adopted, affords the key to the sense in which the phrase is used in s. 53; and, accordingly, we should hold that where the phrase is used in s. 53 of the Act of 1947 it means precise restoration as distinct from restoration with alterations and additions.

That way of putting it is an attractive presentation of the position, and, for my part, I would hesitate long to hold that an intended reinstatement with omissions which had not been approved by the War Damage Commission or a reinstatement of the kind contemplated by s. 8 (3) of the Act of 1943, namely, reinstatement with alterations and additions, would constitute a "making good" for the purpose of s. 53 of the Act of 1947. It seems to me that in either of these cases the only relevant consideration would be the value which the hereditament would have had at the date of the notice to treat if it had been restored exactly to its previous form. I think on the whole, however, that it would be carrying the argument too far to say that a proposed reinstatement involving omissions with which the War Damage Commission have expressly agreed departed from a "making good" within the meaning of s. 53 of the Act of 1947. Such a rigidity of treatment of the relevant language of the section is tantamount to saying that it means, in effect, and in all cases, the value which the hereditament would have if none of the damage had occurred, a view which was not found acceptable by the House of Lords in *East End Dwellings Co., Ltd. v. Finsbury Borough Council* (2) ([1951] 2 All E.R. 587).

Accordingly, although in my judgment the approach to s. 53 for which counsel for the local authority contended is the right one in general, it should not be adopted in the present case, which I should imagine is an exceptional one; and I prefer the view that in this case the value of Irvine Court should be assessed by reference to what it would have been worth had it been reinstated in accordance with the approved plans. I, accordingly, agree that the first appeal should be dismissed and that the second appeal should be allowed.

Appeal by Paddington Borough Council dismissed. Appeal by Associated London Properties, Ltd. allowed. Leave to appeal to the House of Lords granted to Paddington Borough Council in respect of the appeal by Associated London Properties, Ltd.

Solicitors: *Town clerk*, Paddington (for the local authority); *Leslie Nathanson & Co.* (for the claimants); *Treasury Solicitor* (for the War Damage Commission).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

M. v. M. (otherwise B.)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), November 1, 2, 1956.]

Nullity—Incapacity of wife—Practical impossibility of consummation—Failure to undergo operation or treatment Offer at trial to undergo operation—Genuineness of offer.

B

The parties went through a ceremony of marriage in 1945. The marriage was not consummated in spite of attempts to do so. In 1953 the petitioner left the respondent who shortly afterwards attended a hospital where she was told that she required an operation. The respondent did not, however, have any operation or undergo any treatment.

C

The petitioner now sought a decree of nullity on the ground of the respondent's incapacity. The medical evidence at the trial showed that the respondent was suffering from vaginismus which might be cured by an operation followed by psychiatric or psychological treatment. It was then suggested by the respondent that before any decree was pronounced she should have an opportunity to undergo the operation.

D

Held: the petitioner would be granted a decree of nullity since on the evidence the respondent was incapable of consummating the marriage (*G—v. G—* (1871), L.R. 2 P. & D. 287, applied); an adjournment to enable the wife to undergo an operation would not be granted, the respondent having known since 1953 of the defects and that an operation would be required and having taken no step to undergo treatment (*S. v. S. (otherwise C.)*, [1954] 3 All E.R. 736, distinguished).

E

[As to the legal position where there is a curable defect causing impotence, see 12 HALSBURY'S LAWS (3rd Edn.) 228, para. 426, note (c); and for cases on the subject of impotence on account of physical condition, see 27 DIGEST (Repl.) 270, 2161, 2162; and for cases on the consequence of defects being curable, see *ibid.*, 274, 2192-2197.]

F

Cases referred to:

(1) *G—v. G—*, (1871), L.R. 2 P. & D. 287; 40 L.J.P. & M. 83; 25 L.T. 510; 27 Digest (Repl.) 270, 2162.

(2) *S. v. S. (otherwise C.)*, [1954] 3 All E.R. 736; 3rd Digest Supp.

Petition.

G

The petitioner, G.H.M., sought a decree of nullity.

The parties went through a ceremony of marriage in May, 1945, the petitioner being then eighteen years of age and the respondent about eleven years older. Attempts were frequently made to consummate the marriage but without success; in about 1950 at the petitioner's suggestion the respondent saw a doctor at Hove where they were then living. The position did not improve and in 1953 the petitioner left the respondent. The parties met thereafter but the petitioner refused to return to the respondent and in July, 1954, he presented a petition for nullity in which he set out the ceremony of marriage in May, 1945, and alleged, *inter alia*:

H

"7. That the said marriage has never been consummated. 8. That such non-consummation is owing to the wilful refusal of the respondent to consummate the said marriage. Alternatively 9. That such non-consummation is owing to the incapacity of the respondent which existed at the date of the said marriage and which still subsists."

I

By her answer the respondent alleged that the alleged marriage was valid and subsisting and continued:

"2. She denies that she has refused to consummate the marriage wilfully or at all. 3. She denies that she is incapable of consummating the said marriage."

The respondent further alleged that the petitioner had committed adultery and been guilty of cruelty and prayed for a decree of divorce. By his reply the petitioner made no admissions as to the allegation of adultery and denied the alleged cruelty. A

The suit came before KARMINSKI, J., who dealt first with the issue of nullity. The petitioner did not pursue his allegation that the respondent had wilfully refused to consummate the marriage, and the case therefore turned on whether or not the respondent was incapable of consummating the marriage. B

J. A. P. Hazel for the petitioner.

L. Pearl for the respondent.

KARMINSKI, J., stated the facts and continued: The medical evidence in the present case is of great importance. One of the medical inspectors of the court, Mr. Frank Cook, was called. He, together with Dr. Chamberlain, another medical inspector of the court, had examined the respondent and the petitioner in April, 1956. So far as the petitioner was concerned he was found to be a normal, healthy man of the usual development so far as the genital organs were concerned, and apparently capable. The respondent was described as a small woman, placid and co-operative on examination; the hymen was intact; the vaginal orifice barely admitted one finger. C D

Mr. Cook, who has great experience in these matters, had no doubt at all in declaring her to be definitely a virgin. He found that there was no evidence of physical impediment to consummation, but he also found that no penetration had taken place. He emphasised that the respondent was entirely co-operative and showed no reluctance, as some women do at examination of this kind; she was no more tender under examination than many virgins are. Mr. Cook was quite willing to accept that she genuinely believed that she had had sexual intercourse; but he himself was quite certain that sexual intercourse had never taken place. He thought, too, that there was a possibility in the present case of vaginismus, a very serious condition in a woman. Mr. Cook said that though he could not exclude the possibility of vaginismus in this particular case he could not say whether or not it existed because he was not able to examine as far as that. He expressed the view that a mere operation of dilatation would not of itself cure vaginismus if it had existed. That examination by Mr. Cook and Dr. Chamberlain took place in April, 1956. E F

The respondent had consulted a doctor, who was not called before me, at the Middlesex Hospital in May, 1953—I think soon after she and the petitioner parted. Dr. Hamilton, who examined the respondent on Sept. 14, 1956, was good enough to bring his predecessor's notes, and counsel for the petitioner wisely agreed to my reading these notes. [HIS LORDSHIP referred to Dr. Hamilton's examination of the respondent and to certain discrepancies between the notes of the respondent's examination in May, 1953, and the evidence of Mr. Cook. HIS LORDSHIP continued:] Dr. Hamilton found her to be a very tense woman; he thought, too, that it was very unlikely there had been any successful sexual intercourse with her in view of what he found. He was, however, much more definite than Mr. Cook on the question of vaginismus; he came to the conclusion that the respondent had vaginismus. He was asked as to the treatment which might be applied to this particular case, and he took the view that dilatation would have to be followed up by psychiatric or psychological treatment; when that had been done he said there was a fair chance—by which he meant, I think, a possible chance—of success. Unfortunately the possibility of psychological treatment following dilatation was not put to Mr. Cook, so I do not know what his answer might have been, but Mr. Cook took the view that dilatation of itself would not help in this particular case. G H I

In fact the respondent has never put the matter to the test. It is suggested that there is still time, and that as there is a possibility of a cure I ought not

A in the present case to pronounce a decree on the ground that she was incapable if there is a reasonable prospect of her incapacity being cured. I have to apply my mind to the history of the case. I think that the respondent knew very well before the separation that the petitioner was at any rate not satisfied with the sexual intercourse between them, and I have not the slightest doubt, having
B heard the medical evidence, that the husband had grave cause for his anxieties, if that word is suitable, and for his complaints in that regard. The respondent was examined by a doctor in the Middlesex Hospital in 1953 and she accepted that she was told that some sort of operation was required because, as she told me, she was so small. But nothing at all was done by her; no effort was made on her part to undergo any treatment although it is not suggested that the operation of dilatation is a serious one or one accompanied by any real difficulty or danger
C to her life or health. I think that her suggestion of undergoing an operation was very much of an after-thought. It was not, as I have said, even put to Mr. Cook so that with his wealth of experience in these matters he might at least have expressed a view to the court. I think that it is an after-thought on the respondent's part and, I am afraid, not a very genuine one.

I have to deal with the matter, as LORD PENZANCE pointed out in *G — v. G —* (1) (1871), L.R. 2 P. & D. 287, by looking at the practical aspect. If the marriage cannot be consummated, as LORD PENZANCE explained, the basis of the interference of the court is not the structural defect but the impracticability of consummation. He said (*ibid.*, at p. 291) that the question was a practical one, and he asked himself this question:

E “ . . . I cannot help asking myself what is the husband to do in the event of his being obliged to return to cohabitation in order to effect the consummation of the marriage.”

It is right that I should approach the matter from the practical point of view. As I have said, the respondent knew about the defects from the medical man as far back as 1953, if indeed she did not know something of it from the doctor,
F whom I believe she saw in Hove much earlier. She has taken absolutely no step.

It is true that in *S. v. S. (otherwise C.)* (2) ([1954] 3 All E.R. 736) the hearing was adjourned to enable the wife to undergo the small operation of hymenectomy: but that was a case where on the medical evidence it was clear that the only barrier to true consummation was an unduly thick and resistant hymen. In the present case, I have clear evidence, as I think, of vaginismus. The wife heard something about her condition but took no step. I apply the practical test: I find
G that the respondent is incapable of sexual intercourse with the petitioner. In the result, therefore, there will be a decree nisi of nullity on the prayer in the petition, on the ground of incapacity. The prayer in the answer will be rejected.

Decree nisi.

Solicitors: *Barnett & Barnett* (for the petitioner); *Gerald Samuels & Shine* (for the respondent).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

GATEHOUSE v. VISE (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Danckwerts, J.), October 25, 26, 30, November 8, 1956.]

Income Tax—Person assessable—“House . . . divided into distinct properties”
 —“House or building let in different apartments or tenements”—*Flats in single building—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. A, No. VII, r. 12, r. 8 (c).*

Premises which were found to be a single house or building comprised four garages on the ground floor and five flats on the first floor, access to the flats being by two common staircases and along a balcony on to which the front door of each flat opened. All five flats were in lease to different occupying tenants. For a twenty-two years' lease of one of the flats, the tenant paid a premium of £2,750 and rent of £1 per annum. The landlords of the premises were responsible for the repair of the balcony and staircases and the maintenance of three wall lights which lighted them. The tenant of the flat was assessed to income tax for 1951-52 under r. 12 of No. VII of Sch. A to the Income Tax Act, 1918, in the sum of £201, as being the occupier of part of a “house . . . divided into distinct properties, and occupied by distinct owners or their respective tenants”. On appeal the tenant contended that the assessment should have been on the landlords under r. 8 of No. VII on the ground that premises were a “house or building let in different apartments or tenements, and occupied by two or more persons severally” within para. (c) of that rule.

Held: the assessment must be discharged, since the landlords ought to have been assessed under r. 8 (c) of No. VII of Sch. A.

A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd. ((1876), 1 Ex.D. 469) applied.

Appeal allowed.

[As to the assessment of tenement buildings and flats under Sch. A to the Income Tax Act, 1918, see 17 HALSBURY'S LAWS (2nd Edn.) 39, paras. 67, 68; and for cases on the subject, see DIGEST Supp.]

For r. 8 and r. 12 of No. VII of Sch. A, see 12 HALSBURY'S STATUTES (2nd Edn.) 137 and 138; and for the corresponding provisions in the Income Tax Act, 1952, s. 109 (1) (5) and s. 113, see 31 HALSBURY'S STATUTES (2nd Edn.) 102-103, 105.]

Cases referred to:

- (1) *A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.*, (1875), L.R. 10 Exch. 305; *affd.*, (1876), 1 Ex.D. 469.
- (2) *Grant v. Langston*, [1900] A.C. 383.
- (3) *Farmer v. Cotton's Trustees*, [1915] A.C. 922.
- (4) *London & Westminster Bank, Ltd. v. Smith*, (1902), 87 L.T. 244; 4 Tax Cas. 503; 38 Digest 658, 21.

Case Stated.

The taxpayer appealed against an assessment for 1951-52 made on him as occupier of No. 3, Kinnerton Yard, Knightsbridge, London, S.W.1, under Sch. A to the Income Tax Act, 1918, in the sum of £201. There were also appeals in respect of similar assessments made on the occupiers of Nos. 1, 2, 4 and 5, Kinnerton Yard, which it was agreed should be governed by the decision in respect of No. 3.

The property known as Kinnerton Yard was built to the order of one person. The ground floor comprised four garages. The first floor comprised five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There was no means of communication through the garages to the first floor. The only means of access to the flats was by two common staircases and by proceeding along the balcony on

- A to which the front door of each flat opened. It was impossible to distinguish from the outside where one flat began and another ended. The roof was a flat slab covering all the flats and there was nothing to tell where the roof of one flat ended and that of another began. To light the staircases and balcony there were three wall lights which were maintained by the landlords, who were responsible for the repair of the balcony and staircases. The entrance to the
- B garages and flats was by a common approach from Kinnerton Street through a narrow opening between two buildings into Kinnerton Yard, which was covered with tarmac. The yard sloped down from all sides to a central drain for car-washing.

- The premises Nos. 1-5, Kinnerton Yard, together with certain other premises, were comprised in a lease dated July 31, 1935, from the Duke of Westminster
- C to Mr. Charles Henry Ford for 37½ years from June 24, 1935. On Mar. 25, 1938, the lease was assigned by Mr. Ford's personal representatives to Mr. A. H. Wright and Mr. H. V. Maltby, who, by a contract of sale dated July 31, 1939, contracted to sell the leasehold premises and other leasehold properties to Kinnerton Estate Co., Ltd., the landlords at the relevant times for the purposes of the appeal. The landlords were at all such times entitled to possession of the
- D properties and to receipt of the rents and profits therefrom and could have called for an assignment of the premises to them. The premises were destroyed by enemy action in May, 1941, and were rebuilt to new specifications in 1950-51.

- The garages, with the passageway from Kinnerton Street and the yard, were let by Mr. Maltby for twenty-one years on May 9, 1952, and, on the surrender of that lease, to Kinnerton Garage, Ltd., for 19½ years (less three days) from
- E Sept. 29, 1953, in each case at a rent of £1,250 per annum. For 1952-53 and 1953-54 the garages and 31, Kinnerton Street were included in one Sch. A assessment in the sum of £1,312 gross, £1,090 net, made on the landlords as owner-occupiers, the inspector of taxes not being aware of the new lease to Kinnerton Garage, Ltd. For rating purposes the garages were assessed as follows: Nos. 1 and 2 together £155 gross, No. 3 £167 gross, No. 4 £75 gross. The
- F flats were assessed for rating purposes at £80, £65, £80, £65 and £60 gross value respectively.

- All the five flats in Kinnerton Yard were leased for terms of 22½ years (less three days) from Dec. 25, 1950, to tenants at rents of £1 per annum and fire insurance premium, the tenant in each case paying a premium of £2,500 (Nos. 2, 4 and 5) or £2,750 (Nos. 1 and 3). It was agreed that the taxpayer was in
- G occupation of No. 3, Kinnerton Yard, and paid the rent therefor and for the purposes of the appeal should be regarded and treated as if he had been the lessee named in the lease (instead of his mother). It was also agreed for the same purpose that the persons named in the lease as landlords had entered into the lease on behalf of Kinnerton Estate Co., Ltd. Under the lease the landlords demised the flat, comprising one reception room, three bedrooms, bathroom and
- H kitchen, to the lessee who undertook to pay the rents reserved without any deduction whatsoever, except landlords' property tax, and to do internal repairs. The landlords undertook to keep the exterior of the premises in good and sufficient repair.

- The taxpayer contended that the five flats, Nos. 1, 2, 3, 4 and 5, Kinnerton Yard (or alternatively the flats together with the garages on the ground floor),
- I comprised a building let in different tenements and were at all relevant times occupied by two or more persons severally and consequently that an assessment for 1951-52 in respect of the flats, or of the flats together with the garages, should have been made on the landlords under r. 8 (c) of No. VII of Sch. A to the Income Tax Act, 1918, and that the assessment on the taxpayer should be discharged.

The Crown contended: (i) that each of the flats on the first floor Nos. 1, 2, 3, 4 and 5, Kinnerton Yard, constituted a separate house separately assessable for the purposes of income tax, Sch. A, and the taxpayer was properly assessed as

the occupier of No. 3; (ii) alternatively that, notwithstanding any decision that the flats together constituted a single house or building or formed part of a single house or building: (a) the occupation by the taxpayer of No. 3 at a rent which was less than the rackrent, conferred on him a benefit of part of the annual value of the property, which benefit was chargeable to income tax under the charging provisions of Sch. A as "property" and represented his income for tax purposes; (b) since the remaining tenants possessed similar benefits which were similarly chargeable, the house was divided "into distinct properties, and occupied by distinct owners" within the meaning of the Income Tax Act, 1918, Sch. A, No. VII, r. 12, which in the circumstances excluded the operation of Sch. A, No. VII, r. 8; (c) the taxpayer was, therefore, properly assessed and charged in respect of No. 3, Kinnerton Yard, as occupier.

The commissioners found that No. 3, Kinnerton Yard, was part of a single house or building, but they accepted the alternative contention of the Crown and accordingly confirmed the assessment. The taxpayer appealed.

F. N. Bucher, Q.C., and H. H. Monroe for the taxpayer.

Cyril King, Q.C., and Sir Reginald Hills for the Crown.

Cur. adv. vult.

Nov. 8. **DANCKWERTS, J.**, read the following judgment: This is an appeal by a tenant of a flat, No. 3, Kinnerton Yard, London, S.W.1, against an assessment on him as occupier for the year 1951-52 under Sch. A to the Income Tax Act, 1918, in the sum of £201.

The ground floor of Kinnerton Yard comprises four garages. On the first floor there are five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There is no means of communication through the garages to the first floor. The only means by which access can be obtained to the flats is by one of two common staircases and along a balcony on which the front door of each flat opens. The landlords are responsible for the repair of the balcony and staircases, and the maintenance of three wall lights which light them.

The taxpayer is in occupation of flat No. 3, and it was agreed that he should be treated for the purposes of the case as if he were the lessee named in a lease dated Feb. 20, 1951, by two individuals on behalf of Kinnerton Estate Co., Ltd., to his mother, Mrs. Helen Grace Gatehouse. Under the terms of the said lease the lessee paid the sum of £2,750 and agreed to pay the annual sum of £1 payable on June 24 in each year for a term of twenty-two years and one quarter from Dec. 25, 1950 (less the last three days).

The taxpayer claims that, under the rules relating to Sch. A, the assessment should have been made not on him but on the landlords. The general commissioners upheld the assessment on the taxpayer. The general commissioners found that No. 3, Kinnerton Yard was part of a single house or building, but they accepted the contention of the Crown that the building was a house divided into distinct properties occupied by distinct owners or their respective tenants, so that the assessment in respect of No. 3, Kinnerton Yard was held by the commissioners to have been properly made on the taxpayer.

The taxpayer appeals against this decision of the commissioners. It would not appear to make any appreciable difference to the Crown whether they recover the tax from the taxpayer tenant or from his landlords. The persons really interested to oppose the appeal would appear to be the landlords, who are not parties to these proceedings. I suppose, however, that the Crown regard the matter as being one of principle in some way or other. The matter is of importance to the taxpayer because, if he is assessable in a sum of £201, he cannot deduct it from the rent of £1 payable to his landlords.

In essence, as it seems to me, the case depends on which of two rules in the Rules applicable to Sch. A, No. VII, "Rules as to persons chargeable", applies. These rules are r. 8 which provides:

"The assessment and charge shall be made upon the landlord in respect

- A of . . . (c) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement”;

and r. 12, which provides:

- B “Where a house is divided into distinct properties, and occupied by distinct owners or their respective tenants, such properties shall be separately assessed and charged on the respective occupiers thereof.”

The inspector of taxes has applied r. 12 to the present case, and has assessed the taxpayer tenant, as the occupier of flat No. 3. The commissioners found that No. 3 was part of a single house or building, but accepted the contentions of the Crown as to the application of r. 12, and accordingly confirmed the assessment.

- C For the purposes of the argument before me, it was accepted by both sides that the block of flats, consisting of Nos. 1 to 5, constituted a “house”, so on that matter I understand that the finding of the commissioners is not disputed. But the difficulty of the question that remains may be appreciated, if I say that it appears to me that to an untutored mind either rule might in its language seem to be applicable.

- D Counsel for the two parties, with their precise knowledge and industry, led me through a considerable paper chase, amid the early statutes relating to inhabited house duty and income tax. It was an interesting journey, and I hope they will not think that I am lacking in appreciation, or apprehension, of their arguments, if I say that I do not propose to retrace the same route more than I can help.

- E Shortly, it appears that r. 8 (c) had precursors in the statutes dealing with inhabited house duty (which seems to make decisions on that duty material on the true construction of that rule), but the equivalent of r. 8 (c) is not to be found in the statutes relating to income tax till the Income Tax Act, 1853 (s. 36). On the other hand, the precursors of r. 12 (and of sub-rr. (a) and (b) of r. 8) were to be found in the Income Tax Act, 1842.

- F In 1875 there came before the Court of Exchequer the case of *A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.* (1) ((1875), L.R. 10 Exch. 305). Westminster Chambers consisted of several blocks, and each block was divided into different tenements or suites of rooms which were quite distinct, and had an open door leading on to the common staircase. The street door was locked at night, and there was a resident porter living in his own quarters. The association had power by statute to demise or sell any suite separately, and the suites were let as chambers, offices or residences. The majority of the Court of Exchequer thought that, for the purposes of inhabited house duty the association must be assessed as occupiers of each block treated as one dwelling-house, under a rule which is the equivalent of r. 8 (c); and that the respective tenants of the
- G different suites should not be assessed under another rule, which is the equivalent of r. 12. KELLY, C.B., who dissented, however, thought that the latter was the appropriate rule. In other words, the majority thought that the sets of chambers were let in different tenements and were not distinct properties within the meaning of the other rule.

- H In the Court of Appeal ((1876), 1 Ex.D. 469) SIR GEORGE JESSEL, M.R., LORD COLERIDGE, C.J., and POLLOCK, B., unanimously rejected the view of KELLY, C.B., and affirmed the view of CLEASBY and BRAMWELL, BB., in the court below. SIR GEORGE JESSEL, M.R., said (*ibid.*, at p. 480):

“It is necessary now to read r. 14 [now r. 12]: ‘Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively’. It has been suggested that that rule applied to the present case. But the

point, I think, is very plain indeed—‘different tenements being distinct properties’ . . . What is the meaning of ‘distinct properties’? Here, again, you must apply the same rules of construction. ‘Divided into different tenements in distinct ownerships’, is the primary meaning. Are these distinct ownerships? It is plain they are not, because there is only one landlord and one tenant for each of the tenements; there is a direct letting from the landlord, the owner, to the one tenant below him. If the tenements had been sold to different people, and there had been several demises, it would have been a different thing; there would then have been different landlords, and perhaps intermediate tenants, and I do not say what our decision would have been; but that is not the case here; it is a mere letting; it is not within r. 14, because in no sense can there be distinct properties, there being but one landlord throughout.”

It is interesting to compare the wording of the former r. 14 (on which SIR GEORGE JESSEL was commenting) with the present r. 12. The words of the present rule

“Where a house is divided into distinct properties, and occupied by distinct owners or their respective tenants . . .”

closely resemble the phrases which SIR GEORGE JESSEL used in construing r. 14, which he held did not apply to the blocks of suites or chambers under his consideration.

The criticism of SIR GEORGE JESSEL’S language (in reference to the word “house”), which is to be found in the speech of the EARL OF HALSBURY, L.C., in *Grant v. Langston* (2) ([1900] A.C. 383 at p. 391) does not seem to touch the passage which I have quoted, and the other law Lords merely distinguished the two cases on questions of fact.

In *Farmer v. Cotton’s Trustees* (3) ([1915] A.C. 922) SIR GEORGE JESSEL’S view is repeated by LORD PARKER OF WADDINGTON, who says of the *Westminster Chambers* case (1) (*ibid.*, at p. 936):

“In that case the tenements in question were tenements consisting of more than a single room. They were, however, the property of one owner, and therefore not distinct properties within r. 14 of [the House Tax Act, 1808].”

It is, I think, unnecessary to go through the other cases to which counsel for the taxpayer referred me.

On behalf of the Crown, counsel based his arguments to a large extent on contentions as to the principle of the Income Tax Acts in respect of Sch. A, and referred me to certain cases which he said showed that the tax was intended to fall on the occupier who enjoyed the property in the land as of right. In reply, counsel for the taxpayer suggested that while inhabited house duty was plainly occupational in its nature, Sch. A income tax was more in the nature of a tax on property, referring to the common phrase in leases “landlord’s property tax excepted.”

It is quite true that in s. 1 of the Income Tax Act, 1918, the charge on property is in contrast with the charge on profits or gains, and Sch. A begins by imposing tax

“ . . . in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every 20s. of the annual value thereof.”

The annual value comes in because income tax is a tax not on capital but on income; but it always is rather a discouraging pursuit to endeavour to find consistent principles in the statutes relating to income tax. The rules which I have to construe are found in the group called “Rules as to persons chargeable”, and I think that the only clearly discernible principle may be that of

A enabling the tax to be charged on the largest numbers of persons with the least exertion on the part of the officials entrusted with the duty of collecting the tax. This view finds authority in the observations of LORD HALSBURY, L.C., in *London & Westminster Bank, Ltd. v. Smith* (4) ((1902), 4 Tax Cas. 503 at p. 518).

B It seems to me that the present case is really governed by the *Westminster Chambers* case (1), and the other decisions to which I have been referred. The assessment should have been made on the landlords under r. 8 (c), the words of which fit the case. It has been made under the wrong rule and ought to be discharged, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Alexander Rubens & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

C [Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

D CHURCH COMMISSIONERS FOR ENGLAND v. VE-RI-BEST MANUFACTURING CO., LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), November 8, 1956.]

E Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Repairing covenant—Premises mortgaged by lessee by way of legal charge—Lessee in possession of premises—Notice of breach given to lessee and also to mortgagee—No counter-notice by lessee—Counter-notice by mortgagee—Whether leave of court required by lessors before commencing action against lessee for damages and possession—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (2), (3).

F Mortgage—Lease—Forfeiture for breach of repairing covenant—Whether mortgagee entitled to notice of breach—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (2), (3).

G Certain premises were held by lessees under a lease which was to expire in 1976 and which provided for re-entry by the landlords in the event of a breach of any covenant on the part of the lessees. In 1946 the lessees mortgaged the premises by way of a legal charge to a building society. In June, 1955, the landlords served on the lessees, who were in possession of the premises, a notice under s. 1 (2)* of the Leasehold Property (Repairs) Act, 1938, setting out breaches of the covenant to repair and requiring the lessees to remedy the breaches or to pay a sum of money as compensation. At the same time the landlords served a similar notice on the mortgagees. The lessees did not serve a counter-notice under s. 1 (2), but the mortgagees purported to serve a counter-notice under the sub-section, claiming the benefit of the Act. In an action against the lessees, the landlords claimed damages for breaches of covenant and possession of the premises. The mortgagees were not a party to the action. The lessees contended that, since the mortgagees had served a counter-notice under s. 1 (2) of the Act of 1938, the proceedings were improperly constituted in that they had been commenced without the leave of the court which was required under s. 1 (3).†

I **Held:** the landlords did not require the leave of the court before commencing the action, because the lessees had not served a counter-notice and could not rely on the counter-notice served by the mortgagees, and therefore s. 1 (3) of the Act of 1938 did not avail the lessees in the present case.

Per CURIAM: the landlords, having served notice [under s. 1 (2) of the Leasehold Property (Repairs) Act, 1938] on the lessees were under no

* The terms of the sub-section are printed at pp. 778, 779, post.

† The terms of the sub-section are set out at p. 779, letter B, post.

obligation to serve the notice on the mortgagees (see p. 780, letter A, post).

Egerton v. Jones ([1939] 3 All E.R. 889) applied.

[For the Leasehold Property (Repairs) Act, 1938, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 914.

For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739.]

Cases referred to

- (1) *Grand Junction Co., Ltd. v. Bates*, [1954] 2 All E.R. 385; [1954] 2 Q.B. 160; 3rd Digest Supp.
- (2) *Egerton v. Jones*, [1939] 3 All E.R. 889; [1939] 2 K.B. 702; 108 L.J.K.B. 857; 161 L.T. 205; 31 Digest (Repl.) 545, 6670.

Preliminary Issue.

The plaintiffs were the landlords of premises known as Nos. 1-18, Westminster Mansions, London, of which the defendants were the present tenants under a lease, dated July 28, 1898, for a term of seventy-eight and a half years from Mar. 25, 1898. Under the terms of the lease, the landlords had the right of re-entry in the event of a breach of any of the covenants on the part of the lessees. On or about June 29, 1955, the plaintiffs served on the defendants notice in writing setting out breaches of the covenant to repair, and requiring the defendants to remedy the breaches within six months or to pay the sum of £954 4s. 11d. as compensation. By a specially indorsed writ, issued on Mar. 1, 1956, the plaintiffs claimed (a) damages against the defendants for the breaches of covenant, and (b) possession of the premises. The defendants were given leave to defend the action, and by their defence they alleged that, by a charge by way of legal mortgage made on Nov. 29, 1946, they had mortgaged the premises to Hastings and East Sussex Building Society; that on or about June 29, 1955, the plaintiffs served the notice of breach of covenant on the building society; that on or about July 20, 1955, the building society served on the plaintiffs a counter-notice under the Leasehold Property (Repairs) Act, 1938, s. 1 (2), claiming the benefit of the Act; and that, therefore, the proceedings were improperly constituted and invalid in that they had been commenced without the leave of the court. The plaintiffs having conceded that they served a notice on the building society and that the building society had served a counter-notice, an order was made by Master LAWRENCE on Oct. 17, 1956, that the question of law whether, on the facts, the proceedings were improperly constituted in that they had been commenced without the leave of the court under s. 1 (3) of the Act of 1938, should be tried as a preliminary issue.

R. E. Megarry, Q.C., and *F. C. Denny* for the plaintiffs, the landlords.

R. W. Goff, Q.C., and *M. Finer* for the defendants, the lessees.

LORD GODDARD, C.J.: The action is a forfeiture action, brought to recover damages for breaches of covenants to repair, and to recover possession, of certain property in Westminster which was demised on July 28, 1898, by the Ecclesiastical Commissioners to a lessee for a term of seventy-eight and a half years from Lady Day, 1898. The reversion is now vested in the Church Commissioners [referred to hereinafter as "the plaintiffs"], and the defendants are the present lessees in whom the term is vested and are in possession of the premises. They mortgaged the premises by way of legal charge on Nov. 29, 1946, to the Hastings and East Sussex Building Society [referred to hereinafter as "the mortgagees"].

In June, 1955, when the plaintiffs were minded to take proceedings for recovery of possession, the Leasehold Property (Repairs) Act, 1938, was in force. Section 1 (2) of that Act* provides

"A right to damages for a breach of [a covenant to repair] shall not be

* The sub-section is printed as amended by the Landlord and Tenant Act, 1954, s. 51 (2) (b).

- A enforceable by action commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in s. 146 (1) of the Law of Property Act, 1925, and where a notice is served under this sub-section, the lessee may, within
- B twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act."

Section 1 (3) provides:

- C "Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court."

The leave of the court has to be obtained before the action is brought.

- D In June, 1955, the plaintiffs served a notice under the Act of 1938 on the defendants, who were lessees in possession, and they also, knowing of the mortgage, served a notice on the mortgagees. The defendants did not serve any counter-notice and, therefore, there was no need, so far as they were concerned, to obtain leave to bring the action. The mortgagees, however, did serve a counter-notice, and have done nothing since—perhaps it was not for them to do anything. Counsel for the defendants submitted that, although the defendants did not serve any counter-notice (and, therefore, apparently had no reason or desire to take advantage of such protection as the Leasehold Property (Repairs) Act, 1938, conferred on them), they were entitled to take the point that the mortgagees had served a counter-notice, and that, therefore, the action was wrongly brought against the defendants. The mortgagees have not applied, so far as is known to the court, to be made co-defendants in the action.

- F It is quite clear that under s. 146 of the Law of Property Act, 1925, a mortgagee by sub demise can be a "lessee" for the purposes of that section. Section 146 (5) reads:

"For the purposes of this section . . . (b) 'Lessee' includes an original or derivative under-lessee, and the persons deriving title under a lessee . . ."

- G It seems to me that a mortgagee by legal charge must also be included in the term "lessee" for the purposes of s. 146 of the Law of Property Act, 1925, and I am supported in that opinion by the view of UPJOHN, J., in *Grand Junction Co., Ltd. v. Bates* (1) ([1954] 2 All E.R. 385), where he held that, for the purposes of obtaining relief against forfeiture, there was no distinction to be drawn between a mortgagee by sub-demise and a mortgagee by legal charge*; and, if there is no such distinction to be drawn for the purposes of s. 146 of the Act of 1925 (which
- H requires notice of breaches of covenant to be served on the lessee), there would be no good ground for holding that there is any such distinction to be drawn in regard to who is a "lessee" within the Leasehold Property (Repairs) Act, 1938, s. 1.†

- I In my opinion, however, that does not in any way decide the question which arises in this case. Under s. 146 (1) of the Act of 1925 and s. 1 (2) of the Act of 1938, it is "the lessee" who must be served. A lessee, at any rate, was served

* By s. 87 (1) of the Law of Property Act, 1925, a charge by way of legal mortgage of a term of years absolute confers on the mortgagee the same "protection, powers and remedies" as if the mortgagee had a sub-term less by one day than the term vested in the mortgagor.

† By s. 7 (1) of the Act of 1938, the expression "lessee" in that Act has the meaning assigned to it by s. 146 of the Act of 1925, with certain words omitted therefrom. The words omitted are not included in the quotation from s. 146 (5) which is printed at letter F, above.

in the present case, and that lessee was the lessees in possession. That having been done, it seems to me that there was no obligation on the plaintiffs to serve the mortgagees, and that there was not any right in the mortgagees to say that they ought to have been served. That follows from *Egerton v. Jones* (2) ([1939] 3 All E.R. 889). A

It seems to be quite clear that a mortgagee can be described as a lessee, but the present action is brought against "the lessee" in the sense of the lessees in possession. The defendants have executed a legal charge of the lease but they are the lessees, and, as the lessees, they have had notice served on them. They did not choose to take advantage of s. 1 of the Act of 1938 by serving a counter-notice, and I do not see, therefore, why the plaintiffs have not got a right to bring this action. Nor do I see how the defendants, not having served a counter-notice, can take advantage of the fact that the mortgagees, who have no right to receive a notice and on whom there was no obligation to serve a counter-notice, did serve a counter-notice. The mortgagees are not parties to this action and have no right to be made parties to the action, except in the sense that they are, as mortgagees, entitled to take advantage of the right, given by s. 146 (4) of the Act of 1925 of coming to the court and asking for an order vesting the lease in them. The court may then vest the lease in them, subject to such terms as to repairs, charges, costs and other matters, as the court may think fit to impose. It would be a novel ground of interference if the court were to hold that, because someone, on whom service of a notice was not obligatory, had been served with a notice, whether for the purpose of information, courtesy, or by mistake, a defendant in the position of the defendants in the present case (who could have taken advantage of the Act of 1938 by serving a counter-notice) was entitled to rely on the fact that someone who was not a party to the action and who had no right to receive notice, had served a counter-notice. For these reasons I think that the point of law raised on the pleadings, namely, whether this action can be commenced without the leave of the court, must be decided in favour of the plaintiffs, and I so decide it in favour of the plaintiffs. B C D E

Preliminary point decided in favour of plaintiffs. Leave to appeal granted. F

Solicitors: *Milles, Day & Co.* (for the plaintiffs); *Warren & Warren* (for the defendants).

[Reported by MARGARET D. ABEL, Barrister-at-Law.]

A

NOTE.ST. CATHARINES FLYING TRAINING SCHOOL, LTD. v.
MINISTER OF NATIONAL REVENUE.

B [PRIVY COUNCIL (Viscount Simonds, Lord Normand, Lord Oaksey and Lord Tucker), October 15, 1956.]

Privy Council—Canada—Jurisdiction—Saving for “judicial proceeding” commenced prior to coming into force of Act abolishing appeals to Privy Council—Whether notice of appeal against, and notice of dissatisfaction with, tax assessments commenced a “judicial proceeding”—Supreme Court Amendment Act, 1949 (S.C. 1949 (2nd Sess.) c. 37), s. 3, s. 7—Income War Tax Act (R.S.C. 1927 c. 97), s. 58, s. 59, s. 60, s. 63, s. 69—Supreme Court Act (R.S.C. 1952 c. 259), s. 2 (e).

C

Cases referred to:

(1) *Nicholson, Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191; 2nd Digest Supp.

D

(2) *Smith v. Williams*, [1922] 1 K.B. 158; 91 L.J.K.B. 156; 126 L.T. 410; 8 Tax Cas. 321; 28 Digest 100, 604.

Petition for leave to appeal.

Petition by St. Catharines Flying Training School, Ltd., a private company incorporated under the Companies Act, 1934, of Canada by letters patent dated Sept. 12, 1940, for special leave to appeal from a judgment of the Supreme Court of Canada, dated Oct. 4, 1955, allowing in part the appeal by the respondent, the Minister of National Revenue, from a judgment of the President of the Exchequer Court of Canada, dated Nov. 17, 1953. The judgment of Nov. 17, 1953, maintained the petitioners' appeal from assessments to income tax and excess profits tax for the years 1941 to 1945 inclusive, and held that the petitioners were exempt from taxation as being a non-profit corporation within the Income War Tax Act (R.S.C. 1927 c. 97), s. 4 (h). The Supreme Court held that the petitioners' income for the years 1941 to 1943 inclusive received under a contract with the Crown for maintaining a school at St. Catharines, Ontario, and carrying out instruction and training for personnel of the Royal Canadian Air Force was subject to income tax and excess profits tax. The Supreme Court dismissed the respondent's appeal in so far as it related to the petitioners' income for the years 1944, 1945. At the hearing of the petition, the respondent raised a preliminary objection to the jurisdiction of the Judicial Committee to entertain the petition.

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H. Heward Stikeman, Q.C., M. A. Seymour, Q.C. (both of the Canadian Bar), and *P. Shelbourne* for the petitioners.

K. E. Eaton (of the Canadian Bar) for the respondent.

Stikeman, Q.C.: The petitioners must establish that the petition is within the jurisdiction of the Board before continuing on the merits. Section 7 of the Supreme Court Amendment Act, 1949 (S.C. 1949 (2nd Sess.) c. 37), reads:

I

“Notwithstanding anything in s. 3 of this Act*, an appeal from or in respect of a judgment pronounced in (a) a judicial proceeding† that was commenced prior to the coming into force of this Act . . . lies or may be brought as if that section had not been enacted.”

* Section 3 of the Supreme Court Amendment Act, 1949, provides that the judgment of the Supreme Court shall, in all cases, be final, and that no appeal lies from the Canadian courts to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to Her Majesty in Council may be ordered to be heard.

† For the definition of “judicial proceeding”, see p. 783, letter G, post.

The Act was brought into force on Dec. 23, 1949, by publication of a proclamation of the Governor General in Council in the Canada GAZETTE. The petitioners submit that the judicial proceeding commenced before Dec. 23, 1949. The proceeding was under the Canadian Income War Tax Act.

The relevant sections are s. 58 to s. 66 and s. 69. Section 58 provides:

"(1) Any person who objects to the amount at which he is assessed, or who considers that he is not liable to taxation under this Act, may personally or by his solicitor, serve a notice of appeal upon the Minister . . ."

Section 59 provides for the Minister's considering the notice of appeal and notifying the appellant of his decision. Section 60 states that if the appellant is dissatisfied with the Minister's decision, the appellant may send to the Minister a notice entitled "The Income War Tax Act—Notice of Dissatisfaction". The notice of dissatisfaction includes a statement that the appellant desires that his appeal should be set down for trial, and is accompanied by a final statement of facts and reasons. On receipt of the notice of dissatisfaction the Minister is obliged, by s. 62, to reply thereto, and, among other matters, to confirm or amend the assessment. Section 63 reads:

"(1) Within two months from the date of the mailing of said reply, the Minister shall cause to be transmitted to the registrar of the Exchequer Court of Canada, to be filed in the said court, typewritten copies of the following documents . . .

"(2) The matter shall thereupon be deemed to be an action in the said court ready for trial or hearing: Provided, however, that should it be deemed advisable by the court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings."

Section 64 provides for all subsequent proceedings being entitled in the cause. Section 65 enables any matter not set out in the notice of appeal or notice of dissatisfaction to be pleaded or referred to on terms, after an appeal has been set down for trial or hearing as before stated, and s. 66 gives the Exchequer Court exclusive jurisdiction. Section 69 reads:

"If a notice of appeal is not served or a notice of dissatisfaction is not mailed within the time limited therefor, the right of the person assessed to appeal shall cease and the assessment shall be valid and binding notwithstanding any error, defect or omission therein or in any proceedings required by this Act."

All the procedural requirements of the Income War Tax Act were complied with. The Minister assessed the petitioners for the years 1941 to 1945. The petitioners filed their appeal from those notices of assessment on Jan. 4, 1949. On Sept. 2, 1949, the Minister affirmed the assessments. On Sept. 19, 1949, the petitioners filed notice of dissatisfaction, pursuant to s. 60, and also lodged security for the costs of the appeal. On Oct. 19, 1950, thirteen months later, the Minister replied to the petitioners' notice of dissatisfaction and, on Nov. 8, 1950, the documents, in accordance with s. 63, were transmitted by the Minister to the registrar of the Exchequer Court. Both the petitioners' notice of appeal and their notice of dissatisfaction were given within due time.

The question is whether a notice of appeal or a notice of dissatisfaction is the commencement of the "judicial proceeding" which culminated in the Supreme Court, or whether it is the transmission of documents by the Minister to the registrar which is such a commencement. Both the notice of appeal and the notice of dissatisfaction were given before Dec. 23, 1949, the date for the coming into operation of the Supreme Court Amendment Act, 1949; but the transmission of the documents to the registrar of the Exchequer Court took place in 1950. It is the petitioners' submission that the "judicial proceeding" commenced with the filing of the notice of appeal, or, if that is not accepted, that it commenced with the filing of the notice of dissatisfaction. It is also their

A submission that the transmission of the documents to the registrar was a purely mechanical act which did not commence a judicial proceeding. The implication from s. 69 clearly is that the right arises at the time when the notice of appeal is filed, and from that time on all subsequent acts are merely to keep that right in being and lead the petitioners to the court.

The petitioners submit that the decision in *Nicholson, Ltd. v. Minister of National Revenue* (1) ([1945] Ex. C.R. 191) supports their proposition that the filing of the documents by the Minister is a purely mechanical matter, and that the action had been begun some time previously—certainly on the filing of the notice of dissatisfaction and probably on the filing of the notice of appeal. In that case it was held that the appeal to the Exchequer Court provided by the Income War Tax Act was not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof and that it was incorrect to describe it as an appeal from the decision of the Minister. The President (THORSON, J.) said (*ibid.*, at p. 201):

D “The extent of the court’s jurisdiction under s. 66 of the [Income War Tax Act] is very wide . . . The wide extent of this jurisdiction led counsel for the appellant to the argument that the appeal to the court is in the nature of a trial *de novo* and that it may examine all the facts that were before the Minister prior to his determination in his discretion since such facts are connected with the assessment and draw its own conclusions from them. There is, I think, a fallacy in this argument. It is true that s. 63 (2) provides that when the necessary documents have been transmitted to the registrar of the Exchequer Court the matter shall thereupon be deemed to be an action in the said court ready for trial or hearing, but this is mainly for procedural purposes to enable proceedings such as discovery to be had, witnesses to be subpoenaed and the like, and does not affect the nature of the issue before the court.”

F **VISCOUNT SIMONDS:** If the matter were to stop at the stage reached in s. 62 of the Income War Tax Act, and if there were no right except that of appeal to the Minister, would the appeal still be a “judicial proceeding”?

Stikeman, Q.C.: I submit that it would. The phrase “judicial proceeding” is defined, for our purposes, in the Supreme Court Act (R.S.C. 1952 c. 259). Section 2 (e) reads:

G “‘Judicial proceeding’ means and includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction.”

H The “judicial proceeding” is, in my submission, clearly the appearance before the court. The problem is to determine when that commenced. The petitioners accept that they must submit that the matter is an action before it is “deemed to be an action . . . ready for trial” within those words in s. 63 (2). Those words presuppose the possibility of the action being unready at some earlier point of time, and thus of the action being already in existence.

I The petitioners put their submission alternatively. There are only two possible alternatives. These are either that a “judicial proceeding” was commenced when the notice of appeal was filed under s. 58 or, if that is wrong, that a “judicial proceeding” began when notice of dissatisfaction was filed under s. 60. The reason for the differentiation is that, under s. 58, the Minister still has a chance, because he can affirm or reassess; but, after he has affirmed, as he did in this case, there comes the notice of dissatisfaction and it is at this point that the Minister is behind the petitioners and the court is before them, because they say that they wish their case to be set down.

Eaton: When construing s. 7 of the Supreme Court Amendment Act, 1949, A
 regard must also be had to s. 1 of the Judicial Committee Act, 1844*, which
 provides the authority for the admission of any appeal from "any judgments,
 sentences, decrees, or orders of any court of justice within any British colony
 or possession abroad". Section 7 of the Supreme Court Amendment Act, 1949,
 when referring to "judicial proceeding", cannot, in my submission, have the
 effect of widening the jurisdiction which previously existed under the Judicial B
 Committee Act, 1844. It would be proper to read the two provisions together.
 If this is done, then what must be found is a judicial proceeding in a court of
 justice. In my submission, there was no proceeding in a court of justice until the
 documents were transmitted to the Exchequer Court, pursuant to s. 63 of the In-
 come War Tax Act, and this occurred after the time of commencement of the
 Supreme Court Amendment Act, 1949, s. 7. Throughout the preliminary steps C
 envisaged by s. 58 to s. 62 of the Income War Tax Act, there is no judicial pro-
 ceeding and no quasi-judicial proceeding. They are administrative or executive
 functions on the part of the Minister. There was no judicial proceeding in a court
 of justice until the documents appeared at the court.

Section 63 (2), which provides that "The matter shall thereupon be deemed to
 be an action in the said court ready for trial or hearing", does not help one way D
 or the other. It has both the effect of deeming the matter to be an action and
 the effect of deeming it to be an action ready for trial. If it is necessary at that
 stage to deem it to be an action, it follows that it was not an action prior to that
 date.

Section 69, on which my learned friend relied by reason of the words "the
 right of the person assessed to appeal", favours, I submit, the respondent, E
 because the section refers to the right of appeal as contemplating something to
 be done in the future.

Stikeman, Q.C.: In *Smith v. Williams* (2) ([1922] 1 K.B. 158), the respondent
 had successfully appealed against his assessment to income tax, and the appellant,
 by notice in writing under s. 59 of the Taxes Management Act, 1880, required the
 commissioners to state and sign a case for the opinion of the High Court. SANKEY, F
 J., said (*ibid.*, at p. 162):

"The notice is the initiation of the proceedings and thereupon they
 continue . . . the proceedings begin with the notice in writing to the
 commissioners, and they may end with a decision of the House of Lords.
 I am unable to accept Mr. Latter's contention that the proceedings only G
 begin when the case is filed in court . . ."

If one substitutes for "notice in writing to the commissioners" the petitioners'
 "appeal to the Minister", one has a fairly comparable set of proceedings.

Eaton: This decision cannot affect my primary submission based on s. 1 of the
 Judicial Committee Act, 1844. Although the proceedings may have continued H
 throughout, there was not a "judicial proceeding" until a stage that was reached
 after Dec. 23, 1949.

VISCOUNT SIMONDS (after consultation): In their Lordships' opinion,
 the preliminary point taken by the respondent to this petition succeeds. Accord-
 ingly, they will humbly advise Her Majesty to refuse the petition.

Special leave to appeal not granted. I

Solicitors: *Linklaters & Paines* (for the petitioners); *Charles Russell & Co.*
 (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* 5 HALSBURY'S STATUTES (2nd Edn.) 210.

A A. R. WRIGHT & SON, LTD. v. ROMFORD CORPORATION.
[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), November 7, 9, 1956.]

Contract—Parties—Corporation—Seal—Contract not under seal, but made in accordance with corporation's standing orders—Value of contract over £700—

B *Whether contract enforceable against corporation—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 74 (2)—Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 266 (2).*

Local Authority—Contract—Seal—Necessity for seal—Agent signing contract in writing—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 74 (2)—Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 266 (2).

C A local authority was incorporated as a body corporate by royal charter in 1937, and by the terms of the charter the Local Government Act, 1933, applied to the corporation. By an agreement in writing but not under seal, signed by the borough engineer on behalf of the corporation and made in accordance with the corporation's standing orders, the plaintiffs were engaged by the corporation to demolish certain premises belonging to the corporation. Under the agreement the plaintiffs were to receive £39 14s. in money, and the material obtained in the course of the demolition (valued at about £3,200) was to become their property. Their profit out of the contract was estimated at nearly £750. In an action by the plaintiffs against the corporation for damages for breach of the contract by repudiation, the corporation, by its defence, alleged that the contract, not being under seal, was not binding on the corporation. The plaintiffs contended that the agreement was enforceable against the corporation because, being made in accordance with the corporation's standing orders, it was valid by virtue of s. 266 (2)* of the Local Government Act, 1933, which required contracts to be so made, and because the corporation could appoint and had validly appointed the borough surveyor to execute the written contract on their behalf under s. 74 (2)† of the Law of Property Act, 1925.

F **Held:** the contract was not enforceable against the corporation because it was not under the seal of the corporation and (i) s. 266 of the Local Government Act, 1933, did not affect the rule at common law that a contract (not being an insignificant contract within the established exceptions to the rule) was not binding on a corporation unless made under seal, and (ii) the signature of an agent of a party would not, by virtue of s. 74 (2) of the Law of Property Act, 1925, render enforceable a contract which was unenforceable owing to the absence of the party's seal.

G [As to the necessity for a seal to bind a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 82-84, paras. 168, 169; and for cases on the subject, see 13 DIGEST **H** 284, 285, 164-172; 391, 392, 1166-1169.

For the Law of Property Act, 1925, s. 74 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 581; for the Local Government Act, 1933, s. 266, see 14 HALSBURY'S STATUTES (2nd Edn.) 492.]

Cases referred to:

I (1) *Church v. Imperial Gas Light & Coke Co.*, (1838), 6 Ad. & El. 846; 3 Nev. & P.K.B. 35; 1 Will. Woll. & H. 137; 7 L.J.Q.B. 118; 112 E.R. 324; 13 Digest 285, 169.

* The terms of s. 266 of the Act of 1933 are set out at p. 787, letters G and H, post.

† Section 74 (2) of the Law of Property Act, 1925, provides: "The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation."

- (2) *Austin v. Bethnal Green Guardians*, (1874), L.R. 9 C.P. 91; 43 L.J.C.P. 100; A 29 L.T. 807; 38 J.P. 248; 13 Digest 382, 1114.
- (3) *Wells v. Kingston-upon-Hull Corpn.*, (1875), L.R. 10 C.P. 402; 44 L.J.C.P. 257; 32 L.T. 615; 13 Digest 388, 1150.
- (4) *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772; 72 L.J.K.B. 554; 88 L.T. 317; 67 J.P. 245; 13 Digest 394, 1193.
- (5) *Clarke v. Cuckfield Union Guardians*, (1852), Bail Ct. Cas. 81; 21 L.J.Q.B. B 349; 19 L.T.O.S. 207; 16 J.P. 457; 13 Digest 393, 1184.

Preliminary Issue.

By a specially indorsed writ the plaintiffs, A. R. Wright & Son, Ltd., brought an action against the defendants, Romford Corporation, a body corporate incorporated by royal charter, for damages for breach by repudiation on the part of the defendants of a contract to employ the plaintiffs for the demolition of certain premises which were the defendants' property. According to the particulars in the statement of claim, the plaintiffs' estimated profit on the contract, which was not under seal, would have been £744 14s. By their defence the defendants pleaded that, as the contract was not under seal, it was not binding on them. The plaintiffs, by their reply, relied on the Law of Property Act, 1925, s. 74 (2), and on the Local Government Act, 1933, s. 266, and alleged that the agreement was binding on the defendants because it was made by the defendants' borough engineer on the authority of and in accordance with the standing orders of the defendants. An order was made by Master LAWRENCE on Apr. 9, 1956, by consent of the parties, that the points of law raised by the defence and reply should be tried as a preliminary issue.

C. T. Salkeld-Green for the plaintiffs.

G. D. Squibb, Q.C., and *W. J. Glover* for the defendants.

Cur. adv. vult.

Nov. 9. **LORD GODDARD, C.J.**, read the following judgment: The plaintiffs in this action claim damages for breach of contract and in their statement of claim allege that by an agreement in writing, contained in an offer and tender addressed by them to the defendants and a written order of the defendants' borough engineer and surveyor, the defendants engaged them to demolish certain buildings which were the defendants' property. For this service the plaintiffs were to receive £39 14s. in money, and the material obtained in the course of the demolition was to become the property of the plaintiffs. From the particulars in the statement of claim it appears that these materials formed by far the larger part of the plaintiffs' remuneration as they were estimated to be worth over £3,200; and after allowing for the cost of demolition the plaintiffs' estimated profit on the business was in the neighbourhood of £750. By their defence the defendants alleged that they were a body corporate, incorporated by royal charter dated Aug. 20, 1937, and pleaded [in para. 2] that the agreement referred to was not under their seal and so was not binding on them. By para. 3 of their reply the plaintiffs relied on s. 74 (2) of the Law of Property Act, 1925, and on s. 266 of the Local Government Act, 1933, and alleged that the defendants appointed their borough engineer to execute the agreement on their behalf and that it was made in accordance with their standing orders. By an order made in the action by consent it was ordered that the points of law raised in para. 2 of the defence and para. 3 of the reply should be set down and disposed of forthwith and before the trial of the issues of fact.

The charter of incorporation was produced, and by cl. 3 the provisions of the Local Government Act, 1933, are expressly stated to apply to the borough thereby created. The standing orders were produced, and ord. 26 provides for the sealing of documents and how the authority for sealing is to be given. Provision is made in the orders for the signature of documents which

A are needed for any legal proceedings, and other orders relating to contracts provide, among other things, for the obtaining of tenders and estimates and that every contract which exceeds £300 in value or amount shall be in writing. Orders 55 and 58 contain provisions as to what written contracts shall specify and the clauses which are to be inserted as to penalties if the contract exceeds £500, and other matters which it is unnecessary to set out in detail. It is not
 B disputed that the contract alleged in the statement of claim was one the value or amount of which was over both £300 and £500.

From very early times in our law the general rule has been that an unsealed contract is enforceable neither by nor against a corporation. To this general rule of the common law there are and probably always have been certain exceptions. In *Church v. Imperial Gas Light & Coke Co.* (1) ((1838), 6 Ad. & El. 846
 C at p. 861), LORD DENMAN, C.J., said:

“Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions . . . ”
 D

See also *Austin v. Bethnal Green Guardians* (2) ((1874), L.R. 9 C.P. 91). The exception applies to both trading and non-trading corporations: see *Wells v. Kingston-upon-Hull Corpn.* (3) ((1875), L.R. 10 C.P. 402), and to both executed and executory contracts, as was laid down in *Church v. Imperial Gas Light & Coke Co.* (1). Further, in the case of non-trading corporations, if it is shown that the subject-matter of the contract was connected with the purposes for which the corporation was established and that the party claiming has performed his part of the contract, the law will imply a promise to pay for the benefit requested and received: see *Lawford v. Billericay Rural District Council* (4) ([1903] 1 K.B. 772), and *Clarke v. Cuckfield Union Guardians* (5) ((1852), 21 L.J.Q.B. 349). Admittedly,
 E this case does not fall within any of these exceptions, but counsel for the plaintiffs has submitted that, if a contract is made in accordance with the standing orders of the corporation and is signed by someone authorised by the standing orders, it is valid notwithstanding the absence of a seal, and for this he relies mainly on s. 266 of the Local Government Act, 1933. That section provides:
 F

“(1) A local authority may enter into contracts necessary for the discharge of any of their functions. (2) All contracts made by a local authority or by a committee thereof shall be made in accordance with the standing orders of the local authority . . . ”
 G

Section 266 (2) then enacts that the standing orders shall provide for certain matters, and a proviso is added:
 H

“Provided that a person entering into a contract with a local authority shall not be bound to inquire whether the standing orders of the authority which apply to the contract have been complied with, and all contracts entered into by a local authority, if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with.”
 I

I cannot agree that this section affects the age-old requirement of the common law as to the necessity of a seal to bind a corporation. Had Parliament intended to make so drastic an alteration in the law, it would surely have so provided in clear terms. Standing orders deal with the internal affairs of the body making them and, as the proviso shows, do not affect other persons such as those who contract or desire to contract with the corporation. Section 266 of the Act of 1933 requires that the standing orders shall provide for certain steps to be taken

before contracts are made, and the orders provide for the carrying out of these directions. The party contracting or proposing to contract with the corporation is not concerned with whether the corporation has acted in accordance with its standing orders, and, if otherwise valid, a contract will be binding although the orders may not have been followed; but I can find no words entitling me to say that, if a corporation does comply with its standing orders, the seal is no longer necessary either to bind the corporation or to confer contractual rights on it. It is true that under the repealed s. 174* of the Public Health Act, 1875, a contract by an urban authority had to be made under seal only if it exceeded £50 in value or amount, and it may be that, although there is no similar provision in the Local Government Act, 1933, a contract which does not exceed £50 might now be held to be one which, to use the words of LORD DENMAN, C.J., in *Church v. Imperial Gas Light & Coke Co.* (1) (6 Ad. & El. at p. 861), would be "too insignificant to be worth the trouble of affixing the common seal", a question which can be decided if and when it arises. So far as s. 74 (2) of the Law of Property Act, 1925, is concerned, the sub-section authorises the appointment of someone to sign on behalf of the corporation an agreement not under seal, but that can only refer to the execution of an agreement which would be binding on the corporation in spite of the absence of a seal. These could only be contracts which fall within the exceptions to which I have already referred, as, for instance, the engagement of a menial servant such as a porter or housekeeper at the town hall, or perhaps for the purchase of small quantities of goods needed for the day-to-day service of the offices, as they might come within the words of LORD DENMAN, C.J., "the doing of acts very frequently recurring"; but s. 74 (2) of the Act of 1925 cannot, in my opinion, in any way validate an agreement which is not under seal and does not fall within the recognised exceptions, unless, indeed, it be made under some authority conferred by statute on the particular corporation. Although it may be distasteful to give effect to a technical defence of this description, it is a valid defence in law, and it accordingly follows that the action cannot be maintained.

Judgment for the defendants.

Solicitors: *W. G. R. Saunders, Son & de Wolfe*, agents for *H. K. Evershed & Co.*, Leyton (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *J. E. Symons*, Romford (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* Section 174 of the Public Health Act, 1875, was repealed by the Local Government Act, 1933, s. 307, and Sch. 11.

BRIDGES (INSPECTOR OF TAXES) v. HEWITT.
BRIDGES (INSPECTOR OF TAXES) v. BEARSLEY.

[CHANCERY DIVISION (Danckwerts, J.), October 23, 24, 25, November 8, 1956.]

Income Tax—Income—Voluntary payments—Gift of shares in a company—Recognition of work of directors—Covenant to transfer shares—Consideration expressed—Undertaking by directors to continue engagements with company—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. 9, Rules applicable to Sch. E, r. 1.

The founder and principal shareholder of a company had been substantially assisted in building up its business by three directors, but he did not leave them any shares in the company by his will. Considering that the founder had been remiss in not so recognising the directors' work for the company, the founder's son, who became chairman of the company, in 1945 agreed with two of the directors that they and the third director should have twenty thousand shares between them and he and his brother, also a director of the company, entered into deeds of covenant in which they undertook to transfer shares to that total number to the three directors on the death of the founder's widow, when the brothers would become entitled to the founder's shares. This undertaking was expressed to be in consideration of the two directors continuing their engagements with the company for four years. The shares were transferred on July 27, 1953, before the widow's death, to and between the two directors, and to the executors of the third, who had died. The two directors were assessed for the year 1953-54 to income tax under Sch. E to the Income Tax Act, 1952, in respect of the values at July 27, 1953, of the shares so transferred to them. On appeal,

Held: the two directors were rightly assessed to income tax in respect of the shares under Sch. E for the following reasons—

(i) although each transfer of shares would by itself have been a gift that was not taxable, since the shares were given in recognition of a failure in generosity by the company's founder and not of a claim for remuneration for services (the brothers not being substantially the directors' employers by virtue of their financial interest in the company); yet, as the covenant to transfer the shares was expressed in the deed to be in consideration of services by the directors (which could not be contradicted by extrinsic evidence), the nature of the transaction was changed by the deed and the shares were received as profits of the directors' offices, and

(ii) the shares were properly taxable on their values when they were transferred to the directors and it was not the contractual rights acquired under the deed of covenant (for which assessment in 1953-54 would have been out of time) that were assessable to income tax; and

(iii) the values of the shares could not be spread over the four years the directors promised to serve the company, since the covenant was merely to make a transfer of shares as a whole on the happening of a certain event and not to make payments over the years.

Appeals allowed.

[As to taxation of voluntary payments to the holder of an office or employment, see 17 HALSBURY'S LAWS (2nd Edn.) 213, para. 435; and for cases on the subject, see 28 DIGEST 85-88, 490-507.]

For r. 1 of the Rules applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

(1) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp.

- (2) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp. A
- (3) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper v. Blakiston*, 5 Tax Cas. 347; 28 Digest 86, 495.
- (4) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492.
- (5) *Cowan v. Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest 85, 490. B
- (6) *Weight v. Salmon*, (1935), 19 Tax Cas. 174; sub nom. *Salmon v. Weight*, 153 L.T. 55; Digest Supp.
- (7) *Cameron v. Prendergast*, [1940] 2 All E.R. 35; [1940] A.C. 549; 109 L.J.K.B. 486; 162 L.T. 348; sub nom. *Prendergast v. Cameron*, 23 Tax Cas. 122; 2nd Digest Supp. C
- (8) *Patrick v. Burrows*, (1954), 35 Tax Cas. 138; 3rd Digest Supp.
- (9) *Calvert v. Wainwright*, [1947] 1 All E.R. 282; [1947] K.B. 526; [1947] L.J.R. 1335; 177 L.T. 159; 27 Tax Cas. 475; 2nd Digest Supp.
- (10) *Tait v. Smith*, (1954), 35 Tax Cas. 79; 3rd Digest Supp.

Cases Stated.

The respondent taxpayers, Mr. Ernest Bearsley and Mr. Walter M. Hewitt, appealed to the Special Commissioners of Income Tax against assessments to income tax, Sch. E, made on them for 1953-54 in the sums of £50,465 and £39,022 respectively. The questions in issue were: (i) whether £36,000, the value at July 27, 1953, of eight thousand shares in Meccano, Ltd., transferred on that day to each of the two taxpayers by the brothers Roland and Douglas Hornby was income assessable under Sch. E from the taxpayers' offices or employments as managing director, and secretary and director, respectively, of Meccano, Ltd.; (ii) if the values of the shares did not represent such income, whether the value of the covenants to transfer them made by the Hornby brothers on Dec. 30, 1945, represented such income; and (iii) if any income was assessable, whether such income was properly assessable for 1953-54. E

The taxpayers contended that: (i) evidence as to the circumstances in which deeds of covenant for the transfer of the shares were entered into by Mr. Roland and Mr. Douglas Hornby on Dec. 30, 1945, was admissible; (ii) these circumstances included a meeting between Mr. Roland Hornby and the taxpayers towards the end of 1945, at which a promise to transfer shares was given by Mr. Hornby and such promise was a pure act of bounty and in no sense a reward or remuneration for past or future services to the company; (iii) these circumstances also included the circumstances in which clauses expressing consideration moving from the covenantees (the taxpayers) came to be inserted in the deeds, which latter circumstances showed that the consideration clause in no way affected what had been arranged at the previous meeting between Mr. Roland Hornby and the taxpayers; (iv) after the execution of the deeds of covenant the position remained the same as before, and the transfers of shares promised in them by Mr. Roland and Mr. Douglas Hornby were pure acts of bounty and in no sense a reward or remuneration for past or future services to the company; the expression of the consideration moving from the covenantee (the taxpayers) was conventional and was inserted simply to give them a procedural right to sue on the documents effectively; (v) no income assessable under Sch. E arose to the taxpayers on the transfer of the shares on July 27, 1953, or on the execution of the deeds of covenant on Dec. 30, 1945; (vi) alternatively, if any income assessable under Sch. E arose to the taxpayers, it arose on the execution of the deeds of covenant on Dec. 30, 1945, when they acquired rights which were valuable and saleable; such income should therefore have been assessed for 1945-46 and not for 1953-54; (vii) alternatively, if any income assessable under Sch. E arose to the taxpayers, it arose under the deeds of covenant of Dec. 30, 1945, in respect of the four years 1945-46 to 1948-49; such income should therefore have been F
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A spread over and assessed for those four years and was not income assessable for 1953-54.

The second taxpayer also contended that, if there was any element of payment of remuneration or reward for services, the payment was in respect of the taxpayer's services as secretary of the company, and it was made when the shares were transferred on July 27, 1953. At that date the taxpayer had ceased to be secretary and the payment was therefore not assessable on him under Sch. E for 1953-54.

The Crown contended that: (i) the deeds of covenant of Dec. 30, 1945, were clear and unambiguous and the intentions of the parties were therefore to be derived from those deeds alone, without reference to extrinsic evidence; (ii) under the deeds, the taxpayers were entitled to the shares in consideration partly of past services to the company and partly of undertaking to serve the company for a further four years; (iii) the value of the shares transferred on July 27, 1953, represented income, assessable under Sch. E, from the taxpayers' offices or employments as managing director, and secretary and director, respectively, of the company; (iv) such income arose in 1953-54, when the shares were transferred and was properly assessable on the taxpayers for that year.

D The commissioners held that most of the evidence of matters and events antecedent to the execution of the deeds of covenant led by the taxpayers was admissible as evidence of the surrounding circumstances in which the deeds were made, but that some was not admissible. If they considered only the deeds, they would hold that neither the value of the shares nor the value of the covenants represented income assessable on the taxpayers under Sch. E. Evidence of matters antecedent to the execution of the deeds which they thought inadmissible or irrelevant was the evidence (including a draft deed with manuscript alterations) explaining why the consideration came to be inserted in the deeds, which was designed to show that what were bare promises unsupported by any consideration made at the meeting of 1945 remained in the deeds pure acts of bounty. Even excluding this evidence, they held that neither the value of the shares nor the value of the covenants to transfer them represented income assessable on the taxpayers under Sch. E. They found that the covenants were entered into and the shares were transferred by the Hornby brothers in their personal capacity from the personal motive of doing something which they thought that morally their father should have done by his will, i.e., transferred the shares. If they considered all the evidence of antecedent matters, they would find that the consideration clause was inserted with the object of binding the Hornby brothers as strongly as possible but this would not alter the opinion they had reached on considering only the evidence they regarded as admissible.

Although some estimate of the value of the covenants could have been made in December, 1945, when they were entered into, since there were too many factors of uncertain value, they considered they did not at that date represent money's worth which could form part of the taxpayer's income under Sch. E. If, contrary to their view, anything was assessable at all, it would be the value of the shares transferred and the proper year of assessment would be 1953-54, when they were transferred. They allowed the appeal. The Crown appealed.

F. N. Bucher, Q.C., and Sir Reginald Hills for the Crown.

N. E. Mustoe, Q.C., and H. H. Monroe for the taxpayers.

I *Cur. adv. vult.*

Nov. 8. DANCKWERTS, J., read the following judgment: The judgment which I am about to deliver relates to two appeals by the inspector of taxes against decisions of the Special Commissioners of Income Tax in favour of the taxpayers, Mr. Ernest Bearsley and Mr. Walter Manning Hewitt respectively. The facts of the two cases are similar, and the cases relate to assessments to income tax under Sch. E made for the year 1953-54 in sums which include the value at July 27, 1953, of shares in the capital of Meccano, Ltd. The value of the

shares in Mr. Bearsley's case is £36,000 (eight thousand shares), and in Mr. Hewitt's case a similar amount of shares is involved. A

Meccano, Ltd., in June, 1908, took over a business of constructional and mechanical toy manufacturers which had been founded by Mr. Frank Hornby, to whom practically all the shares in the company were allotted. In the building up of the business and the running of it, Mr. Frank Hornby was greatly helped by Mr. Bearsley, Mr. Hewitt, and a third man, Mr. George Jones. Mr. Bearsley joined the business in 1907, and he became a director of the company in 1919, and managing director on the works side as from Oct. 1, 1936, under an agreement of Feb. 15, 1937. This agreement was to run for ten years from Oct. 1, 1936, and Mr. Bearsley undertook that he would not while a director, or within three years after ceasing to hold office as director, engage in the business of constructional or mechanical toy manufacture. On the expiration of this agreement, no fresh service agreement was entered into, but Mr. Bearsley continued to carry out his previous duties, with the addition of a share of the work previously carried out by Mr. Jones, with increased remuneration, £3,000 per annum salary and a commission of $8\frac{3}{4}$ per cent. of the net profits of the company (in place of £2,000 per annum and commission of $6\frac{1}{2}$ per cent.). This was provided for by a resolution of the directors on Oct. 8, 1946. Mr. Bearsley is still acting as a director and managing director of the company. B C D

Mr. Hewitt joined the company as secretary without a service agreement in 1913, becoming a director in 1932. He was appointed secretary as from Oct. 1, 1936, by an agreement dated Apr. 1, 1937, which increased his salary to £1,250 per annum with a commission of 3 per cent. of the net profits of the company. This agreement was to run for ten years from Oct. 1, 1936, and contained a restrictive covenant similar to that in the agreement with Mr. Bearsley. The directors' resolution of Oct. 8, 1946, provided for the continuance by Mr. Hewitt of his previous duties, together with a share of the work previously carried out by Mr. Jones, at a salary of £2,500 per annum (in addition to director's fees of £500 per annum) and a commission of $6\frac{1}{4}$ per cent. Mr. Hewitt ceased to be secretary in 1951. In October, 1952, he became ill and in October, 1953, he resigned his directorship. E F

Mr. Jones joined the business in 1908. By the agreement of Feb. 15, 1937 (under which Mr. Bearsley was appointed managing director on the works side), Mr. Jones was appointed managing director on the marketing and sales side at a similar salary and commission. He became ill in 1945, did not attend the office after October or November, 1945, or render any services after that time, and died in April, 1949, having remained a director until his death. G

The following facts have been found by the Special Commissioners:

(a) During Mr. Frank Hornby's life (he died on Sept. 21, 1936) Mr. Bearsley, Mr. Hewitt and Mr. Jones all wished to have a fairly substantial holding of shares in the company. They wanted these shares for reasons of security, and also as giving them a standing with the employees of the company commensurate with their respective important positions; for they were in fact the backbone of the company, had helped Mr. Frank Hornby to build up the company's business and were very largely, in their different capacities, responsible for its successful running once it had been firmly established. H

(b) Mr. Frank Hornby did from time to time transfer to these three gentlemen comparatively small batches of shares during his lifetime, and he had also transferred shares to his two sons; but he did not transfer the number of shares to which these three gentlemen thought they were in justice entitled. The matter had been mentioned to him several times, and he had said that he would look after them. In the case of Mr. Bearsley, the discussion at the time usually resulted in some increase in remuneration, which was not what he wanted; for he was satisfied with his remuneration, and what he wanted was an increased shareholding so that people might know what he was in the company. I

A (c) The relations of all three gentlemen with Mr. Frank Hornby were good, and, though he was thus chary of transferring shares to them during his lifetime, they all had the impression that he would leave each of them a reasonable number of shares by his will.

The number of shares acquired by them in Mr. Frank Hornby's lifetime was six thousand shares in the case of Mr. Bearsley, two thousand in the case of B Mr. Hewitt, and 8,040 in the case of Mr. Jones.

Mr. Frank Hornby died on Sept. 21, 1936, and by his will he left all his shares in the company in trust for his wife for life and, after her death, to his two sons, Roland and Douglas, in equal shares absolutely. The number of shares which passed in this way was 161,420. At Mr. Frank Hornby's death, Roland held twelve thousand shares and Douglas held ten thousand shares. The two sons C were already directors of the company, and Roland was appointed chairman soon after his father's death. Mr. Frank Hornby's wife was seventy-six when he died, but she did not die until October, 1953, when she must have been about ninety-three years of age.

Mr. Bearsley, Mr. Hewitt and Mr. Jones were very surprised and disappointed that Mr. Frank Hornby had not left them any shares in the company by his will, D and they decided to approach the Hornby brothers about the matter; for reasons immaterial to this case they did not make this approach till 1945. Before doing so, Mr. Bearsley and Mr. Hewitt discussed the matter, and Mr. Bearsley said he would ask for a total of twenty thousand shares. It is at this point that the transaction which has produced the claims by the inspector of taxes came into being.

E The findings of fact by the Special Commissioners are as follows. Some time in the last quarter of 1945, Mr. Bearsley and Mr. Hewitt had a meeting with Mr. Roland Hornby, when the matter was discussed. Mr. Jones was not present, and, as has been stated, it was about this time that he ceased to attend the office because of his illness. Mr. Roland Hornby agreed at once that Mr. Bearsley, Mr. Hewitt and Mr. Jones should have twenty thousand shares between them.

F Mr. Roland Hornby's view was that his father had been remiss in not leaving shares by his will to these three gentlemen. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Mr. Roland Hornby thought the shares should have been left in recognition of the work of these three gentlemen with the company. No condition was suggested that G Mr. Bearsley and Mr. Hewitt should continue in the service of the company (their service agreements were due to expire on Sept. 30, 1946), or that the shares were remuneration.

As Mr. Roland Hornby held only twelve thousand shares and Mr. Douglas Hornby only ten thousand, it was never contemplated that the Hornby brothers should transfer any of their own shares; it was understood that the shares should H come on the death of Mr. Frank Hornby's widow from the trust fund in which she had an interest. Mrs. Frank Hornby was now eighty-five, and her expectation of life was about four years, although, as has been said, she lived until October, 1953.

Mr. Roland Hornby at first suggested that the twenty thousand shares should be divided among Mr. Bearsley, Mr. Hewitt and Mr. Jones in such a way as to I give each of them about twelve thousand shares, taking into consideration the shares they already held, and on this footing, Mr. Hewitt would thus have received more than the others, but, as he was the junior of the three, he would not accept this arrangement. Eventually it was agreed that Mr. Bearsley should have eight thousand shares, Mr. Hewitt eight thousand, and Mr. Jones four thousand.

Since the arrangement arrived at at this meeting involved that no shares could be transferred to Mr. Bearsley, Mr. Hewitt and Mr. Jones till after the death of

Mrs. Frank Hornby, it was left to Mr. Hewitt to make arrangements to "implement" the agreement. I think that the word "implement" must mean put the arrangement into the form of some sort of legal document. At any rate, Mr. Hewitt got in touch with his solicitor and he acted for Mr. Bearsley, Mr. Hewitt and Mr. Jones in this matter, and as a result on Dec. 30, 1945, deeds of covenant in similar form were entered into between the Hornby brothers respectively and Mr. Bearsley, Mr. Hewitt and Mr. Jones in which a consideration moving from the covenantees was expressed as hereinafter mentioned.

The Case contains statements as to the instructions given by Mr. Hewitt and the intentions of his solicitor in drafting the deeds of covenant in the manner in which they were expressed, and a copy of a draft deed showing alterations made is exhibited to the Case, but the Special Commissioners considered that this evidence was inadmissible, and with that view I agree. It seems to me that evidence of the circumstances surrounding the execution of the deeds is plainly admissible, because no business document is executed in a vacuum without regard to the situation with which it is intended to deal; but evidence of statements of the parties or their solicitors which tend to contradict the terms of the document have to be excluded except in cases of equivocation.

It is necessary, therefore, to examine the precise terms of the deed of covenant of Dec. 30, 1945, between Mr. Roland Hornby and Mr. Ernest Bearsley, a copy of which is exhibited to the Case as a specimen of the deeds. This deed is expressed to be made between Mr. Roland Hornby (called "the covenantor"), whose private address is given and whose description is simply "company director", and Mr. Ernest Bearsley ("the covenantee"), whose private address is given and whose description is again "company director". The deed recites the interest of the covenantor in shares of the company under his father's will and recites that:

"The covenantor desires to mark his appreciation of the past services of the covenantee [the taxpayer] in the employment of the said company and also desires that the covenantee shall remain in the employment of the said company for a certain period."

Clause 1 of the deed is as follows:

"1. In consideration of the covenantee [the taxpayer] continuing his present engagement with Meccano, Ltd., until the expiry of four years from the date hereof the covenantor for himself and his legal personal representatives hereby covenants with the covenantee that he the covenantor will after the date of the death of the said Clara Hornby and within three months after such date transfer and assign to the covenantee absolutely and free from any lien charge or other incumbrance and without any payment therefor by the covenantee four thousand* ordinary shares in Meccano, Ltd., or the equivalent thereof if the capital be increased and will execute in due form a written transfer in respect of such shares sufficient to vest the full equitable title to such shares in the covenantee and will use his best endeavours to procure that the covenantee shall be registered as the holder of such shares in the register of members of the said company."

Clause 2 makes the covenant bind the covenantor's legal personal representatives and requires them to assume liability for the death duties (if any) in respect of the shares. Clause 3 gives the benefit of the covenant to the covenantee's legal personal representatives. Clause 4 provides in effect for liquidated damages payable by the covenantor in the event of performance of the covenant being prevented by the sale of shares by the covenantor or the trustees of Frank Hornby's will.

In fact, the covenants were not carried out according to the precise provisions thereof. Mr. Hewitt became ill in October, 1952. The company had only a small pension scheme and Mr. Hewitt was maintaining his three sisters. He became

* Another 4,000 was transferred to Mr. Bearsley by a separate similar deed.

- A apprehensive as to his financial position, and pressed for the transfer of the shares without waiting for the death of Mrs. Frank Hornby. On July 27, 1953, although Mrs. Frank Hornby was still alive, all the shares which Mr. Roland Hornby and Mr. Douglas Hornby had by the deeds of covenant covenanted to transfer to Mr. Bearsley and Mr. Hewitt after her death were transferred to them in her lifetime. Mr. Jones had died in April, 1949, and the shares which were to be transferred to him were transferred to his executors and estate duty was paid in respect of them. The value of a share in the company at July 27, 1953, has been agreed to have been £4 10s.
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It was in respect of the receipt of the shares by Mr. Bearsley and Mr. Hewitt in this manner that claims have been made by the inspector of taxes for the year 1953-54. The claims are made under Sch. E (s. 156) of the Income Tax Act, 1952,

- C which provides that tax shall be charged "in respect of every public office or employment of profit". Meccano, Ltd., is in fact a public company. The relevant rules are found in Sch. 9 to the Act. Rule 1 provides:

- "Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment."
- D

Rule 4 provides for assessment on any additional salary, fees or emoluments in a similar manner.

- The charge is on salaries and other profits of the office, and it is rather startling to find a large and, at first sight, capital sum received in one year giving rise to such a devastating claim on the taxpayer. As VISCOUNT DUNEDIN said in *Seymour v. Reed* (1) ((1927), 11 Tax Cas. 625 at p. 647), in reference to the benefit received by the cricketer, James Seymour:
- E

- "When I think of this little nest egg—which, of course, paid income tax as an investment and which, now that it has taken the form of a farm, will pay income tax under Sch. A—being treated, the whole sum, as income, honestly, had it not been for the fact that honourable judges, whose opinions I respect, have come to another conclusion, I would have thought the contention was quite preposterous."
- F

- However, it must be accepted that, as the result of a number of decisions, some of which were given when income tax was not the crushing burden that it is at the present time, it is no longer possible to assume that a large sum received in one year is not to be treated, for income tax purposes, as the income of that year. Nor again can it be assumed that the fact that the money or property is acquired from other persons than the recipient's employers prevents the acquisition being treated as a profit of the recipient's office. James Seymour's benefit was held by the House of Lords to escape the terms of Sch. E, but another cricketer was less fortunate in *Moorhouse v. Dooland* (2) ([1955] 1 All E.R. 93), in which collections made by the public at cricket matches were held to be part of the perquisites or profits of a professional cricketer playing under the rules of the Lancashire Cricket League. Therefore, the fact that the payments were not made in the present case by the Hornby brothers as directors of Meccano, Ltd., or by that company (which was the employer of Mr. Bearsley and Mr. Hewitt) does not necessarily enable Mr. Bearsley and Mr. Hewitt to escape tax on the transfers of shares. On the other hand, the contention made on behalf of the Revenue that the Hornby brothers had such a financial interest in the company that they were substantially their employers seems to me not to be sustainable.
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The Special Commissioners reached the conclusion that the value of the shares was not assessable as income of Mr. Bearsley and Mr. Hewitt for the year 1953-54, and they considered that the transfer of the shares was not intended to be an act by way of remuneration for the services performed by them in their capacities as officers of the company. The main contention of the Crown before me was

that the Special Commissioners had fallen into error by attributing too much importance to the motives which induced the Hornby brothers to make the payments and too little importance to the positions of the recipients, which, it was claimed, was the decisive aspect. A

A number of cases was cited to me, which it will be useful to examine. *Cooper v. Blakiston* (3) ((1908), 5 Tax Cas. 347) (the Easter offerings case) is, of course, a case on which the Inland Revenue relied. The Easter offerings, which were given by the congregation to the incumbent for the purposes of augmenting his stipend, were given to the incumbent as such and so were held by the Court of Appeal and the House of Lords to be profits of his office. These were, of course, as is pointed out by LORD PHILLIMORE in *Reed v. Seymour* (1) (11 Tax Cas. at p. 654), periodical payments, and LORD LOREBURN, L.C., said (5 Tax Cas. at p. 355): B

"Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." C

By way of meeting this suggestion, counsel for the taxpayers pointed out that, during Mr. Frank Hornby's lifetime, Mr. Bearsley and Mr. Hewitt obtained transfers of shares from time to time. But I can well imagine that, if the large blocks of shares, which are the subject of the present case, had been received by them from Mr. Frank Hornby shortly before his death, the Revenue would be contending for estate duty purposes that they were not part of the normal expenditure of the deceased or of the same nature as the earlier transfers of shares. D
Herbert v. McQuade (4) ((1902), 4 Tax Cas. 489), where the clergyman received annual grants of money from a fund, was a case of a similar nature. E

In *Cowan v. Seymour* (5) ((1919), 7 Tax Cas. 372), the ordinary shareholders of a company, after liquidation had been completed, by a unanimous resolution voted a sum in equal shares to the chairman and the secretary of the company. It was held that the sum thus received by the secretary did not accrue to him in respect of an office or employment of profit and that he was not chargeable to income tax under Sch. E in respect of the sum. In that case, it was plain that when the secretary received the sum he had ceased to hold any office, and while he was secretary and liquidator he never received any remuneration. These facts distinguish it from the present case. F

In *Weight v. Salmon* (6) ((1935), 19 Tax Cas. 174), a managing director of a company received a fixed salary and each year by resolution the directors gave him the privilege of applying for certain unissued shares in the company at their par value, which was considerably less than their current market value. He was assessed to income tax under Sch. E on the basis of the difference between the market value of the shares taken up and the par price actually paid for them. It was held by the House of Lords that the privilege represented money's worth and was assessable as a profit of his office as managing director. G

In *Cameron v. Prendergast* (7) ([1940] 2 All E.R. 35), a director of a limited company intimated to his co-directors his intention of resigning his office. In a letter they asked him in the interests of the company not to serve notice of resignation, and said that the company, in consideration of his acceding to this request, would within a certain time pay him a sum of £45,000 and would embody its undertaking in a formal deed. The deed was entered into, and the company did pay £45,000, in two sums of £35,000 and £10,000. The House of Lords held that the amount received by the director arose from his office and was properly assessable to income tax under Sch. E. H

I was also referred to *Patrick v. Burrows* (8) ((1954), 35 Tax Cas. 138) (in which an employee was successfully assessed on the value of shares transferred to him under a trust scheme for the benefit of employees), and *Calvert v. Wainwright* (9) ([1947] 1 All E.R. 282) (in which a taxicab driver was held to have been correctly assessed on the tips received by him from passengers). I

- A** I have already mentioned *Moorhouse v. Dooland* (2), in which the professional cricketer was held by the Court of Appeal to be assessable on the sums received by him by means of collections from the public. It is to be observed that under the rules of the Lancashire Cricket League (a member club of which was his employer) the professional cricketer was authorised to make such collections on the occasion of meritorious performances by him, and these collections, in the case of a successful cricketer, would be periodic. On the other hand, in *Seymour v. Reed* (1) the proceeds were of a benefit received by the cricketer which were held not to be assessable to income tax. The features of this case were that, save in very exceptional cases, a benefit would not be received more than once in a cricketer's career, and the cricketer was approaching retirement, and the amount was in fact used to provide for his retirement.
- C** These cases seem to me to establish—(i) that a sum may be assessable as a profit, even though it appears to be an unusually large one in comparison with the recipient's normal income; (ii) that it may be assessable though it is received in the form not of cash, but of money's worth, such as shares; (iii) that it may be assessable though it is received from persons who are not the employers of the recipient or even persons having any actual financial interest in the services of the recipient; but (iv) that it depends on the circumstances, and not every sum received from another person during the period of the recipient's service is assessable as income and a profit of his office, even though it comes from the recipient's employer, and this must be more obviously so if the amount is received from a person who is not the employer.
- D**

- In the end, therefore, none of the cases cited is conclusive. It must depend on the circumstances of the particular case. The test is put in this way by **E** VISCOUNT CAVE, L.C., in *Seymour v. Reed* (1) (11 Tax Cas. at p. 646):

- “ . . . and it must now (I think) be taken as settled that [the words ‘salaries, fees, wages, perquisites or profits’ from the office or employment of profit] include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, ‘Is it in the end a personal gift or is it remuneration?’ If the latter, it is subject to the tax; if the former, it is not.”
- F**

- G** The word “remuneration” does not appear in the material provisions of the Act. It is a paraphrase used by LORD CAVE and ROWLATT, J.

- I must now face the difficult task of applying the test to the circumstances of the present case. The material findings of fact by the commissioners seem to me to be these. When Mr. Roland Hornby was approached, his view was that his father had been remiss in not leaving shares by will to the three persons who had helped him to build up the company. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Mr. Roland Hornby thought the shares should have been left in recognition of the work of these three gentlemen with the company. No condition was suggested that Mr. Bearsley and Mr. Hewitt should continue in the service of the company, or that the shares were remuneration. If the matter had rested there, I think that the taxpayers would have been entitled to succeed. It seems to me that the expectation of receiving bequests of shares in Mr. Frank Hornby's will was an expectation of receiving *gifts* of shares, and, when Mr. Roland Hornby accepted that the taxpayers had a moral claim to have received shares, it was not on the footing that the taxpayers had any claim to receive them as remuneration for services, but simply that Mr. Frank Hornby had failed in his generosity as a testator. In my view, the taxpayers did not think that they were going to receive shares from the Hornby brothers by reason of services performed or to be performed to the company, and the Hornby brothers did not think they were going to give
- H**
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shares to the taxpayers in any way in consideration of services by them to the company. The position was that there was a promise by the Hornby brothers to give the taxpayers some of the shares which were coming to the Hornby brothers under Mr. Frank Hornby's will. This was a purely voluntary promise, the performance of which could not have been enforced by the taxpayers by process of law. If the matter had remained in this position, and the promise had been duly fulfilled by the transfers of the shares, I think that the shares would have been received as a present and not as a profit of the taxpayers' offices, and would not have been assessable to income tax in the hands of the taxpayers. A B

But the transaction was changed. It was conceived that it was desirable to introduce the element of consideration in order to make the promises legally enforceable, and the consideration which was selected was a promise by Mr. Bearsley and Mr. Hewitt to continue serving in their offices with the company for four years from the date of the deeds of covenant. In this way, the acquisition of the shares under the terms of the deeds irretrievably was linked up with the services of the taxpayers as officers of the company. It seems to me to be impossible to deny that, under the obligations created by the deed, the shares were received by the taxpayers by reason of their offices, and, therefore, as profits of these offices. I have already said that I do not think that evidence is admissible to contradict the plain terms of the deeds by attempting to show that the intentions of the parties were to give a meaning to the provisions of the deeds contrary to the words which the deeds plainly contain. Even if evidence were to be admitted as to the intentions of the draftsman of the deeds, I am not satisfied that a different result would be reached. The draftsman chose to introduce consideration into the transaction between the parties, in order to create a binding relationship, and it seems to me to be impossible to contend that the consideration was not a real consideration, having no effect in law at all. The parties introduced consideration for what were supposed to be adequate reasons, and the effect cannot now be cast aside because the results have been found to be inconvenient. C D E

Two alternative contentions were put forward on behalf of the taxpayers. The first of these was that, if the transaction fell within the terms of Sch. E, the income of the taxpayers was the value of the rights acquired in December, 1945, by the taxpayers under the deeds of covenant; this would mean that those values would have to be estimated in December, 1945, and the assessment on them now, or at the material date of the assessments under appeal, would be out of time. Evidence was tendered that it was possible for a valuer to make an estimate of some sort as to the values in question. The commissioners treated the estimates as being such an uncertain matter that they could not amount to money's worth and, therefore, they were not a possible part of the taxpayers' income. I do not think that this is the correct answer, but I do not think that the contention can succeed. Counsel for the taxpayers, in support of this contention, relied on *Tait v. Smith* (10) ((1954), 35 Tax Cas. 79), as well as *Weight v. Salmon* (6); but I do not think that those cases have any application on the facts of the present case. If the conclusion is correct that the transfers of the shares were profits of the taxpayers' offices and remuneration for the services to be performed by them, they were paid for those services when the shares were transferred to them (though the shares were not immediately realised), and assessable accordingly. The assessments were, therefore, correctly made in respect of the year when the assessable income was received by the taxpayers. F G H I

A further contention was made by counsel for the taxpayers that the amount of the values of the shares received by the taxpayers should be spread over the four years during which the taxpayers promised to serve the company, and the assessments be made accordingly. Whatever morality or reasonableness might be thought to be satisfied by such a result, in my view it is not maintainable, because there was no promise to make payments over a series of years—merely

A a promise to make transfers of the shares as a whole on the happening of a certain event. In the result, therefore, the appeals succeed.

Appeals allowed.

Solicitors : *Solicitor of Inland Revenue ; Lightbounds, Jones & Co., agents for Owen, Dawson & Wynn-Evans, Liverpool (for the taxpayers).*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

B

R. v. MAHONEY.

C [COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hallett and Pearson, J.J.), November 19, 1956.]

Court-Martial—Desertion—Documentary evidence of absence and arrest—Inference of intention from length of absence—Certificate of arrest stating that accused was then wearing civilian clothes—Statement in certificate inadmissible—No objection to admissibility of evidence at trial or in notice of appeal—Conviction upheld—Army Act, s. 163 (1) (g) (h) (jj)—Courts-Martial (Appeals) Act, 1951 (14 & 15 Geo. 6 c. 46), s. 5 (1) proviso.

D

In order to prove a charge of desertion from Oct. 9, 1955, to Apr. 13, 1956, the prosecution called a non-commissioned officer who produced (1) a certified true copy of a duly signed record of a finding of a regimental court of inquiry held on Oct. 31, 1955, which stated that the appellant was absent from Oct. 9 to the date when the court of inquiry was held and still remained absent, and (2) a certificate of arrest signed by an officer of the Royal Military Police, to the effect that the appellant was arrested on Apr. 13, 1956, and that at the time of his arrest he was wearing civilian clothes. The appellant gave no evidence explaining his absence. No objection was taken, either at the trial or in the notice of appeal, to the admissibility of the statement in the certificate of arrest that the appellant was wearing civilian clothes.

E

F

On appeal against conviction of desertion,
Held: (i) the appellant had been rightly convicted of desertion because the copy record of the court of inquiry was evidence of his absence from Oct. 9 to Oct. 31, the certificate of arrest was evidence of the fact of his arrest on Apr. 13, the inference that he was absent between Oct. 31 and Apr. 13 was a proper inference to draw, and unexplained absence from Oct. 9 to Oct. 31 was abundant evidence that he had no intention of returning.

G

(ii) although oral evidence that the appellant was wearing civilian clothes when arrested could have been given at the court-martial, yet the certificate of arrest was not evidence of this, since under the Army Act, s. 163 (1) (jj) the certificate was evidence only of the fact, date and place of arrest, and such a certificate should not contain a statement that the person arrested was wearing plain clothes; but, no substantial miscarriage of justice having occurred, the appeal would be dismissed under the proviso to s. 5 (1) of the Courts-Martial (Appeals) Act, 1951.

H

Appeal dismissed.

[**Editorial Note.** The passage in the MANUAL OF MILITARY LAW (1951 Edn.), p. 383, footnote 17, which reads—"A statement in the certificate of surrender to the effect that the man was wearing civilian clothes is admissible as part of the fact of the surrender or apprehension"—is disapproved, see p. 801, letter G, post.

I

For the Army Act, s. 163 (1) (g) (h) (j) (jj), see 22 HALSBURY'S STATUTES (2nd Edn.) 379; for the superseding provision of s. 189 (3) of the Army Act, 1955, see 35 HALSBURY'S STATUTES (2nd Edn.) 567; and for the Courts-Martial (Appeals) Act, 1951, s. 5 (1) proviso, see 30 HALSBURY'S STATUTES (2nd Edn.) 468.]

Appeal against conviction by district court-martial.

The appellant, Pte. Bertie Mahoney of the Middlesex Regiment, was convicted before a district court-martial on a charge of desertion from Oct. 9, 1955, to Apr. 13, 1956, and was sentenced to nine months' imprisonment. At the trial, on the conclusion of the case for the prosecution, counsel for the appellant submitted that there was no case to answer because the appellant was entitled to release on Oct. 2, having enlisted on a regular engagement for five years on Oct. 2, 1950. That submission was overruled and the appellant was not called to give evidence, nor did he call any witness. The grounds of appeal were (i) that there was no, or no sufficient, evidence of desertion; (ii) that the evidence showed that the appellant was no longer a serving soldier at the time of his arrest; and (iii) that there was no evidence that he was absent without leave at the time of arrest. For the prosecution only one witness was called, a non-commissioned officer, who produced (a) a certified true copy of a duly signed record of the finding of a regimental court of inquiry held on Oct. 31, 1955, which stated that the appellant was absent without leave from Oct. 9 and was still absent on the date of the inquiry, and (b) a certificate of arrest signed by an officer of the Royal Military Police which certified that the appellant was arrested at Midhurst on Apr. 13, 1956, and at the time of arrest was wearing civilian clothes. The witness also produced an extract from Part II orders of the unit dated Aug. 22, 1955, stating that the appellant was posted to the depot with a view to discharge and a further extract from Part II orders, dated the following day, cancelling the appellant's posting.

W. R. Rees-Davies for the appellant.

E. Garth Moore for the Crown.

LORD GODDARD, C.J.: The appellant in this case was found guilty by a court-martial of desertion. He obtained leave to appeal to this court because our attention at the time was not called to the provisions of the Army Act, s. 163, which makes certain documents evidence. I am not blaming anyone for that. In this case the only evidence—which would not be evidence in a civil court—called before the court-martial was the evidence of a corporal who apparently was detailed to produce some documents. He produced documents which in fact show that a court of inquiry had been held in respect of the appellant's absence from his unit, and that the court of inquiry had found that he was absent from Oct. 9 to the day when this court of inquiry was held on Oct. 31. Another document was also put in which showed that the appellant was arrested at Midhurst, his unit I understand being at Mill Hill, and another document was put in which said:

"I certify that the accused of the Middlesex Regiment was arrested at Midhurst, Sussex, at 19.45 hours on Apr. 13, 1956, and at the time of his arrest was wearing civilian clothes."

Section 163 (1) of the Army Act provides:

"(g) Where a record is made in one of the service books in pursuance of any Act or of the King's regulations, or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or by the officer or record officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated. (h) A copy of any record in one of the said service books purporting to be certified to be a true copy by the officer or record officer having the custody of such book shall be evidence of such record."

Then it is provided in para. (jj):

"Where the proceedings are proceedings against an officer or soldier on a charge of being a deserter or absentee without leave, and the officer or soldier has been apprehended and has on arrest been taken into the

A custody of a provost marshal, assistant provost marshal or other officer, a certificate purporting to have been signed by such provost marshal, assistant provost marshal or other officer . . . and stating the fact, date and place of arrest . . . shall be evidence of the matter so stated."

B Therefore, this finding of the court of inquiry was quite properly admitted, and I do not think counsel for the appellant, who has endeavoured to take every point that could be taken, has disputed that it could be admitted as evidence of what the court of inquiry found.

C The court-martial, therefore, had before them evidence that the appellant was absent from his unit from Oct. 9 to Oct. 31. They also had evidence that he was arrested on Apr. 13. Counsel for the appellant with some courage has asked the court to say that on those facts the court-martial were not justified in drawing the inference that he was absent from his unit from the day when the absence began, Oct. 9, till his arrest. I can only say that I cannot agree to that. It seems to me that where a man is found to be absent without leave from Oct. 9 to Oct. 31, and has then to be arrested and is not arrested till Apr. 13, the inference is that he has been absent from his unit the whole of that time. D If a man is absent from Oct. 9 to Oct. 31, I should say that that is ample time on which a court-martial might hold that he did not intend to return. Why he did not intend to return has to be explained by him. No explanation being given, there was ample evidence here on which the court-martial could hold that the appellant was absent from his unit from Oct. 9 till his arrest on Apr. 13, and therefore there was ample evidence that he had been absent for so long a time that, in the absence of any explanation by him, he intended to desert Her Majesty's Forces. E

F The whole argument addressed to the court was that the appellant was entitled to assume that he had not to go back to his unit. I need not go into that at any length, because he gave no evidence why he did not return to his unit. Therefore, there was abundant evidence to justify a finding that he intended to desert; but one other point has been brought up in this court for the first time—it was never mentioned in the notice of appeal or taken below. The certificate of arrest, which was put in as evidence, does add these words: "at the time of his arrest was wearing civilian clothes". That a man dressed himself as a civilian and not in his uniform might be some evidence of his intending to desert. At any rate, the court cannot say, and counsel for the Crown does not contend, that those words "at the time of his arrest was wearing civilian clothes" could properly be inserted in this certificate. They ought not to have been there. There is a passage in the *MANUAL OF MILITARY LAW* (1951 Edn.) at p. 383, which reads: G

H "A statement in the certificate of surrender to the effect that the man was wearing civilian clothes is admissible as part of the fact of the surrender or apprehension."

I This is wrong; such a statement in the certificate is not evidence, though proof of the wearing of plain clothes could be given by verbal evidence. This point was never taken below. The attention of the court-martial was not called to it, I think for the good reason that counsel for the appellant was strenuously arguing that no inference could be drawn from the fact that he was in civilian clothes and, for all I know, the court was in agreement with that because, as he says, nowadays soldiers are allowed to wear civilian clothes a great deal more than they used to be. However that may be, the point was never taken below and was not taken in the notice of appeal. No objection was taken to the admissibility of the document in which the statement that the appellant was wearing plain clothes appeared, and the court considers they are obviously justified in applying the proviso to the Courts-Martial (Appeals) Act, 1951, s. 5. Of course the appellant did not intend to return, his contention being that he

was not bound to return. The question whether he was bound to return has not been argued before us. If he had gone into the box and given some explanation about this, it might have had considerable effect in mitigation, but he did not. There was evidence, therefore, in this case, and abundant evidence, that the appellant was absent from his unit in such circumstances that the court was perfectly entitled to find that he had no intention of returning, and that constitutes the offence of desertion, and this appeal is dismissed

Appeal dismissed.

Solicitors: *Wilders & Sorrell*, Hornsey (for the appellant); *Director of Army Legal Services* (for the Crown).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

DRISCOLL v. CHURCH COMMISSIONERS FOR ENGLAND AND OTHERS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 30, 31, 1956.]

Real Property—Restrictive covenant—Modification—"Obsolete"—Large houses to be used only as private dwelling-houses save with written consent of lessor—Most houses in district converted into flats or for use as guest houses—Lessor willing to consent to change of user subject to conditions to preserve residential character of neighbourhood—Impeding reasonable user of land—Discretion of Lands Tribunal—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 84 (1).

The applicant held the residue of the ninety-nine year terms created by leases of several large dwelling-houses granted between 1865 and 1870. The leases were granted by the predecessors in title of the Church Commissioners for England who were the freeholders. Each lease contained a restrictive covenant that "the premises shall not be used for any trade or business or otherwise than as a private dwelling-house save with the previous written consent of the lessor". The applicant converted the houses into hostels and residential clubs for persons from overseas and in 1949 he applied to the Church Commissioners for consent to use the properties for such purposes. The Church Commissioners were prepared to consent to the houses being converted into flats, or to their being put to use as guest houses, subject to certain conditions which in the subsequent proceedings before the Lands Tribunal were found to be conditions that it was reasonable to impose in order to maintain a proper standard for the neighbourhood. The applicant did not accept consent on these conditions and in April, 1952, the Church Commissioners issued writs for possession of all the houses, except two, based on forfeiture of the leases for breaches of the restrictive covenants. In the action the applicant admitted the breaches of covenant and counter-claimed for relief from forfeiture under the Law of Property Act, 1925, s. 146 (2). The applicant then revived an application, which had been initiated by him in 1949, and applied to the Lands Tribunal for the restrictive covenants to be modified under s. 84 of that Act so as to permit the user which he desired. In 1955 the tribunal found that, although there had been changes in the district in which the houses were situated, and few people could afford to keep the large houses in the district as private residences so that such houses were mainly divided into flats or used as guest houses, yet the district was still essentially a residential district, and that the owners and lessees were entitled to the amenities which they enjoyed when they entered into their leases. The tribunal accordingly decided that the restrictive covenants

A were not obsolete and in its discretion refused to modify them. The actions brought by the Church Commissioners were heard in July, 1956, and relief from forfeiture was granted to the applicant on terms which provided for the restrictive covenants to be observed as they stood or as they might be modified pursuant to the application to the tribunal. On appeal by the applicant from the determination of the tribunal,

B **Held:** (i) the applicant was entitled to proceed before the tribunal for modification of the restrictive covenants notwithstanding the actions for forfeiture and possession because, although the issue of the writs in the actions constituted an unequivocal election on the part of the Church Commissioners to determine the leases, yet, until the actions had been decided in favour of the Church Commissioners, the restrictive covenants were potentially good since, e.g., relief from forfeiture might be granted.

C *Dendy v. Evans* ([1910] 1 K.B. 263) applied.

(ii) the application was rightly dismissed because (a) the covenants were not obsolete as the district was still essentially a residential district and the covenants enabled the premises to be retained for reasonable residential use and the amenity of a residential neighbourhood thereby to be preserved (dictum of ROMER, L.J., in *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application*, [1955] 3 All E.R. at pp. 563, 564, applied); and (per DENNING and MORRIS, L.J.J.) (b) even if the covenants were obsolete, the tribunal had a discretion whether to modify them or not to modify them and, on the facts, there was no reason to suppose that the tribunal's discretion had been exercised wrongly, and (c) the covenants did not impede the reasonable use of the land having regard to the fact that the Church Commissioners had given their consent on reasonable conditions to a reasonable change in use (*Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214, applied).

E Appeal dismissed.

[**Editorial Note.** There is a divergence of view on what it is permissible to take into consideration in deciding whether a restrictive covenant is obsolete. F DENNING, L.J., took into consideration the question whether or not the landlord used the covenant reasonably (see p. 807, letter H, post); HODSON, L.J., accepted the submission that in considering the question of obsolescence it was irrelevant to consider whether the landlord would consent, subject to conditions, to the restrictive covenant not being enforced (see p. 809, letter I, post). MORRIS, G L.J., did not express a view on this question.

As to the grounds for discharging or modifying restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 572, para. 1063; and for cases on the subject, see 31 DIGEST (Repl.) 188, 3202-3205.

H For the Law of Property Act, 1925, s. 84, see 20 HALSBURY'S STATUTES (2nd Edn.) 605. For the Lands Tribunal Act, 1949, s. 1 (4) (which provides that the Lands Tribunal shall exercise the jurisdiction conferred on "the authority" by the Law of Property Act, 1925, s. 84), see 28 HALSBURY'S STATUTES (2nd Edn.) 319.]

Cases referred to:

- I (1) *Dendy v. Evans*, [1910] 1 K.B. 263; 79 L.J.K.B. 121; 102 L.T. 4; 31 Digest (Repl.) 529, 6520.
 (2) *Serjeant v. Nash, Field & Co.*, [1903] 2 K.B. 304; 72 L.J.K.B. 630; 89 L.T. 112; 31 Digest (Repl.) 553, 6733.
 (3) *Bracegirdle v. Oxley, Bracegirdle v. Cobley*, [1947] 1 All E.R. 126; [1947] K.B. 349; [1947] L.J.R. 815; 176 L.T. 187; 111 J.P. 131; 2nd Digest Supp.
 (4) *Julius v. Oxford (Bp.)*, (1880), 5 App. Cas. 214; 42 Digest 646, 518.
 (5) *Dendy v. Wallis*, (1909), Unreported.

- (6) *Jones v. Carter*, (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, 6527. A
- (7) *Grimwood v. Moss*, (1872), L.R. 7 C.P. 360; 41 L.J.C.P. 239; 27 L.T. 268; 36 J.P. 663; 31 Digest (Repl.) 528, 6513.
- (8) *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application*, [1955] 3 All E.R. 559; [1956] 1 Q.B. 261; 3rd Digest Supp.
- (9) *Re Henderson's Conveyance*, [1940] 4 All E.R. 1; [1940] Ch. 835; 109 B L.J.Ch. 332; 2nd Digest Supp.

Case Stated.

This Case was stated by the Lands Tribunal under the Law of Property Act, 1925, s. 84, and R.S.C., Ord. 58A.

The application to the tribunal was made by Terence John Driscoll under the Law of Property Act, 1925, s. 84, for the modification of restrictive covenants contained in the leases of eight dwelling-houses. The application was heard on Apr. 19, 1956, and it was proved or admitted (among other things) that the Church Commissioners, who were the lessors, had on Apr. 7, 1952, issued writs for possession of six of the houses, on the ground of forfeiture for breach of the covenant which the applicant sought to modify, and that the applicant had counterclaimed for relief against forfeiture. The applicant argued before the tribunal that the covenant was obsolete or impeded the reasonable user of the land. The Church Commissioners contended (among other things) that the applicant had no locus standi having regard to the forfeiture proceedings. The applicant failed to satisfy the tribunal that any of the conditions precedent to the exercise of the tribunal's discretion under s. 84 was satisfied, and dismissed the application, finding it unnecessary to consider the question whether the applicant had by reason of the forfeiture actions, ceased to have an interest in the premises so as to justify an application under s. 84. C D E

In the actions for possession the applicant was granted relief from forfeiture on certain conditions by PEARCE, J., in July, 1956.

Michael Albery, Q.C., and *W. L. Roots* for the applicant. F

Percy Lamb, Q.C., and *P. H. R. Bristow* for the respondents, the Church Commissioners of England.

DENNING, L.J.: In the years between 1865 and 1870 the predecessors of the Church Commissioners for England granted leases of certain premises in Croydon at a ground rent for ninety-nine years, and those leases are due to expire in 1964 and the succeeding years. (I expect that they were building leases at a ground rent.) In those leases the commissioners put a restrictive covenant. The usual form was, G

"the premises shall not be used for any trade or business or otherwise than as a private dwelling-house save with the previous written consent of the lessor." H

Large houses were built—ten-roomed or even twenty-roomed houses—and there is no doubt that at the date when the covenant was made it was contemplated that those houses would be occupied by people of wealth and position with sufficient servants to keep such large houses going for use for a single family. In the course of years—and particularly since the wars, when it has become almost impossible to get servants to staff houses of this size—the Church Commissioners have readily granted consents to these houses being used, not for single private dwelling-houses, but to be converted into flats or as guest houses and so forth. I

We are concerned with a number of these houses, the leaseholds of which were bought by the applicant, Mr. Terence John Driscoll, a few years back. We were told that when he bought them, some were used as boarding houses, others were self-contained flats, and two or three were still used for single private

A dwelling-houses. The applicant turned them into hostels and residential clubs for people from overseas. He had not, however, consent for this user of the premises, so he applied in 1949 to modify those restrictive covenants.

There is a procedure which has been in force ever since 1925, prescribed by the Law of Property Act, 1925, s. 84, which set up an authority (now the Lands Tribunal) which, it was provided,

B "shall . . . have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which C the authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user."

D By sub-s. (12) this procedure applies to long leaseholds as well as freehold land. Under that provision the applicant applied to the Lands Tribunal to modify this restriction which I have read, and he sought the removal or modification of the restriction so as to permit the user as a private guest house or as a hostel for a residential club. The Church Commissioners, when he sought a modification, did not turn it down altogether. There was a letter in September, 1949, in which the solicitors to the Church Commissioners, writing to the solicitors E for the applicant, said:

"In certain cases licences have been granted permitting houses on the commissioners' estate to be used as guest houses, but the terms of the licences are such as to preserve the character of the neighbourhood . . . We are prepared to take our clients' instructions with regard to the granting to F Mr. Driscoll of a similar licence. The terms on which Messrs. Clutton would advise the granting of such a licence are as follows . . ."

Then it sets out a number of conditions: that each house should have its own resident matron or supervisor, that it is to be properly furnished, that it is to be kept outwardly as a private residence, that the number of persons occupying each house is to be restricted, that wireless sets are not to be audible outside, G and so forth; and the licence was to be "revocable at the commissioners' pleasure and to be personal to" the applicant. Then the applicant has to make good within twelve months all the dilapidations.

So the Church Commissioners offered to grant him permission on those conditions. He did not see his way to agree to those conditions; and one can well see that they were rather stringent. There were negotiations, and he eventually H determined to go to the tribunal to see if the tribunal would modify the restrictions. Before he got there, the commissioners issued writs for forfeiture in respect of six out of the eight leases, claiming that the premises were forfeited because he had broken his covenant about user; and certainly he had: he had not the necessary consent of the commissioners. In those actions for forfeiture the applicant had to admit that there were breaches, but he counterclaimed I for relief from forfeiture*. The actions were tried by PEARCE, J., in July, 1956. He granted relief on terms that (in effect) provided for the repairs to be done to the premises and provided for the covenants to be observed either as they stood or as they were modified.

I will mention one point at once, a technical point taken by counsel on behalf of the Church Commissioners. He raised it by cross-notice under the new rule, R.S.C., Ord. 58, r. 6 (2), which is, I think, open to him. He said that because

* I.e., under the Law of Property Act, 1925, s. 146 (2).

of those writs for forfeiture being issued, the applicant had no locus standi to apply for these restrictions to be modified at all in regard to six of these leases. He said that the issue of a writ for forfeiture is an unequivocal election by the landlords to determine the leases, and in consequence the leases had gone and the covenants had gone, and that there was nothing left to modify. I do not agree with that argument, for this reason, that, although a writ is an unequivocal election, nevertheless, until the action is finally determined in favour of the landlord, the covenant does not cease to be potentially good. For instance, the forfeiture may not be established; or relief may be granted; in which case the lease is re-established as from the beginning. That appears from *Dendy v. Evans* (1) ([1910] 1 K.B. 263) following what SIR RICHARD HENN COLLINS, M.R., said in *Serjeant v. Nash, Field & Co.* (2) ([1903] 2 K.B. 304). It seems to me that so long as the covenant is potentially good, the applicant, or anyone in like position, has a locus standi to apply to the tribunal for a modification of the covenant. So I think that the applicant is not to be defeated on any technical point.

Putting that matter on one side, the applications came before the president of the tribunal, SIR WILLIAM FITZGERALD. He sat himself to hear the case, he heard the evidence, and he went and inspected the site. He refused to modify the restriction. The applicant appeals to this court.

I must first say a word about appeals from the Lands Tribunal. Parliament has now enacted, in the Lands Tribunal Act, 1949, s. 3 (4): "A decision of the Lands Tribunal shall be final"; but then there is this proviso:

"Provided that any person aggrieved by the decision as being erroneous in point of law may, within such time as may be limited by rules of court, require the tribunal to state and sign a case for the decision of the court . . ."

That is the provision under which the matter is brought before us. A person who is aggrieved by the decision as being *erroneous in point of law* may bring the matter up to this court. I would not wish those words unduly to hamper an appeal from the tribunal, and I do not think they do, because it is well settled that the question whether or not there is any evidence to support a particular finding is a question of law. It is also well settled that the question whether an inference drawn from primary facts is a legitimate inference is also a question of law. There have been before the Divisional Court several cases of dangerous driving where the Lord Chief Justice and his colleagues, having had primary facts stated, have held that the justices were not justified in dismissing the charge and have directed them to convict. Such was *Bracegirdle v. Oxley*, *Bracegirdle v. Cobley* (3) ([1947] 1 All E.R. 126). It is for the tribunal of fact to find the primary facts, but having done so, the inferences from those facts are matters on which an aggrieved person can appeal.

In this case, therefore, we have to see what are the facts which the tribunal has found, and to see what are the conclusions which it has drawn from those facts. Then we have to see whether the conclusions which it has drawn are reasonable conclusions for it to draw. So far as the facts are concerned, the Church Commissioners agreed that there were changes in the neighbourhood. Mr. Clutton, their chartered surveyor, said:

"It is true that the houses were now too large for single occupation, but the commissioners would always agree to their conversion into flats or to other uses subject to such conditions as they considered fit to impose to maintain what they consider a proper standard for the neighbourhood."

The president of the tribunal made these findings:

"I was of opinion that, although there were changes in this area of Croydon, those changes were only to the extent that they reflected the change in regard to the size of private residences. It is true that few people could afford to keep these rather large houses as private residences today

A and consequently most of them have been converted into flats or guest houses, but I came to the conclusion that it is still essentially a residential area and that the owners and lessees of the houses in the area were entitled to the amenities which they enjoyed when they entered into their leases. One of those amenities was the benefit of a covenant that no trade or business should be carried on in the area and that premises should not be
B used otherwise than as a private dwelling-house save with the previous written consent of the lessor. I cannot regard that provision as obsolete today and I came to the conclusion that if those amenities were to be preserved the Church Commissioners should still retain the control which can be exercised by giving or withholding their consent, subject to the proposed conditions referred to in para. 11 above which I found as a fact reasonable. Furthermore, it was clear to me that the gravamen of the objection, which the evidence and my inspection satisfies me is valid, of the Church Commissioners is the manner in which the applicant conducts these clubs and the dilapidated condition into which he allowed the premises to fall. I do not hesitate to say that the applicant's failure in these respects does injure both the Church Commissioners and the other objectors [the other residents]. The only conclusion that I can draw is that the applicant's object in making this application is to free himself altogether from the reasonable fetters which the Church Commissioners consider necessary to maintain the character of this neighbourhood. The applicant failed to satisfy me on any of the grounds set out in s. 84 of the Act as a condition precedent for the discharge of modification of the covenants . . . In these
E circumstances I felt unable to exercise my discretion to grant this application."

So we have those primary facts (if I may so call them) in regard to these premises. When the premises were originally let in 1865 or 1867 it was undoubtedly contemplated that they should be used as single private dwelling-houses only; but at the present day, if they are to be used at all, there has to be a departure from that purpose which was originally contemplated: they must be turned into flats or into guest houses. In one sense, therefore, the covenant is obsolete, because it can be said no longer to serve the purposes originally contemplated; but, as SIR WILLIAM FITZGERALD says, the covenant still serves a useful purpose in another way: it enables the landlords, the Church
G Commissioners, to keep control over the use to which these houses are put. It enables the landlords here, the Church Commissioners, to keep the area as a residential area, instead of its being used, as it might have been, for commercial purposes. It seems to me that, so long as the landlord uses this covenant reasonably for a useful purpose, then, even though that purpose goes beyond
H what was contemplated ninety years ago, the covenant is not obsolete; whereas, if the covenant is shown no longer to serve any useful purpose, then, of course, it is obsolete. And in considering whether it still serves a useful purpose, I think that it is very important to see how the landlord, or whoever is entitled to the benefit of the covenant, has used it in the past and seeks to use it in the present. If he uses it reasonably, not in his own selfish interests but in the
I interests of the people of the neighbourhood generally, as, for instance, when he gives his consent for any sensible change of user, then it will serve a useful purpose. I should have thought that if he uses it unreasonably, for instance, to exact a premium as a condition of his consent; or if he refuses consent altogether when he ought to give it, as, for instance, for turning it into flats, it would no longer serve a useful purpose. In short, so long as the landlord uses the covenant reasonably in the interests of the public at large it is not obsolete, but, if he seeks to use it unreasonably, then it is obsolete.

The same result is reached by another line of reasoning. Assume that the covenant is obsolete because the premises cannot be used for single dwelling-houses. Nevertheless I am clearly of opinion that the tribunal has a discretion whether to discharge or modify these restrictions. We have been referred to *Julius v. Bishop of Oxford* (4) ((1880), 5 App. Cas. 214) which lays down the circumstances in which permissive words in a statute can be treated as compulsive. Counsel for the applicant urged us to say that the power given by the words "the authority shall have power by order wholly or partially to discharge or modify any such restriction" is not only a permissive power but also imposes a duty on the tribunal to modify the restriction in some way or other, though it has a discretion as to the precise way to be adopted. I do not agree with that view. It seems to me that this section does give a discretion in the tribunal whether to modify the restriction at all. In this case the President of the Lands Tribunal, having considered the matter and seen the premises, has said that in his discretion he does not think it is reasonable to modify it in the way proposed or sought by the applicant. I see no reason to suppose that he exercised his discretion wrongly.

I would only add that, before the tribunal, the applicant sought to make a case on the second limb of s. 84 (1) (a):

"that the continued existence thereof [of the restriction] would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons . . ."

The president of the tribunal found that that was not made out. On the facts which I have stated, it seems to me that he was well justified in so saying. The continued existence of this restriction does not impede the reasonable user of the land when we know that, on the findings of the tribunal, the Church Commissioners have given their consent freely and reasonably to all reasonable changes of user, such as enabling the houses to be turned into flats or into guest houses, subject to conditions which they have felt it necessary to impose in order to preserve the residential character of the area.

I can find no fault in point of law with the reasoning of the tribunal, and I would dismiss the appeal accordingly.

HODSON, L.J.: I am of the same opinion. The Church Commissioners on Apr. 7, 1952, issued a writ against the applicant and another for possession of all the premises the subject of this application save two, based on forfeiture of the leases for breach of the covenant sought to be modified in this application. The rival contentions were these. On the one hand it was said by the Church Commissioners that the leases were determined by the forfeiture, so that there are no subsisting covenants to be discharged or modified. On the other hand the applicant says that the issue of the writ did not determine the applicant's interest in the premises, and that the leases subsisted until the determination of the action and the counterclaim for relief from forfeiture. He relied on *Dendy v. Evans* (1) ([1910] 1 K.B. 263), a decision of this court, where it was held, affirming a decision of DARLING, J., in the King's Bench Division, that:

"though the issue and service of the writ to recover possession operated as a final election by the lessor to determine the lease, the effect of the order for relief was to restore the lease as if it had never become forfeited . . ."

and, therefore, certain other consequences followed. One passage in the judgment of COZENS-HARDY, M.R., was commented on, where he said (*ibid.*, at p. 268):

"I therefore think that it is reasonably clear that there was nothing in the issue of the writ in the action of *Dendy v. Wallis* (5) (1909) (Unreported), which put an end to the lease, and, further, that the mere issue of the writ in that action had no effect or operation upon the underlease."

- A That sentence at first sight appears to be in conflict with earlier authorities—*Jones v. Carter* (6) ((1846), 15 M. & W. 718), *Grimwood v. Moss* (7) ((1872), L.R. 7 C.P. 360), and *Serjeant v. Nash, Field & Co.* (2) ([1903] 2 K.B. 304)—to which our attention was drawn, all of which cases were cited to the Court of Appeal in *Dendy v. Evans* (1); and I think that the circumstances in which the court came to that conclusion are perhaps illuminated when one looks at one of those earlier cases, *Serjeant v. Nash, Field & Co.* (2), also a decision of this court. SIR RICHARD HENN COLLINS, M.R., said ([1903] 2 K.B. at p. 310):

“There is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be retracted, treats a breach of covenant by the lessee as constituting a forfeiture.”

- C Later in his judgment the Master of the Rolls said (*ibid.*, at p. 311):

“It is true that the rights of the parties were not determined by the issue of the writ, and could not be finally determined until the result of the action was known . . .”

- D I think the effect of the authorities is that the right of the applicant is not destroyed for this purpose, bearing in mind that the right to relief relates back, just as the right to forfeiture relates back; so that the preliminary objection taken in respect of the six cases, I think, fails.

When one comes to the substantive matter under the Law of Property Act, 1925, s. 84, the applicant has to satisfy the authority, i.e., the Lands Tribunal, before the tribunal can make an order, that certain preliminary circumstances are established. In this case the applicant has relied on s. 84 (1) (a),

- E “that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user.”

F With regard to the second alternative, the Lands Tribunal took into account the way in which the properties in question had been managed by the landlords in the past, and came to a conclusion adverse to the applicant. The learned president expressed himself, in the judgment to which our attention G was drawn, in this way:

“I cannot hold that the Church Commissioners are so enforcing the restrictions as to impede the reasonable user of the premises for public or private purposes without securing practical benefits to other persons.”

- H I think that he was, in considering the alternative to which I am now referring, entitled to take that matter into consideration, and, therefore, there is no valid criticism which can be made against his conclusion in that respect.

- I The main attack on the conclusion of the President of the Lands Tribunal has been made by counsel for the applicant, however, on the ground that he was wrong in that he misdirected himself, and, alternatively, that there was no evidence on which he could come to the conclusion that the restriction ought not to be deemed obsolete, because it is said that on the face of the findings of fact which he made the restriction was obsolete, and that he was diverted from the right conclusion only by taking into consideration the activities of the commissioners in this case. I think that has been a difficult question, because for my part I agree with counsel's submission that in considering the question of obsolescence it is not relevant to consider whether the Church Commissioners will or will not withhold their consent to the covenant not being enforced or not being kept alive in a particular case subject to certain restrictions. One has to consider the circumstances of the covenants of the estate as found as a

fact by the tribunal and then consider whether, as a matter of law, the tribunal was right in coming to the conclusion that the provision was not obsolete. Some assistance, I think, can be obtained, in considering this question, from what this court said in a judgment delivered by ROMER, L.J. (the other members of the court concurring), in *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (8) ([1955] 3 All E.R. 559). In that judgment, he considered the word "obsolete" and the definitions in the SHORTER OXFORD ENGLISH DICTIONARY to which the attention of the court had been drawn, and he said (*ibid.*, at p. 563) that it seemed to him that:

"the meaning of the term 'obsolete' may well vary according to the subject-matter to which the term is applied";

and dealing with that case (which was a case of a kind like this where a restriction in a covenant had to be considered) he said (*ibid.*, at p. 564):

"... I cannot see how, on any view, the covenant can be described as obsolete, because the object of the covenant is still capable of fulfilment, and the covenant still affords a real protection to those who are entitled to enforce it."

I think that one gets some assistance from that passage in considering whether or not the Lands Tribunal was entitled as a matter of law to come to the conclusion which it reached. I would first of all say that what one has to consider is the restriction against use of the premises otherwise than as a private dwelling-house. One is not considering the question whether the premises shall or shall not be used for trade or business. Nor do I think one gets any real assistance, in considering the restriction for use otherwise than as a private dwelling-house, from considering the provision "save with the previous written consent of the lessor", because that to my mind does not really assist one in considering whether or not the covenant is obsolete. I for my part am driven to consider what is the true effect of the finding of fact in para. 12 of the Case, because, so far as facts are concerned, apart from inferences which can properly be drawn from the facts, we are held closely, by the provisions of the Act of 1949, to the findings of the tribunal. Paragraph 12 of the Case stated by the learned president reads:

"I was of opinion that although there were changes in this area of Croydon those changes were only to the extent that they reflected the change in regard to the size of private residences. It is true that few people could afford to keep these rather large houses as private residences today and consequently most of them have been converted into flats or guest houses, but I came to the conclusion that it was still essentially a residential area and that the owners and lessees of the houses in the area were entitled to the amenities which they enjoyed when they entered into their leases. One of those amenities was the benefit of a covenant that no trade or business should be carried on in the area and that premises should not be used otherwise than as a private dwelling-house save with the previous written consent of the lessor."

I also have in mind the fact (which is referred to in the Case) that the president had viewed the residences the subject-matter of this appeal. I am sorry that there is not more information as to these particular houses, because it is very easy to generalise and say that nobody nowadays lives in a big house, that they cannot afford to heat them, that they cannot afford to staff them, and that at best they can only "camp out" in one corner of the place; we have not the full details as to the size of these houses; but reading the conclusion of fact as to the majority of houses no longer being occupied as private residences, while a few were, consent having been given, no doubt, to the conversion of the majority for multiple housing, I am of opinion that there is material thereon

A which the learned president could arrive at the conclusion at which he did, viz., that the provision was not obsolete.

So that, even on the first limb, where I accept that the applicant is on stronger ground than on the second, I think that the applicant fails to satisfy this court that there is any ground on which this court can interfere with the conclusion of the tribunal. It therefore is not relevant for me to go further and consider the question of discretion. Anything I may say on that question is no part of the ground of my decision on the main issue in the case. But it would appear to me that this is one of those cases where the discretion of the Lands Tribunal is at large, so that it would be (as it was in *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (8)) futile to send this case back for a reconsideration of the question of the exercise of discretion, because no directions which we could give would be likely to produce a different result from that which the learned president reached, on the footing that he had discretion, in para. 12 of the Case.

MORRIS, L.J.: I have reached the same conclusions. The applicant has been using the properties which are in question for the purposes of guest houses or hostels forming a residential club for Commonwealth students. That is a laudable purpose. The learned President of the Lands Tribunal in his judgment described the establishment of such clubs for Commonwealth students as being highly desirable and as being a purpose to be encouraged if possible. The real dispute that has arisen between the parties is as to the way of achieving that purpose. For, as the learned president also pointed out, the Church Commissioners have stated that they have been at all times willing to allow the applicant to use the premises as private guest houses or hostels for a residential club: the question has been how and on what conditions the purpose should be achieved.

The applicant has invoked the procedure that is permissible under the Law of Property Act, 1925, s. 84, and has asked for the modification or discharge of certain restrictions. The jurisdiction under that section used to be exercised by official arbitrators*, and there was an appeal to a nominated judge, who was a judge of the Chancery Division. In *Re Henderson's Conveyance* (9) ([1940] 4 All E.R. 1), FARWELL, J., set out what was the approach of the court when hearing an appeal from the official arbitrator. But now, since the passing of the Lands Tribunal Act, 1949, the determination of these matters is by the Lands Tribunal. The Lands Tribunal Act, 1949, s. 1 (4), provides that the Lands Tribunal shall exercise "the jurisdiction conferred on the authority under s. 84 of the Law of Property Act, 1925". It is provided by s. 3 (4), that the decision is final, subject to the proviso as to the rights of any person "aggrieved by the decision as being erroneous in point of law" to have a Case Stated for the decision of the Court of Appeal.

When the hearing took place before the Lands Tribunal in May, 1956, an action was pending, but had not been heard, in which, in reference to those houses in respect of which there was a right of re-entry, there had been writs served claiming forfeiture. In those actions the applicant counterclaimed for relief from forfeiture. The actions were not heard until July, 1956, after the date of the hearing by the Lands Tribunal. It seems to me that at the date of the hearing by the Lands Tribunal, the applicant was a "person interested" within the language of s. 84. Section 84 begins with the words:

"The authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested . . ."

The applicant was, in my judgment, a "person interested". He had his claim to be relieved, and the authority of *Dendy v. Evans* (1) ([1910] 1 K.B. 263)

* See s. 84 (10) (repealed) of the Law of Property Act, 1925, and R.S.C., Ord. 54D, rr. 2, 3.

in this court shows that, though the issue of a writ may amount to a final election on the part of a lessor to treat a lease as forfeited, the effect of an order for relief is to restore the lease as if it had never become forfeited. The applicant had the right to claim that relief. In my judgment, at the date of the hearing before the Lands Tribunal, the applicant had a locus standi: he was a "person interested."

The application was based on two grounds: it was said that the restriction was obsolete; and it was said that the continued existence of the restriction

"would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons."

The restriction which the applicant sought to modify was to the effect (and I am quoting from the Case Stated) that

"the premises shall not be used for any trade or business or otherwise than as a private dwelling-house save with the previous written consent of the lessor."

The substance of the matter was that the application related to the restriction concerning user otherwise than as a private dwelling-house. It was not suggested that the restriction that the premises should not be used for any trade or business was obsolete, or was impeding reasonable user, though there had to be a request for modification of that restriction because the use to which the applicant puts the premises is technically a carrying on of a trade or business.

The learned President of the Lands Tribunal held that the applicant failed to satisfy him "on any of the grounds set out", and I read that as meaning, failed to satisfy him either that the restriction was obsolete or that it impeded reasonable user. In regard to the latter of those, the president, in the decision (which, though not strictly part of the Case Stated, has been by mutual assent of the parties referred to) after referring to the undertaking of the Church Commissioners, said:

"In the light of this undertaking I cannot hold that the Church Commissioners are so enforcing the restrictions as to impede the reasonable user of the premises for public or private purposes without securing practical benefits to other persons."

It seems to me that, in view of that finding, it is very difficult to submit that the continued existence of these two restrictions would impede the reasonable user of the land; and I see no reason for thinking that the learned president made any error in law in so deciding.

As to the restriction preventing the user otherwise than as a private dwelling-house, he came to the conclusion set out in para. 12 of the Case, which has been referred to by my Lords. He came to the conclusion that the area "is still essentially a residential area", although "few people could afford to keep these rather large houses as private residences today". Those findings of his, it seems to me, are sufficient to warrant his conclusion that the restriction is not obsolete.

I derive considerable help from the judgment of ROMER, L.J., in this court in *Re Truman, Hanbury, Buxton & Co., Ltd.'s Application* (8) ([1955] 3 All E.R. 559). ROMER, L.J., said (*ibid.*, at p. 563):

"If, as sometimes happens, the character of an estate as a whole, or of a particular part of it, gradually changes, a time will come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area."

A Nothing of that kind has happened in the present case. ROMER, L.J., also said (*ibid.*, at p. 564):

“ . . . I cannot see how, on any view, the covenant can be described as obsolete, because the object of the covenant is still capable of fulfilment, and the covenant still affords a real protection to those who are entitled to enforce it.”

B It seems to me that this covenant is still capable of fulfilment even though there may not be many people who could afford to keep these rather large houses. Furthermore, the covenant does afford a real protection. As the learned president pointed out, there are other tenants of the same lessors who regard it as an amenity that premises should not be used otherwise than as a private dwelling-house save with the previous written consent of the lessor.

C This covenant is a protection for the lessors in that it enables them to preserve this desirable amenity. Other tenants of property may regard it as a considerable protection to them if the consent of their lessor is needed in respect of other properties.

D Counsel for the Church Commissioners made a point that there is significance in the fact that the covenant provides that the user shall not be “ otherwise than as a private dwelling-house save with the previous written consent of the lessor ”. It is quite true, as counsel for the applicant pointed out, that in one sense the words as to consent do not add very much since in any case, whether those words are there or not, any lessor can give his consent. But it seems to me that those words do have some significance. They rather point

E to the possibility, contemplated when the leases were entered into, that there might come a time when some consent would be needed, and perhaps for the reason that, though the area would continue to be a residential area, it might not be possible for a whole house always to be in single occupation. It might be quite a satisfactory position for the tenants, who might in a particular area all be tenants of the one lessor, to repose confidence in their lessor that written

F consents would in proper cases be granted so as to preserve the character and amenities of an area. This would particularly be so if the lessors were considered to be managing the property in the interests of all concerned, of the lessors and the lessees, and of the local community as a whole.

I therefore do not think that the learned president in any way made an error in law when he came to his conclusions. I would only add, without repeating

G what has been said, that I am in entire accord with what my Lord, DENNING, L.J., said in regard to the topic of discretion; and applying the passages in *Julius v. Bishop of Oxford* (4) ((1880), 5 App. Cas. 214), to the circumstances of this case I adopt the same method of approach as that referred to by my Lord.

Appeal dismissed.

Solicitors: *Kinch & Richardson*, agents for *Copley Singleton & Billson*, Croydon (for the applicant); *Milles, Day & Co.* (for the respondents).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

M. & S. DRAPERS (a firm) v. REYNOLDS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 23, 24, November 8, 1956.]

Trade—Covenant in restraint of trade—Collector and salesman in credit drapery trade—Covenant for period of five years after termination of employment not to canvass or solicit orders from customers in employers' books during last three years of employment—Employment terminable at two weeks' notice—Covenant unreasonable.

In March, 1953, the defendant entered the employment of the plaintiffs as a collector and salesman, having for several years previously been in the credit drapery trade. In August, 1955, the parties entered into a written agreement, determinable at two weeks' notice on either side, whereby the plaintiffs agreed to pay the defendant a weekly wage of £10. Clause 8 of the agreement provided that for a period of five years following its determination the defendant would not canvass or solicit orders by way of the business of a credit draper from any person whose name had been inscribed on the books of the plaintiffs as a customer during the three years immediately preceding the determination of the agreement and on whom the defendant had called in the course of his duties for the plaintiffs. The defendant left the plaintiffs' employment in May, 1956, and thereafter sold goods by way of the business of a credit draper to persons whose names were on the plaintiffs' books as customers during the three years before he left their employment. On a claim by the plaintiffs to restrain the defendant from committing further breaches of the agreement,

Held: clause 8 of the agreement was unenforceable since the restriction for as long as five years was, for a man in the position of the defendant, unreasonable (*Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724, and *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688, applied; *Gilford Motor Co. v. Horne*, [1933] Ch. 935, distinguished).

Semble (per DENNING and MORRIS, L.JJ.): in determining whether a restriction in restraint of trade is reasonable the fact that the restriction will prevent the employee, a salesman, from selling his goods to persons who were part of his trade connection before the employment began, and in relation to whom his knowledge was not acquired in the service or at the expense of his employers, is a factor weighing against the validity of the restriction (see p. 820, letter F, and p. 821, letter B, post); cf., p. 816, letter H, post, per HODSON, L.J.

Appeal dismissed.

[Editorial Note. In such cases as the present the onus of showing that the restriction is reasonable is on the covenantee, the employer (see, e.g., *Attwood v. Lamont*, [1920] 3 K.B. at p. 587).

As to covenants in restraint of trade limited as to time, see 32 HALSBURY'S LAWS (2nd Edn.) 414, para. 693, note (q); and for cases on the subject, see 43 DIGEST 43, 431-437.]

Cases referred to:

- (1) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, 154.
- (2) *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 43 Digest 62, 641.
- (3) *Dubowski & Sons v. Goldstein*, [1896] 1 Q.B. 478; 65 L.J.Q.B. 397; 74 L.T. 180; 43 Digest 43, 438.
- (4) *Gilford Motor Co. v. Horne*, [1933] Ch. 935; 102 L.J.Ch. 212; 149 L.T. 241; Digest Supp.

- A (5) *Attwood v. Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 43 Digest 20, 131.
 (6) *Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 43 Digest 22, 143.
 (7) *Fitch v. Dewes*, [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 43 Digest 34, 276.

B

Appeal.

The plaintiffs, a firm carrying on business as credit drapers, appealed against an order of His Honour JUDGE CHARLESWORTH, at Newcastle-upon-Tyne County Court, dated July 19, 1956, whereby he dismissed their claim against the defendant, their former employee, (i) for £30 damages for breaches of an agreement not to canvass or solicit orders from certain ascertainable persons for a period of five years after termination of the employment, and (ii) for an injunction to restrain him from committing further breaches. The facts appear in the judgment of HODSON, L.J.

C

Peter Foster for the plaintiffs.

R. J. Parker for the defendants.

D

Nov. 8. The following judgments were read.

Cur. adv. vult.

DENNING, L.J.: I will ask HODSON, L.J., to give the first judgment.

E

HODSON, L.J.: The defendant was first employed by the plaintiffs as a collector and salesman in March, 1953, without any formal agreement. When he joined the plaintiffs he had a connection with customers presumably of other employers, having at the time of the hearing been in the credit drapery trade for five or six years in all; and the plaintiffs benefited from that connection in that persons who composed it became customers of the plaintiffs when the defendant joined the firm. On Aug. 11, 1955, the parties entered into a written agreement determinable at two weeks' notice on either side, providing for a weekly wage of £10 to be paid to the defendant. On May 17, 1956, he left the employment of the plaintiffs. Clause 8 of the agreement provided:

F

"For a period of five years following the determination of this agreement the servant shall not directly or indirectly either by himself or as the agent servant or partner of another person or company sell or canvass or solicit orders and in either case by way of the business of a credit draper from any person whose name shall have been inscribed upon the books of the firm as a customer during the three years immediately preceding such determination upon whom the servant has called in the course of his duties for the firm . . ."

G

Since he left the employment of the plaintiffs the defendant sold goods to persons whose names were on the books of the plaintiffs as customers during the three years before he left their employment by way of the business of a credit draper. The plaintiffs seek to enforce the covenant against him. The plaintiffs as covenantees accepted the proposition that prima facie the covenant was void and unenforceable unless they could establish that the restraint was reasonable. The county court judge held that, although it might be that the plaintiffs had some proprietary rights in their lists of customers, a restriction for as long as five years for a man in the position of the defendant, earning a modest wage and liable to be dismissed on two weeks' notice, was quite unreasonable; and he gave judgment for the defendant. The plaintiffs have appealed, contending that since a proprietary right is established, the protection of which is necessary, the restriction does not necessarily become unreasonable even if it is unlimited in point of time and the notice is short. They maintain, correctly, that they had a legitimate interest to protect and were entitled to take steps to prevent their existing customers from being interfered with or being enticed away.

I

So far as the question of shortness of notice is concerned, it appears that, although the position of the employee has to be considered, the court will not inquire into the adequacy of the consideration or weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed on him by the restraint. See the observations of LORD PARKER of WADDINGTON in *Herbert Morris, Ltd. v. Saxelby* (1) ([1916] 1 A.C. 688 at p. 707). On the question of time they rely mainly on the authority of *Mills v. Dunham* (2) ([1891] 1 Ch. 576), *Dubowski & Sons v. Goldstein* (3) ([1896] 1 Q.B. 478) and *Gilford Motor Co. v. Horne* (4) ([1933] Ch. 935). In the first case there was an agreement for the employment of the defendant as a traveller providing that he was to "call upon and solicit orders" for all articles in the way of the plaintiffs' business of anti-septic manufacturers, and in the event of the determination of the agreement that he should not, either on his own account or for any employer,

"call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with"

anyone who had while the agreement was in force been a customer of the plaintiffs. The defendant was in breach of the agreement and it was held to be enforceable because the restriction did not go beyond what was reasonable although unlimited as to time and although the employment was terminable at one week's notice on either side. It is to be noted that LINDLEY, L.J., was of opinion ([1891] 1 Ch. at p. 586) that the onus was not cast on the person supporting the covenant to show that it was reasonable. This view is not now accepted (see LORD PARKER's observations in *Herbert Morris, Ltd. v. Saxelby* (1)).

In the second case a similar covenant was held valid in the case of a milk roundsman. These authorities, prior to 1913, as ATKIN, L.J., and YOUNGER, L.J., pointed out in *Attwood v. Lamont* (5) ([1920] 3 K.B. 571) must be read in the light of the recent decisions of the House of Lords in *Mason v. Provident Clothing & Supply Co., Ltd.* (6) ([1913] A.C. 724) and *Herbert Morris, Ltd. v. Saxelby* (1). Since these decisions it has been recognised that as the time of the restriction lengthens and the space of its operation extends, the weight of the onus on the covenantees grows (see per LORD SHAW OF DUNFERMLINE in *Herbert Morris, Ltd. v. Saxelby* (1), [1916] 1 A.C. at p. 715). In *Mason's* case (6) LORD MOULTON described the position of a local canvasser and debt collector such as that of the defendant in the present case. He said ([1913] A.C. at p. 743):

"... it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand."

These observations of LORD MOULTON apply, I think, to the present case and show that the time of the restriction ought to be taken into account in considering whether or not it is reasonable. In the present case there is the added circumstance which has to be taken into account, namely, that a large proportion of the customers covered by the covenant was in fact composed of persons who had formed the connection of the defendant before he entered the service of the plaintiffs.

The third case, strongly relied on by the plaintiffs, especially as it is a decision of this court given since the two House of Lords cases above mentioned were decided, is *Gilford Motor Co. v. Horne* (4). That case concerns a covenant in restraint of trade between a company which bought parts of motor vehicles

A from manufacturers, assembled the parts on the company's premises and sold the products under the name of Gilford Motor Vehicles. They also sold separate parts for cash. By an agreement dated May 30, 1929, the defendant was appointed managing director for six years from Sept. 1, 1928. Clause 9 of the agreement provided that:

B "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit interfere with or endeavour to entice away from the company any person firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company."

C In November, 1931, the defendant's employment was terminated by an agreement providing that he was to receive a fixed sum payable in instalments. Shortly afterwards he opened a business for the sale of spare parts of Gilford vehicles. It was held by the Court of Appeal that in the circumstances the covenant was not wider than was reasonably necessary for the protection of the plaintiff company's trade and was therefore enforceable by injunction. This D was a covenant unlimited as to time and is an authority in favour of the plaintiffs, who seek to enforce a covenant against solicitation of customers which is limited to five years and therefore to that extent an a fortiori case, for the court did not take the view that such a covenant in the case under consideration was so wide as to be unreasonable by reason of the time element. I think, however, that the circumstances of that case were entirely different from those of the present E case.

The first task of the court, it has been said, in these cases is to ascertain the nature of the master's business and of the servant's employment. The managing director is not regarded in the same light as the traveller or canvasser. Each case must be considered in the light of its own circumstances, and I have come to the conclusion that, paying due regard to the decisions of the House of Lords in F *Mason v. Provident Clothing & Supply Co., Ltd.* (6) and *Herbert Morris, Ltd. v. Saxelby* (1), the decision of the learned county court judge was right and ought to be affirmed. He considered all the circumstances of the case, recognising the proprietary right which the plaintiffs were entitled to protect, and held that the restriction for as long as five years against dealing with the plaintiffs' customers on whom he had called during his service with them was, for a man in the position G of the defendant, unreasonable. In my opinion the decision was correct in law and I would dismiss the appeal.

MORRIS, L.J.: When the defendant became employed by the plaintiffs in March, 1953, as a collector salesman he had a certain connection of customers. He had been previously employed in the credit drapery trade. As a result there H were many householders known to him and to whom he was known; they might be expected to be responsive to his persuasiveness as a salesman. After he joined the plaintiffs his work consisted in calling (i) on those householders who formed his own connection and whom he introduced, (ii) on those whose names were on a list given to him by his new employers, and (iii) possibly on other householders. His task was to effect sales of drapery on credit terms: payments I were to be made in equal instalments spread over a period of twenty weeks. The system was that each collector salesman would call weekly to collect payments due. The defendant had been employed by the plaintiffs for over two years four months before the written agreement of Aug. 11, 1955, was entered into. The evidence does not explain why it was then made, but there is no challenge as to its validity beyond that which is involved in denying the claim of the plaintiffs to enforce the covenants contained in cl. 8.

The learned judge's main ground for refusing to enforce restraint on the defendant was that a restriction for as long as five years for a man in the position

of the defendant, whose employment at £10 per week was subject to two weeks' notice, was quite unreasonable. The plaintiffs, accepting the burden of showing that the restrictions were reasonable, submitted that they were so in their scope and that as the restrictions related only to customers whose names had been on the plaintiffs' books and on whom the defendant had called in the course of his duties, the restrictions would be good even had they been unlimited in time or as to space. Incidentally the words

"whose name shall have been inscribed upon the books of the firm as a customer during the three years immediately preceding such determination"

appear to be ambiguous. Do these words refer to customers whose names have been put on the books at any time during the three years, or do they refer to customers whose names have been and remained on the books during the three years' period? No point as to ambiguity in reference to these words was, however, taken by either side. The defendant submitted that the restrictions went beyond any legitimate protection of interest and were too extensive in scope and time, and, furthermore, were unreasonable because they deprived the defendant of his goodwill relationship towards customers whom he had introduced.

The general principles which govern cases of this kind have been authoritatively laid down by the House of Lords in the two leading cases of *Mason v. Provident Clothing & Supply Co., Ltd.* (6) ([1913] A.C. 724) and *Herbert Morris, Ltd. v. Saxelby* (1) ([1916] 1 A.C. 688). In the former case, Mason was a canvasser employed by a clothing and supply company having branches all over England, which carried on business on what was described as a check and credit system. It was held that an agreement by Mason that he would not within three years after the termination of his employment be in the employ of any person firm or company carrying on or engaged in a business the same as or similar to that of his employers or assist any person employed or assisting in any such other business within twenty-five miles of London was unenforceable as being wider than was reasonably necessary for the employers' protection.

It is clear that a restraint is invalid if it is imposed in order to prevent competition or the use of personal skill and knowledge acquired by an employee in his employer's business. In *Herbert Morris, Ltd. v. Saxelby* (1) LORD SHAW OF DUNFERMLINE said ([1916] 1 A.C. at p. 714):

"Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large."

In the same case LORD PARKER OF WADDINGTON, after referring to the fact that in *Mason's* case (6) the restraint was held bad as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets, said (*ibid.*, at p. 710):

"In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary."

A It appears from the speeches in *Mason's* case (6) that a different and limited restraint might have been enforced. VISCOUNT HALDANE, L.C., said ([1913] A.C. at p. 731):

B "Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits. He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they could have restrained him from doing this."

C Later LORD HALDANE said (*ibid.*, at p. 734):

D "The success of the canvasser depended, as I have already said, mainly on his natural aptitude. No doubt he might acquire, in the course of his employment, lists of actual or possible customers in the district in which he had canvassed. I think that under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers."

LORD SHAW OF DUNFERMLINE said (*ibid.*, at p. 741):

E "A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour."

F LORD MOULTON said (*ibid.*, at p. 743):

G "Such being the nature of his employment [*i.e.*, in that case], it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense."

H In *Herbert Morris, Ltd. v. Saxelby* (1) LORD SHAW, in referring to the presumption which the law makes in favour of the free disposal of one's own labour and of the onus on those averring circumstances sufficient to overcome such presumption, said ([1916] 1 A.C. at p. 715) that, as the time of restriction lengthens or the space of its operation extends, the weight of that onus grows. In *Fitch v. Dewes* (7) ([1921] 2 A.C. 158), LORD BIRKENHEAD, L.C., referred to the old controversy between freedom of contract and certain considerations of public policy. He mentioned two considerations by reference to which a restraining covenant in a contract of service can be measured: First, is it against the public interest? And, secondly, does that which has been stipulated for exceed what is required for the protection of the covenantee? He further said (*ibid.*, at p. 166) that the courts had long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time and of space as one of the elements by the light of which they would measure the reasonableness of the restriction taken as a whole.

I Applying these principles to the facts of the present case, I am clearly of the opinion that a period of five years was quite unreasonable as a period of limitation. As the learned judge pointed out in his judgment in the present case, the customers of one credit draper can always be canvassed and are likely to be canvassed by other credit drapers. In a sphere where competition is normally free, since every householder is a potential purchaser, and where successful

selling must to some extent depend on the personal abilities of particular salesmen and also to some extent on the quality or attractiveness of the goods which the salesman's employer can offer, a period of five years' banishment from particular doorsteps seems to me to be in any event of wholly unwarranted duration. This conclusion, in agreement with that of the learned judge, is of itself sufficient to dispose of this appeal. Even if, apart from the question as to time, the restriction could otherwise be upheld, it is not for the court to re-cast the agreement so as in its place to substitute one which the parties never made.

It was, however, submitted on behalf of the defendant that, apart from the question of time, the restrictions were too wide in that (i) they would prevent the defendant from calling on those customers whom he had introduced to the employers and in respect of whom his special knowledge and influence were not gained during his employment by or at the expense of the employers, (ii) they would prevent him from calling on customers who from every practical point of view had ceased to be customers of the employers but on whom he had perhaps unsuccessfully called or called at an early stage during the three-year period, (iii) they would prevent his calling on people who had moved away from the area of the employers' operations. In the circumstances, it becomes unnecessary to express any final view in regard to these contentions. I do not consider that a restriction of the present kind would necessarily be held to be unreasonable merely because it could be shown possibly to extend to one or two cases beyond the range of contemplated protection. But if an employee introduced his friends or his "connection" as customers, the reasonableness of any restriction that might involve that the employee would after a short time no longer be employed by the employer but yet be debarred from calling on his friends or on those who constituted his own connection would have to be most carefully considered. Each case must be judged on its own facts in the light of the principles laid down. In the present case the restrictive agreement was not entered into until the defendant had been employed for over two years. It was submitted that this circumstance coupled with the fact that the defendant had previously been in the employment of other employers tended to diminish the weight of consideration (i) to which I have referred above. Though there is some force in this, I consider that in the present case it was not reasonable to prevent the defendant from calling on those who formed his own connection and in regard to whom his knowledge was not acquired during his service with nor at the expense of the employers.

If a collector salesman who leaves the employment is free immediately to call on behalf of a new competing employer on customers who have outstanding weekly liabilities to the former employer, being customers on whom he recently called, he may persuade them not only to transfer their custom but also to incur new financial liabilities which will compete with the existing outstanding ones. The former employer has a legitimate interest to protect: but as regards a salesman's own connection—if it can be said to continue to exist as such—there are different considerations to be taken into account. While I think that, in accord with what was laid down in *Mason's* case (6), some reasonable and properly limited restriction could have been devised, I am of opinion that the operation of the clause under consideration extends beyond the limits of what can be justified. I would dismiss the appeal.

DENNING, L.J.: I entirely agree. During the last forty years the courts have shown a reluctance to enforce covenants of this sort. They realise that a servant has often very little choice in the matter. If he wants to get or to keep his employment, he has to sign the document which the employer puts before him; and he may do so without fully appreciating what it may involve. Moreover, if these covenants were given full force, they would tend to reduce his freedom to seek better conditions, even by asking for a rise in wages; because if he is not allowed to get work elsewhere, he is very much at the mercy of his employer.

A Whilst showing proper reluctance to enforce these covenants, the courts will, however, do so if they are shown to be reasonable—as between the parties and as regards the public. In the present case I think that the employers might reasonably protect their own trade connection, that is the connection which was properly their own as distinct from the connection which the traveller brought with him. I do not, however, see why the employers should be able to forbid him
 B to call on the people whom he already knew before he worked for them—the people whom I will call “his customers”. His knowledge of these people, and his influence with them, were due to his own efforts—or at any rate they were nothing to do with these employers. His goodwill with those customers belonged to him, and cannot reasonably be taken from him by a covenant of this kind. Any other view would mean that, soon after employing him, they could dismiss
 C him at a fortnight’s notice and could then prevent him for five years thereafter from calling on those persons who had been his customers long before he entered the employment. When I find the clause is so wide as to cover “his customers” and is for so long as five years, I think that it is an unreasonable restraint of trade. We were referred to *Gilford Motor Co. v. Horne* (4) ([1933] Ch. 935), but I think that case is distinguishable for the reasons given by HODSON, L.J. A managing
 D director can look after himself. A traveller is not so well placed to do so. The law must protect him. I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Smith & Hudson*, agents for *Waller & Houseman*, Newcastle-upon-Tyne (for the plaintiffs); *Doyle, Devonshire & Co.*, agents for *T. H. Campbell Wardlaw*, Newcastle-upon-Tyne (for the defendant).

E [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WEST WAKE PRICE & CO. v. CHING.

[QUEEN’S BENCH DIVISION (Devlin, J.), October 29, 30, 31, November 1, 14, 1956].

F *Insurance—Indemnity policy—Indemnity against claims in respect of neglect, default or error—Q.C. clause—Accountants’ clerk converting client’s money to own use—Action by client against accountants—Whether client’s claim covered by policy—Meaning of “claim” in policy.*

G The plaintiffs, a firm of accountants, were insured by the defendant underwriter “against loss for any claim or claims which may be made against them . . . in respect of any act of neglect, default or error on the part of the assured . . . or their partners or their servants in the conduct of their business as accountants”. The underwriters (in a clause called for convenience the “Q.C. clause”) further agreed “to pay any such claim or claims which may arise without requiring the assured to dispute any claim, unless a King’s Counsel . . . advise that the same could be successfully
 H contested by the assured, and the assured consents to such claim being contested, but such consent not to be unreasonably withheld”. The plaintiffs acted as accountants to H. Ltd., and in the course of their duties they received and paid out money on behalf of H. Ltd. At the end of 1952 it appeared that B., a clerk of the plaintiffs, had received from H. Ltd., some £20,000 which could not be accounted for. H. Ltd., brought
 I an action against the plaintiffs, relying on the irregularities of B. and alleging that the plaintiffs were negligent in failing to keep proper books and to supervise the activities of B. The statement of claim disclosed a claim in respect of one loss, but three causes of action were alleged, viz., for (i) damages for negligence or breach of duty as accountants; (ii) money had and received; and (iii) moneys converted by the plaintiffs to their own use. Head (iii) was restricted to the acts of B. as constituting wrongful conversion, but no direct allegation of fraud or dishonesty was made. The

plaintiffs now claimed against the underwriters that the claim made in the action by H. Ltd., was covered by the Q.C. clause.

Held: the claims were not covered by the Q.C. clause for the following reasons:—

(i) on the true construction of the policy, the word “claim” was limited to an unmixed claim, viz., a claim only in respect of an “act of neglect, default or error”, which was a description that did not include a claim based on dishonesty or a claim for money had and received where the claim arose out of dishonest acts, and

(ii) the claims against the plaintiffs were not such an unmixed claim as is described at (i) above, having regard to the facts that they included a claim for money had and received and arose out of dishonesty on B.’s part, although the dishonesty was not alleged in the action by H. Ltd., against the plaintiffs.

Dictum of **DEVLIN, J.**, in *Heskell v. Continental Express, Ltd.* ([1950] 1 All E.R. at p. 1048) discussed.

Per **CURIAM**: underwriters were not bound by the way in which a claimant chose to formulate his claim, but could properly invite the court to ascertain the true nature of the claim and to make such inquiry as might be necessary for that purpose (see p. 828, letter E, post).

The Q.C. clause analysed, see p. 825, letter I, to p. 827, letter A, post.

[As to insurance contracts of indemnity, see 18 HALSBURY’S LAWS (2nd Edn.) 405, para. 580.]

Cases referred to:

- (1) *Goddard & Smith v. Frew*, [1939] 4 All E.R. 358; Digest Supp.
- (2) *Reischer v. Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 29 Digest 206, 1650.
- (3) *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033; 2nd Digest Supp.
- (4) *Johnston v. Salvage Association*, (1887), 19 Q.B.D. 458; 57 L.T. 218; 29 Digest 298, 2444.

Action.

This action was instituted by a firm of accountants against an underwriter who had by an indemnity policy agreed (in proportion to the sum subscribed against his name) to indemnify the plaintiffs against certain losses. Clients of the plaintiffs had started an action against the plaintiffs claiming damages for (so the plaintiffs in the present action alleged) negligence by the plaintiffs in the conduct of their business. The plaintiffs accordingly claimed a declaration (i) that the defendant was by virtue of the indemnity policy bound, in proportion to the sums subscribed by him, to pay the said claims in negligence without requiring the plaintiffs to dispute the same, unless a Queen’s Counsel advised that the same could be successfully contested by the plaintiffs, and the plaintiffs consented, or unreasonably withheld their consent, to contest the same; and (ii) that if the defendant were entitled to require and did require the plaintiffs to dispute the claim, the defendant was obliged to pay, in proportion to the sum subscribed by him, all costs, charges and expenses in connection therewith.

Gilbert Paull, Q.C., and *R. J. Parker* for the plaintiffs.

Neil Lawson, Q.C., and *W. G. Wingate* for the defendant.

Cur. adv. vult.

Nov. 14. **DEVLIN, J.**, read the following judgment: This is a case in which difficulties have arisen over the interpretation and application of a form of clause, generally known as the “Queen’s Counsel clause” (since it has no number in the policy, I shall refer to it, for short, as the “Q.C. clause”) in a policy of indemnity insurance. The policy is called “Lloyd’s Accountants Indemnity Policy” and it insures the plaintiffs, a firm of accountants,

A "against loss for any claim or claims which may be made against them . . . in respect of any act of neglect, default or error on the part of the assured . . . or their partners or their servants in the conduct of their business as accountants."

B There follow two clauses. One deals with a definition of the words "business as accountants", on which nothing turns in this case; the other makes it a condition precedent to the assured's right of indemnity that they should give the underwriters immediate notice of any claim and such information as the underwriters may reasonably require. There then follows the indemnity by which the defendant and his fellow underwriters agree to pay to the assured all such loss not exceeding £25,000. The underwriters then make a further promise in the following terms:

C "We further agree to pay any such claim or claims which may arise without requiring the assured to dispute any claim, unless a King's Counsel (to be mutually agreed upon by the underwriters and assured) advise that the same could be successfully contested by the assured, and the assured consents to such claim being contested, but such consent not to be unreasonably withheld."

D The plaintiffs acted as accountants for a company called Hammer (Southern) Ltd., and a Mr. William Hinds, who were promoters and financiers of theatrical enterprises. Their duty was to act as accountants and auditors and to supervise the financial interests of these two clients in the various ventures which they undertook. The plaintiffs had in their employment, as an accountant clerk, a Mr. Bell, and he received and paid out moneys for the clients in connection with these ventures between 1949 and 1952. At the end of this period, it appears that Mr. Bell had received from the clients £20,000 or more which could not be accounted for. These clients (I shall refer to them as "the claimants") made claims against the plaintiffs which were not met; and on Apr. 26, 1956, they each of them issued a writ, the one claiming £16,562 and the other claiming £5,850. Statements of claim in these actions have been delivered which I shall later consider in more detail. At present it is sufficient to say that the claimants do not rely solely—or, indeed, counsel for the plaintiffs submits mainly—on the irregularities of Mr. Bell, but they also allege that the plaintiffs as a firm were negligent in failing to keep proper books and ledgers, to conduct annual audits and to supervise the activities of their servant Mr. Bell.

G The plaintiffs assert that the claimants have made claims which are covered by the Q.C. clause; and the plaintiffs have brought this action in order to have that point determined. They contend that for this purpose the nature of the claims is sufficiently and conclusively set out in the statements of claim. The underwriters contend that the nature of the claims cannot be ascertained without an investigation into the facts on which they are based; and they also dispute that the claims formulated in the statements of claim are within the Q.C. clause. H That clause refers to "any such claims", which takes one back to the body of the policy, where they are described as "claims in respect of any act of neglect, default or error". These words are apparently wide, but it is plain on the authorities—and counsel for the plaintiffs does not contend otherwise—that they do not extend to acts of dishonesty by the claimants or their servants, or to claims against the plaintiffs for money had and received, at any rate unless I it is shown that those claims are in respect of an act of neglect, default or error. The problem in this case is how to deal with a "mixed" claim in which questions both of dishonesty and negligence are raised.

In speaking of negligence or dishonesty, I am using broad terms and I must now analyse more closely the nature of the claims as formulated in the writs and statements of claim. Three causes of action are alleged: first, damages for negligence or breach of duty as accountants; secondly, money had and received; and, thirdly, "moneys converted by the defendants to their own use". The

statements of claim, which were delivered at the same time as the writs, show that the third head is restricted to the acts of Bell which are alleged as wrongful conversion. Any direct allegation of fraud or dishonesty is avoided. A person can, of course, convert money innocently; he can even convert it to his own use innocently if he believes he has a good title to it; but it has, I think, been taken for granted in this case that Mr. Bell, if these allegations are proved, was dishonest. The point may not matter for the plaintiffs' purpose, since they are ready to concede that a claim for money had and received would not be a claim within the policy. I have no doubt that it would be outside the policy if the failure to account was due to dishonesty. I wish, however, to guard against a decision that all claims for money had and received are necessarily outside an indemnity policy in the terms of the present one or that the authorities by which I am bound would compel me so to decide. It might be—I do not have to decide it—that a failure to account which was due to a payment made to a third party who was in good faith believed to be entitled to it would be an "error" within the meaning of the policy. For the purposes of this case it has not been found necessary in the argument to draw precisely the boundaries between an indemnity policy and a fidelity policy, and the broad distinction that has been used is the distinction between negligence and fraud. I shall in this judgment use the word "negligence" to describe the ambit of the policy and to save the constant repetition of "any act of neglect, default or error"; and I shall by way of contrast with it use the term "fraud", though I am well aware that there may be acts of conversion which fall short of fraud and yet are outside the policy.

There are thus three causes of action set out in each action and there is one loss claimed, for the whole loss is attributed to one or other of the three causes. The question which I shall have to determine in the end is whether there is more than one claim.

If there is only one claim, I may also have to determine what its real nature is, whether it ought to be described as a claim in respect of fraud or a claim in respect of negligence. In the writs and in the statements of claim negligence is put as the main claim and the other heads of claim are alleged as alternatives. Counsel for the plaintiffs submits that the court is not entitled in ascertaining the true nature of the claim to look outside these documents; but he does not carry this submission so far as to say that the court is bound by the order in which the pleader chooses to arrange them and bound to accept as the main claim that which the pleader or those instructing him have selected. I find the selection in this case rather a curious one. The truth is, to put it bluntly, that Mr. Bell is alleged to have stolen the claimants' money. It seems an inversion from the natural in these circumstances to begin by saying that the claimants were careless in not discovering that their servant was stealing money; and then to add by way of alternative that in fact he was stealing money. The statements of claim were delivered six months ago and the defences have not yet been filed. The claimants have very reasonably granted time while the plaintiffs' differences with their insurers are being resolved. I may take it, I suppose, that the claimants are now aware of the policy of insurance in this case and I suppose that I ought not to speculate about when they first became aware of it or whether they thought that a claim put into a form apparently covered by a Lloyd's policy might be more valuable to them than one which was not. I am satisfied that if I have to ascertain the real nature of the claim, I am entitled to look at the matter as well as the form of the statements of claim and to reach my own conclusions about it, and I am satisfied that these claims are claims based primarily on the fraud of Mr. Bell.

If there was a real doubt about whether Mr. Bell was the servant of the assured, it would be more understandable that the claimants should keep the allegation of his fraud as a second string; but counsel for the plaintiffs has admitted that

A Mr. Bell was employed by the assured as an accountant clerk and was their general servant. He made that admission subject to the qualification that in these particular matters Mr. Bell might have been acting outside his employment, and also subject to the reservation that the facts about Mr. Bell's position, as distinct from the allegations about it, were irrelevant and inadmissible. I am not prepared, for reasons which I shall give later, to take as strict a view on the latter point as counsel for the plaintiffs would wish me to. I think that if I have to ascertain the true nature of the claim it is permissible for me to satisfy myself, as I do, that the allegation that Mr. Bell is a servant is substantial and not flimsy.

C I turn now to the construction of the policy. It seems that the effect on a policy in these terms of a mixed claim in fraud and negligence has not yet been judicially considered—in the relevant cases hitherto fraud has been admitted; and it will, I think, prove helpful to consider the effect of a mixed claim on the main indemnity clause in the policy before tackling the complications created by the Q.C. clause.

D The essence of the main indemnity clause, as indeed of any indemnity clause, is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured have been found liable and so sustained a loss. If judgment were given against them for the sum claimed, they would undoubtedly have sustained a loss and the question would then arise what was the cause of the loss. If the proximate cause (this seems to be the test; *Goddard & Smith v. Frew* (1), [1939] 4 All E.R. 358) of the loss was the dishonesty of their servant, they could not recover under the policy; if on the other hand it was their own neglect, they could recover. If the action between the claimants and the assured did not settle the question of causation, it would in all probability settle the facts in the light of which the question could be answered. Yet all this would involve publicity which, where charges of professional negligence are made, might do considerable harm to an assured over and above the amount of any judgment obtained against him. For this reason professional men may prefer paying a bad claim to fighting it. Obviously one of the main objects of the Q.C. clause is to give the assured additional cover, not only against the cost of litigation but also as a protection against unwelcome publicity.

G I said that the question would be what was the proximate cause of the loss—dishonesty or negligence. Counsel for the plaintiffs submits that that would not in fact be the right question. He submits, quoting as authority the dictum of LINDLEY, L.J., in *Reischer v. Borwick* (2) ([1894] 2 Q.B. 548 at pp. 551, 552), and a passage in 18 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 306, that is largely founded on it, that it would be enough for him to show that negligence was one of the proximate causes of the loss. I think that as the argument developed it became apparent that this point would not play as large a part in the determination of this dispute as was at first thought. I do not for the purposes of my judgment find it necessary to decide it. Since, however, in the course of the discussion I have had occasion to look at what I said about *Reischer v. Borwick* (2) six years ago in *Heskell v. Continental Express, Ltd.* (3) ([1950] 1 All E.R. 1033 at p. 1048), I must comment that I do not find the relevant passage altogether satisfactory. I doubt that it is correct to describe the dictum of LINDLEY, L.J., as "the rule laid down in *Reischer v. Borwick* (2)". I should still like to find a way of avoiding the making of minute distinctions between two causes "of approximately equal efficacy"; but if the price that has to be paid for the solution is the interposition of a category labelled "cause of equal efficacy" between "the cause" and "a cause", the price may be too high.

I I turn now to an analysis of the Q.C. clause. It comprises three promises by the underwriters, and while this combination of promises produces a clause which is sui generis in contracts of insurance, each of the promises looked at

individually is, I think, based on a conception which is not a novelty in insurance law. The three promises, each contingent on the happening of certain events, are: (i) that the underwriters will pay the costs of legal proceedings; (ii) that they will pay a claim against the assured without proof of actual loss, if it is more likely than not that there will be a loss, the question of likelihood being determined by Queen's Counsel; (iii) that they will pay a claim without proof of loss, and even if it is unlikely that it would cause a loss, if the assured reasonably objects to fighting it. A

There is no great dispute about the meaning and effect of the first promise. It is an engagement "supplementary to the contract of insurance"—I adopt the phrase by which a suing and labouring clause (to which this part of the Q.C. clause bears some similarity) is described in the Marine Insurance Act, 1906, s. 78. A suing and labouring clause is not part of the contract of indemnity; see *Johnston v. Salvage Association* (4) ((1887), 19 Q.B.D. 458). The performance of this promise does not involve the underwriters in any liability to indemnify the assured against the loss. B
If the action against the assured succeeds, a loss will be proved; but it would still be open to underwriters to assert that the loss is not within the policy. For example, a claim which appeared on presentation to be in respect of negligence might turn out in reality, when all the facts were known, to be in respect of fraud. It would then be open to the underwriters, irrespective of whether they could properly be made liable for the costs of the action, to refuse to pay the claim. D

The second promise comes into operation if a claim is made and Queen's Counsel advises that it cannot successfully be contested. The underwriters' liability in this event to pay the claim bears some similarity to the conception in marine insurance of constructive total loss. There is behind it the same notion, viz., that there are circumstances in which a business man does not want to have to wait until he can prove that a loss has actually occurred. In the conception of constructive total loss he recovers if he can show that a peril insured against has operated in such a way as to be more likely than not to cause an actual total loss of the thing insured, the question of likelihood being determined as a question of fact by the court. The similar question which arises under the Q.C. clause, viz., whether the action can be successfully contested, is to be determined by Queen's Counsel. E

The third promise involves underwriters in the obligation of paying the claim, whether or not it can be successfully contested, if the assured has reasonable grounds for refusing to contest it. This is not, I think, an indemnity insurance at all. The underwriters undertake to pay on the happening of an event, namely, the making of a claim within the categories defined in the policy, even though it may be beyond question a bad claim and therefore one which cannot legally involve the assured in any loss; the assured need prove neither that the loss has occurred nor that there is any likelihood of a loss occurring. It is, in short, what is called contingency insurance. F

The making of a claim is the event or "peril" which brings the Q.C. clause into operation and so puts it on the underwriters to fulfil one or other of the three obligations in the clause. It may be indeed that it is more truly expressed as one obligation, which is a conditional obligation to pay the claim unless underwriters establish grounds for substituting one or other of two alternative promises. G
It does not for the purposes of this case matter how that point of construction should be decided. This case turns on whether the event which brings the clause into operation has occurred, that is, whether a claim for negligence within the policy has arisen. Quite clearly a claim has been made and counsel for the plaintiff submits that in considering whether or not it is within the policy, that is, whether it is in respect of negligence, all that can be looked at is the claim as formulated by the claimants—the writs and statements of claim. As this is at least inter alia a claim in respect of negligence, the plaintiffs contend that the H I

A clause has come into operation, and a declaration to that effect is in substance the relief which they are asking for in this action. Or, put another way, since the question whether or not the clause has come into operation depends entirely on whether a claim has been made within the meaning of the policy, the court is in effect being asked to declare that the claim in the statement of claim is one that falls within the policy.

B Counsel for the defendant disputes that this is the right approach to the Q.C. clause. He is bound, I think, to concede that if a claim within the meaning of the clause arises, the underwriters' obligations also arise; but he submits that a claim within the meaning of the clause does not arise unless it is a claim which is in some way connected with loss. He submits that the clause is part of the contract of indemnity and that there can be no indemnity without proof of loss.

C He therefore submits that it is not enough for the assured to produce a claim which appears to be in a form within the policy; they must also prove, before the clause comes into operation at all, that it is a claim which is connected with loss. The word "connected" is not one that counsel used. It is the best one that I can think of to describe what I understood him to mean. For he does not

D say that the assured must prove that the claim has actually caused him a loss: clearly, if the assured had to prove that, the Q.C. clause would give him no rights over and above the main indemnity clause. Nor does he make the unqualified contention that the assured must prove that the claim is one that is likely to cause a loss: for one easy way of disputing such a proposition would be to show that the claim was a bad one and would be likely to fail; and counsel is bound to

E concede that under the Q.C. clause that issue is reserved for Queen's Counsel. So he phrases the connection in this way—that the assured must show that the claim, if pursued, to a successful conclusion would cause him to sustain a loss within the policy. How does the assured set about proving this? The sort of inquiry that counsel envisages would take a curious form. The assured would

call evidence to show that he was negligent and that as a result of his negligence

F he would have to pay the claim. By reason of the Q.C. clause the underwriters would be estopped, as it were, from contending that the assured was not careless—in something of the same way, I suppose, as a tenant may be estopped from denying his landlord's title—but they might contend that the admitted negligence was not, or would not be, the true cause of the loss. If such an inquiry took place, then, on the particular facts of this case, counsel for the defendant would

G hope to establish that it was Mr. Bell's dishonesty and not the firm's negligence, if any, that was the true cause of the loss

If the assured emerged successfully from this ordeal and showed that his negligence, if proved, would be the true cause of the loss, the matter would then be remitted to Queen's Counsel to decide whether the issue of negligence ought to be fought at all. If he decided that it ought to be fought, and if the assured was

H unable to find reasonable grounds for withholding his consent, the trial between the claimant and the assured would then take place—the claimant being, it must be hoped, a man of sufficient patience to consent to holding up his claim while the assured was fighting his preliminary bouts with his insurers—and the assured would then contend that he was not negligent. If judgment went against the assured, it is quite possible, and indeed probable in a case such as the present, that

I the judge, if he found that Mr. Bell was fraudulent and that the firm was negligent, would not determine which was the cause of the loss, since the assured was plainly responsible for both. The contest would then enter on its third phase. Hitherto it would have been dealing with probabilities. The assured would have succeeded in showing that his negligence, if successfully proved, would probably

(no one could say more than that) be the cause of the loss which would be actually incurred only if the action against him was successful. By this means he would have satisfied the requirements of the Q.C. clause and obtained the rights which that clause grants to him. In the third phase, where he seeks an indemnity

under the main indemnity clause, he must show that his negligence was in fact the cause of judgment being given against him. Many facts might have come out at the trial when the claimant's case was heard which would have been unknown to the judge who had to try the question whether the Q.C. clause had come into operation. It would be open to the underwriters, therefore, to contend once again that dishonesty was the real cause. When the assured emerged triumphant from this third phase, he would obtain full relief under the policy. A

With all respect to underwriters, these contentions really make nonsense of the Q.C. clause. It does not have to be read twice to see that its main object is to protect the assured from having to face litigation which, whether successful or not, might be damaging to his reputation. If before the clause comes into operation underwriters can require the assured to expose the whole nature of the claim in a court of law, the object is completely defeated. Worse than that, a clause which is manifestly designed so that it may be concealed from the public that the assured has been charged with negligence would have as a preliminary to its operation a set of proceedings conducted by the assured on the assumption that he was in fact negligent. Such proceedings would form a most unhappy preliminary to the action between the claimant and the assured in which the assured might wish properly to dispute his negligence. But, of course, they are unlikely to be a preliminary to anything. In nine cases out of ten the claimant would decline to hold his hand while proceedings under the policy were taking place, the assured would be driven to fight and the Q.C. clause would be quite worthless. B

I do not go as far as do the contentions of the plaintiffs in this matter. I do not consider that the underwriters are bound by the way in which the claimant has chosen to formulate his claim. I think that underwriters can properly invite the court at this stage to ascertain the true nature of the claim and to make such inquiry as may be necessary for that purpose. An example may be given in relation to a claim for money had and received of the sort which I have already considered. I think it would be open to the underwriters to show, for example, that, while that might be the form of claim which commended itself to a pleader, the writ had been preceded by a letter charging embezzlement. Similarly, I think it might be open to the assured to show that the issue raised by such a claim was whether or not a person to whom he had in good faith paid away the claimant's money was authorised to receive it. There is, however, all the difference between a limited inquiry of this sort confined to ascertaining the true nature of the claim and the inquiry into the whole circumstances which would be necessary in order to determine whether fraud or negligence was the probable cause of the loss. C

I should therefore reject the interpretation of counsel for the defendant of the Q.C. clause for the sufficient reason that it robs the clause of all sense and meaning; but I reject it also on the ground that there is no justification for reading into it the limitations which counsel wants to introduce. The clause says in effect that in the event of "any such claim or claims" arising the underwriters are to do one of three things. "Any such claim" clearly means any claim "in respect of any act of neglect, default or error". There is no justification for introducing the additional qualification that it also means any claim which, if successfully prosecuted, would be likely to result in a loss. Counsel's reason for introducing this additional qualification is that one must import into the clause the conception of indemnity. I do not see why one should. The conception of indemnity may arise to some extent from the clause itself; for example, if one of the promises may be regarded as in effect a promise to pay a constructive total loss, it would be a contract of indemnity. The clause, at least in part and perhaps in whole, is not a contract of indemnity; but is, as I have described it, a supplementary contract outside the main contract of indemnity. Counsel had submitted as a matter of construction that as the limitation of loss to £25,000 D

A is contained in the contract of indemnity, the Q.C. clause must be read as part of the contract of indemnity, since otherwise there would be an obligation under the Q.C. clause to pay claims up to any amount. I think that a limitation to £25,000 can, however, be implied into the Q.C. clause as a matter of common sense without troubling whether it is a part of the contract of indemnity or not. In a commercial document, it is reasonable to think that commercial men will regard **B** some things as being too obvious to require statement.

The rejection of the main submission of counsel for the defendant clears the ground for his alternative argument which seems to me to raise the real point in the case. In the actions which have been brought against the assured, is there one "claim" or more than one "claim" in the sense in which the word "claim" is **C** used in the policy? If the claim is to be related to the amount claimed, there is only one sum claimed either as a liquidated amount or by way of damages (it is not argued that for this purpose a distinction is to be drawn between them) although the claim is supported by three alternative causes of action. If, on the other hand, "claim" means "cause of action", then there are three, of which one is undoubtedly within the policy. Counsel for the plaintiffs submits that **D** "claim" means "cause of action", that there has therefore arisen against the assured a claim for negligence, that that brings the Q.C. clause into operation and that it is immaterial that the document which contains the claim should also contain other claims based on different causes of action which are not within the policy. Counsel for the defendant submits that only one claim has arisen. If he is right about that, it does not determine the matter, for it would then be **E** necessary to consider whether that claim was a claim for negligence or not. If, however, counsel for the plaintiffs is right that there are two or more claims, then he must succeed, for one is undoubtedly within the policy.

I think that the primary meaning of the word "claim"—whether used in a popular sense or in a strict legal sense—is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may **F** be supported or as the grounds on which it may be based. In the OXFORD DICTIONARY "claim" is defined as first, "A demand for something as due; an assertion of a right to something"; secondly,

"Right of claiming;—right or title (to something or to have, be, or do something; also on, upon the person, etc., that the thing is claimed from)."

G All the examples given under these two heads are examples of claims made to an object or on a person. Under the verb "to claim" it is observed that it is "often loosely used, especially in the United States, for: contend, maintain, assert." I do not doubt that the word is frequently used in this looser meaning of "contention", or that it is often used by lawyers as if it meant the same thing as a cause of action. It is quite natural to speak of a claim in fraud or a claim in **H** negligence, and counsel for the plaintiffs has advanced many powerful arguments to show that it is as "cause of action" that the word is used in this policy. His strongest point is, I think, that the words that I have to construe are "claim . . . in respect of any act of neglect, default or error". This would seem to show that the policy is itself characterising claims according to their causes of action. Counsel can also argue that his interpretation makes the policy more workable, **I** at any rate from a lawyer's point of view. Thus, a claim in negligence comes into existence when an allegation of negligence is made and continues until the allegation fails or succeeds; a claim in the sense of a cause of action must always be either inside or outside the policy for the whole of its life. A claim for a sum of money, however, may start outside the policy if it is based solely on fraud; perhaps be brought within the policy if a charge of negligence is added; and then disappear from the scope of the policy if the charge of negligence is disproved at the trial. I do not see any insuperable difficulty about this. A claim need not always have the same character. Under the policy there are only two points of

time when its character is relevant; the first is when it is made and the second when (if it does) it succeeds; and it is not essential to the working of the policy that it should bear the same character on both occasions. But counsel for the plaintiffs is justified in submitting that this point is at least a helpful indication. A

He illustrates the same sort of point by reference to the clause in the policy which requires immediate notice in writing to be given of any claim. When the assured received a claim in the form in which it is set out in this case, that is, for fraud and negligence, ought he to give notice of it? Ought his duty to give notice to depend on the view he forms of the real nature of the claim—whether it is in fraud or negligence? If he failed to give notice and the action proceeded and the claim in fraud failed, would the claim then for the first time come within the policy? And would not underwriters have cause for complaint that they had not been notified of the claim when it was first made? I find this last consideration rather artificial. The clause in the policy requires “immediate notice in writing of any claim made upon them”. I think that the object of the clause is that underwriters want to be told at once of any claim that is likely to be of interest to them under the policy and I have no doubt that a sensible assured would act in that spirit without sitting down first to construe the words “act of neglect, default or error”. Still, the phrase “any claim” must on a strict construction refer only to any claim that falls within the policy; and if an assured liked to stand on his strict rights and declined, for example, to report a claim for money had and received until the point when it became manifest that it involved neglect or error, underwriters might have a grievance but no remedy. The value of the point can be exaggerated but again it is helpful as showing the sort of sense in which the parties might understand the word. B C D E

The machinery of the policy does not work so smoothly under the plaintiffs’ interpretation when one comes to apply the Q.C. clause; but, nevertheless, it may be said, except at one point, to work. If the Queen’s Counsel is presented with the statement of claim in this case, he will, on the plaintiffs’ interpretation, be asked to advise merely in relation to para. 3 (which relates to the issue of negligence) ignoring para. 4 (which relates to the issue of fraud). He will have to advise whether the claim in negligence can be successfully contested. If it is quite obvious that there is no answer to the claim in fraud, the exercise will, except for the purpose of the policy, be academic, but it must be performed. One of the ways in which the claim might be successfully contested would be to say that while negligence might have to be admitted, it was not the cause of the loss; and that would, I suppose, have to be considered as if someone other than the assured was responsible for Mr. Bell’s acts. If counsel advised that the action should be contested, and it was contested, the underwriters would be liable to pay all the costs in connection with the negligence, but not any costs relating to fraud if that was also contested. This division of finance might be inconvenient but it is not impracticable. The clause is not a subrogation clause; the assured remains in full control of the action. He is not, it may reasonably be contended, entitled to call for funds in advance but merely to be reimbursed costs, charges and expenses that have been incurred. If at the end of the case the division cannot be agreed, any dispute that is brought to the courts about it would doubtless be referred to a taxing master and settled by him. Moreover, on any view of the clause a division may be inevitable; for separate claims in respect of separate sums of money, one claim based on fraud and the other on negligence, may be combined in the same action against the assured and there could then be no doubt that under the Q.C. clause the claims would have to be dealt with separately. F G H I

The real difficulty in the application of the Q.C. clause arises if underwriters are required to pay the claim. This difficulty is to my mind a most formidable one. The underwriters cannot pay the claim in negligence without also discharging the claim in fraud; and they can therefore, if the plaintiffs’ contention

A is right, be compelled under the Q.C. clause to pay a claim that is not within the policy. This difficulty, in spite of all the attractiveness of the plaintiffs' argument, seems to me to be, if not decisive, at least enough to drive me back to a favourable reconsideration of the ordinary and primary meaning of the word "claim". If the word is to be used with any precision, it must be defined in relation to the object claimed. The grounds for the claim or the causes of action which support it can give it colour and character, but cannot give it its entity. If one says of a claim against a defendant that it is for £100, one has said all that is necessary to identify it as a claim; but if one says of it that it is for fraud or negligence, one has not distinguished it from a charge or allegation. In particular, if a claim is identified as something that has to be paid (and that is how it is referred to in the Q.C. clause), it must be something that is capable of separate payment: one cannot pay a cause of action. It follows, I think, that if there is only one object claimed by one person, then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: likewise, where several claims are each dependent on the same cause of action (as, for example, where one cause of action leads to alternative claims for an injunction, damages or an account or other different forms of relief), there remains only one cause of action, however many claims it may give rise to. In my judgment there is in each of these actions against the assured only one claim and I have therefore to consider whether this "mixed" claim is a claim in respect of negligence within the meaning of the policy.

Several tests have been considered in the course of the arguments which may be applied to the claim in order to answer this question. One is that the court must look at the real nature of the claim, irrespective of the form in which it is pleaded, and determine whether it is wholly or mainly a claim in respect of fraud or in respect of negligence. If this is the right test, for reasons that I have already indicated, I should determine it as a claim in fraud.

Another test is to follow, as closely as the altered circumstances permit, the method adopted in *Goddard & Smith v. Frew* (1). The Court of Appeal there determined that the true proximate cause of the loss being embezzlement, it was not within the policy. There is nothing in this case to show that the Court of Appeal had to distinguish between two suggested causes; but presumably if it had had to do so, it would have done it by ascertaining which of the two was the proximate cause (subject to the plaintiffs' contention based on *Reischer v. Borwick* (2)). For that purpose it would have had access, if necessary, to proved or admitted facts. Here, in my judgment, counsel for the plaintiffs is right in submitting that if causation enters into the matter at this stage at all, which he disputes, it must be determined on the facts alleged. On the assumption that all the facts in the statement of claim are to be taken as true—as they would be, for example, in demurrer proceedings—I am satisfied that the true cause of the loss is the dishonesty of Mr. Bell. Indeed, it seems to me to be plain that the charge of negligence cannot be regarded as anything other than an alternative. In order to sustain the charge that the claimants were careless in not discovering that Mr. Bell was failing to account for money, the first matter to prove is that he was in fact failing to account for money; as soon as it is established that a servant of the claimants failed to account for money the cause of action against them is complete and any investigation into the question whether it ought to have been detected or not is superfluous.

If, therefore, either of these was the test, I should decide the point in favour of there being one claim. But I have reached the conclusion that there is in fact a simpler and more effective test which is the correct one. It depends simply on the true construction of the policy. Businessmen often want to write into a document words which they think will amplify its meaning, but which lawyers reject as superfluous; nevertheless, the writing in of superfluities sometimes helps to clarify questions of construction. If a layman wanted a phrase such

as "claims in respect of negligence" to be altered to read "claims in respect of negligence only" or "claims in respect of negligence but not in respect of fraud", a lawyer would tell him that these additions were superfluous, since negligence meant negligence and nothing else and did not include fraud. That is plainly enough the effect of the decision in *Goddard & Smith v. Frew* (1). If words such as these were there, however, they would serve to show that a claim in respect of negligence and in respect of fraud is excluded from the description in the policy. To come within the policy the character of the claim must be unmixed. It must be negligence alone. Applying this test, which I think is the right one, the claim in this case is outside the policy. A B

It is true that a decision to this effect can deprive the assured of the benefit of the Q.C. clause in a case in which, if the true facts were known, he would be entitled to it. But that is the inevitable result of a clause whose very nature compels it to be applied to cases where the true facts are still unknown. Under the main indemnity clause the assured has all his rights intact under the policy if he wishes to wait until the true facts are known. The Q.C. clause is an additional right which he can claim before the true facts are known. He must take with it all the virtues and vices inherent in the character of a clause which is dealing with possibilities, not with certainties. In general, the clause will work to his advantage; claims will get paid which on the true facts have no validity. It does not seem to me that the clause is stultified because it may occasionally work the other way. There is no practical danger that claims for negligence will frequently be overlaid by unsustainable charges of fraud and taken outside the policy; business men do not as a rule make charges of fraud without justification. C D

It is not in any event simply a question of giving a literal meaning to the word "claim" in a case in which a more liberal meaning might be urged as being more consistent with the presumed intention of the parties. Although a loose or liberal meaning would ensure that the assured derived all possible benefit from the Q.C. clause, it would also mean that the underwriters were compelled to discharge a claim which admittedly, good or bad, was outside the limits of the policy. If I were entitled to determine the case by setting these two considerations in opposite scales, I think that I should find that the latter weighed more heavily with me. But in truth where considerations of this sort are at all finely balanced, it cannot be disputed that the right method, which perhaps is the right method in all cases, is to take the words in their primary meaning, certainly whenever that corresponds with the ordinary usage of businessmen. E F G

In my judgment therefore the plaintiffs have failed on the material they have produced to establish that a claim, which is within the meaning of the policy, has arisen against them; and accordingly have failed to prove the event which brings the Q.C. clause into operation. Their claim must therefore be dismissed.

Action dismissed.

Solicitors: *Ward, Bowie & Co.* (for the plaintiffs); *William Charles Crocker* (for the defendant).

[Reported by MARGARET D. ABEL, Barrister-at-Law.]

ROBSHAW BROTHERS, LTD. v. MAYER.

[CHANCERY DIVISION (Upjohn, J.), November 13, 1956.]

Specific Performance—Summary procedure—“Sale or purchase”—Contract to transfer leasehold property—Absence of money consideration—R.S.C., Ord. 14A, r. 1.

By a contract in writing, expressed to be a contract for sale, the plaintiffs agreed to transfer leasehold property to the defendant. The sale price was expressed to be “nil”, and the consideration for the transfer was that the defendant would assume liability to pay the rent reserved by the lease and to fulfil all other tenant’s covenants. The plaintiffs, having issued a writ indorsed with a claim for specific performance of the contract, applied for summary judgment under R.S.C., Ord. 14A, r. 1.

Held: proceedings under R.S.C., Ord. 14A, did not lie, because the contract was not for “sale or purchase” within the meaning of those words in r. 1 of that order, there being nothing in the context of the order to extend the meaning of those words beyond their primary meaning, viz., a sale or purchase in consideration of a payment in money.

[As to summary judgment in an action in the Chancery Division for specific performance, see 26 HALSBURY’S LAWS (2nd Edn.) 50, para. 80; and for cases on the subject, see DIGEST (PRACTICE) 395, 991.]

Cases referred to:

- (1) *Re Sutton’s Contract*, (1920), 65 Sol. Jo. 259; 40 Digest 731, 2616.
- (2) *Coats v. Inland Revenue Comrs.*, [1897] 1 Q.B. 778; *affd.* C.A., [1897] 2 Q.B. 423; 66 L.J.Q.B. 732; 77 L.T. 270; 61 J.P. 693; 9 Digest (Repl.) 420, 2718.
- (3) *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; 82 L.T. 44; sub nom. *Paine v. Cork Co.*, 69 L.J.Ch. 156; 10 Digest (Repl.) 918, 6267.
- (4) *Simpson v. Connolly*, [1953] 2 All E.R. 474; 3rd Digest Supp.
- (5) *Stranks v. St. John*, (1867), L.R. 2 C.P. 376; 36 L.J.C.P. 118; 16 L.T. 283; 30 Digest (Repl.) 418, 611.
- (6) *Robinson v. Harman*, (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 30 Digest (Repl.) 443, 857.

Procedure Summons.

The plaintiffs by their writ claimed specific performance of an agreement in writing dated Mar. 26, 1956, for the sale by the plaintiffs to the defendant of leasehold property situate at 105, Commercial Road, in the County Borough of Bournemouth, comprising office accommodation on the first and second floors thereof, and consequential relief. By their summons dated Oct. 9, 1956, they asked for (i) an order for the specific performance of the agreement mentioned in the writ; (ii) alternatively that directions might be given as to the pleadings and other matters in the action; (iii) such further or other order as the court might deem just. The defendant took the preliminary point that R.S.C., Ord. 14A, r. 1, did not apply, because in the absence of money consideration there was no contract for the sale or purchase of property.

Martin Roth for the plaintiffs.

J. M. Price for the defendant.

UPJOHN, J.: By a contract expressed to be a contract of sale and embodied in the National Conditions of Sale, 16th Edn., dated Mar. 26, 1956, the plaintiffs contracted to sell leasehold property held under a lease dated Nov. 17, 1950, to the defendant. In a memorandum indorsed in the usual way on the National Conditions of Sale the price was expressed to be “nil”. The reason for that was that the leasehold property was held at a substantial rent and the consideration for the transfer (to use a neutral term) was the assumption by the transferee

of the obligations of the tenant contained in the lease of Nov. 17, 1950, and so no money passed. The question which I have to determine is whether such a contract is one for which proceedings under R.S.C., Ord. 14A, are appropriate in an action for specific performance of the contract. A

Neither side relies on any condition in the contract as affecting the matter, and, therefore, I do not refer further to the contract. R.S.C., Ord. 14A, r. 1, so far as relevant, is in these terms:

"(1) In any action in the Chancery Division commenced by a writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit, the plaintiff may . . . on affidavit made by himself . . . stating that in his belief there is no defence to the action, apply to the court or a judge for judgment . . ."

The writ in this action for specific performance was issued on Sept. 4, 1956, and the summons under R.S.C., Ord. 14A was issued on Oct. 9, 1956. The point for determination taken by the defendant is that the contract is not a contract for the "sale or purchase" of property. It is submitted on behalf of the defendant that "sale", as an ordinary legal term, denotes a sale for money, and, as no money passed on the occasion of this contract, it cannot properly be described as a contract for sale or a contract for purchase. D

On the other side it is submitted for the plaintiffs that the words "sale or purchase" have no fixed meaning, and that they must be given a meaning appropriate to the context, and that in the circumstances "sale or purchase" ought to have a wider meaning such as that given by some law text writers, in particular in WHARTON'S LAW LEXICON (14th Edn.), at p. 823, where it is said that a purchase is E

"an acquisition of land, obtained by way of bargain and sale, for money or some other valuable consideration."

In my judgment, the law is correctly stated in an interesting article by Mr. CYPRIAN WILLIAMS on this question in the SOLICITORS' JOURNAL, Vol. 65, at p. 286. Before reading that article, I will refer very briefly to *Re Sutton's Contract* (1) ((1920), 65 Sol. Jo. 259) which came before P. O. LAWRENCE, J. One question which arose there was whether the sale of certain settled land for consideration other than cash was a proper exercise of the powers given by the Settled Land Act, 1882. The learned judge held that it was, and it is interesting to note that he so held for the reason—I am quoting from his very short judgment as reported—that "consols are as good as cash". In this article to which I have referred that judgment was criticised, and Mr. CYPRIAN WILLIAMS, in my judgment, correctly states the law (65 Sol. Jo. 286): F

"But it is well established by judicial authority that in English law the primary meaning of the word 'sale' is the conveyance of some article of property for money."

He refers to *Coats v. Inland Revenue Comrs.* (2) ([1897] 1 Q.B. 778), and continues:

". . . a power to sell means, in the absence of any context, a power to sell for money, and that a person who exercises such a power is bound to sell for money (STIRLING, J., *Payne v. Cork Co., Ltd.* (3), [1900] 1 Ch. 308 at p. 314)." I

That follows the definitions which are to be found in BENJAMIN ON SALE (8th Edn.), p. 1, and WILLIAMS ON VENDOR AND PURCHASER (4th Edn.), p. 1. I propose to refer briefly to *Coats v. Inland Revenue Comrs.* (2) for a reason that will appear in a moment. That was a case under the Stamp Act, 1891, and there is a classic passage by WILLS, J. ([1897] 1 Q.B. at p. 783):

"Now, 'sale' undoubtedly in our law generally imports the exchange of some commodity or some article of property for money, and it will be found

A so defined in MR. BENJAMIN'S book on SALE, and I think in LORD BLACKBURN'S book also."

The learned judge then proceeded to consider s. 55 of the same Act which he pointed out appeared to enlarge the ordinary meaning of the word "sale". He continued (*ibid.*):

B "That is a clear indication that there may be, within the meaning of these sections, a conveyance on sale where the transaction is not properly a sale in the ordinary understanding of the word, because it is not for money."

I read that passage because I think it gives the clue to the definition to be found in the Law of Property Act, 1925, s. 205 (1) (xxiv), where "sale" is defined in these terms:

C "'Sale' includes an extinguishment of manorial incidents, but in other respects means a sale properly so called."

That seems to me to mean a sale for money.

D A modern judicial expression of the *prima facie* meaning of "sale" is to be found in *Simpson v. Connolly* (4) ([1953] 2 All E.R. 474). It was held in that case that an agreement to extinguish an existing debt if land is transferred is not a sale of land. FINNEMORE, J., said (*ibid.*, at p. 477):

"But the general principle of English law is that a sale means the exchanging of property for money. That applies—and I think both counsel agree with this—to a sale of land and a sale of chattels equally."

Such is the primary meaning of the word "sale".

E There are no doubt to be found authorities and statutes which have extended that meaning. In MR. T. CYPRIAN WILLIAMS' book, the CONTRACT OF SALE OF LAND, at p. 3 he says:

F "'Sale', in the strict and primary sense of the word, means an agreement for the conveyance of property for a price in money; but the word 'sale' may be used in law in a wider sense and so applied to the conveyance of land for a price consisting wholly or partly of money's worth other than the conveyance of some other land."

G Apparently he considered that a sale for something other than money can in a wider sense be properly described as a sale. The authority to which he refers in support of the last part of that paragraph is *Stranks v. St. John* (5) ((1867), L.R. 2 C.P. 376). The question in that case was purely one of title as appears from the very brief headnote, which is in these terms: "By agreeing to let, a lessor impliedly promises that he has a good title to let". The observations of WILLES, J., must be read, of course, in relation to the question of title as stated in the headnote. WILLES, J., said (*ibid.*, at p. 379):

H "If it is expressly agreed that the lessor shall grant a good and valid lease, as in *Robinson v. Harman* (6) ((1848), 1 Exch. 850), there can be no doubt in the matter, and the only question in that case was with respect to the amount of damages; but, in any case, I think it must be implied that the lease shall be a valid one. This would be clear apart from authority, because a lease for seven years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title."

I Further, I do not think it can seriously be doubted that the words "contract for sale of land" when they appeared in the Vendor and Purchaser Act, 1874, s. 1*, had to be given a wider meaning than a sale for the price of money having regard to the context to be found in s. 2 of that Act. Again, as appears from the judgment in *Coats v. Inland Revenue Comrs.* (2), the *prima facie* meaning of "sale" in the sense of sale for money is extended in the Stamp Act, 1891.

* Repealed by the Law of Property Act, 1925, s. 207 and Sch. 7; the corresponding provision is s. 49 of that Act.

I do not find authorities on the construction of statutes of assistance in this case because they all depend on the context to be found in the particular statute. The question I have to consider is whether I ought to give the words "sale or purchase" in R.S.C., Ord. 14A, what has been called their primary meaning, i.e., a sale or purchase for money; or whether I can give them a broader meaning, meaning a sale or purchase either for money's worth or for valuable consideration. A

It has been pointed out, of course, that the words "sale or purchase" in the order are plainly correlative and it has been urged that, in view of the wide definition of "purchase" in the Law of Property Act, 1925, I ought to give a wide meaning to "purchase", and, therefore, to "sale" in Ord. 14A. I think, however, that the word "purchase" in the Law of Property Act, 1925, s. 205 (1) (xxi), had to be given a very wide ambit for the reason, among other things, that it is concerned with the doctrine of purchase for value without notice. In this present case there is no doubt that the defendant is a "purchaser for value" of a lease, but that again does not really help me in the construction of this order. B

I approach the problem certainly with a desire to give the order as wide an ambit as possible, for it is a procedural provision, and those who practise in the Chancery Division know that it is of the greatest possible utility in enabling plaintiffs, where they have reason to believe that there is no defence to the action, to get judgment in a summary way. If I thought I could properly do so, I should certainly extend the ambit of the rule to cover this case. I come back, however, to the question of construction. I am really being asked to give to the phrase "sale or purchase" not its plain prima facie meaning of sale or purchase for money, but to cover a transaction for valuable consideration. The order does not use that phrase. I can find no context which would entitle me to extend the prima facie meaning of "sale or purchase" in this order. I cannot see how I can enlarge it, for instance, to include an exchange which plainly is not a sale or purchase. Nor, for instance, could I extend it to the case of a transfer in consideration of what is not normally described as a sale or purchase, e.g., marriage. I must give to these words their strict primary meaning, and that is sale or purchase in consideration of money. Accordingly the preliminary point succeeds, and I must dismiss this application under R.S.C., Ord. 14A. C

I trust that the matter will be brought to the attention of the Rules Committee so that the jurisdiction under R.S.C., Ord. 14A may be enlarged in appropriate circumstances. D

Order accordingly.

Solicitors: *Montagu's and Cox & Cardale*, agents for *Snell & Co.*, Tunbridge Wells (for the plaintiffs); *Roche, Son & Neale*, agents for *Peter S. Horden*, Bournemouth (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.] E

F

BEEVIS v. DAWSON AND OTHERS.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), November 5, 6, 7, 1956.]

Jury—Trial by—Request by jury to stop case during defendants' case—No direction to jury by judge—Libel action—Plea of justification—Plaintiff not having given evidence but contemplating giving evidence in rebuttal—Invitation to jury on behalf of defence to stop case and award a farthing damages.

Libel—Justification—Jury returning verdict before conclusion of defence—Plaintiff intending to give evidence in rebuttal of justification—Need for ruling by judge whether such evidence should be permitted—Whether jury entitled to intervene.

At the trial of a libel action in which the defendants pleaded justification the plaintiff called his evidence and did not himself give evidence, but his counsel indicated an intention to call the plaintiff to rebut any evidence that the defendants might give in support of their plea of justification. The trial judge gave no ruling whether the plaintiff might give evidence in rebuttal. The defendants' counsel invited the jury, in the course of the trial, to stop the case and award the plaintiff one farthing damages, and, in the course of a long opening speech, told the jury that it was for the plaintiff to satisfy them of his good character, which amounted, in effect, to a statement placing on the plaintiff the onus of disproving the plea of justification. During the opening speech for the defence the jury asked whether a majority verdict would suffice, but were told that it would not. Subsequently, after some of the evidence for the defence (which included evidence relevant to the plea of justification) had been given, the jury asked if they might retire and were permitted to do so but were given no direction by the judge as to the onus of proof or on the invitation to them on behalf of the defence to stop the case and award a farthing damages, and were not directed by the judge on the position arising from the possibility of evidence being given by the plaintiff in rebuttal. The jury brought in a unanimous verdict in favour of the plaintiff and awarded him one farthing damages. On appeal by the plaintiff,

Held: (i) in view of the three factors, viz., (a) that there had been no ruling whether the plaintiff could give evidence in rebuttal, (b) the misstatement regarding the burden of proof on the issue of justification and (c) the invitation to the jury to stop the case, and in view of the absence of any direction by the judge to the jury on the consequence of the possibility of evidence being given in rebuttal, there must be a new trial which should be before a judge alone.

(ii) the decision whether a plaintiff in a libel action, where justification is pleaded, should be allowed to postpone giving his evidence until after evidence had been tendered for the defence in support of the plea of justification rests in the discretion of the court (see p. 841, letter G, and p. 849, letter D, post).

Browne v. Murray (1825), Ry. & M. 254) considered.

Per JENKINS, L.J.: any question of the jury intervening and stopping the case is a matter between the judge and the jury and not a matter which should be introduced to the jury by counsel on his own initiative (see p. 848, letter C, post; cf. p. 844, letter D, post).

Observations on the duty of counsel in the conduct of litigation (see p. 839, letter F, post; see also p. 842, letter B, and p. 850, letter G, post).

Verdict before FINNEMORE, J. ([1956] 2 All E.R. 371), set aside.

[**Editorial Note.** PARKER, L.J., indicates the nature of the direction which might be given to a jury where evidence by a plaintiff may still be called in rebuttal of a plea of justification. It is that the jury might be told that they had heard that the plaintiff was yet to be called as a witness, subject to the judge's ruling, and that therefore they must either ignore the evidence already given by the defence or wait until the ruling was asked for and obtained (see p. 850, letter D, post).]

As to the burden of proof of justification, see 20 HALSBURY'S LAWS (2nd Edn.) 457, 458, para. 558.

As to verdicts by a jury for one party before all the evidence for the other party has been heard, see 19 HALSBURY'S LAWS (2nd Edn.) 313, para. 652; and for cases on the subject, see 30 DIGEST (Repl.) 267, 268, 312-318.]

Cases referred to:

- (1) *Browne v. Murray*, (1825), Ry. & M. 254; 171 E.R. 1012.
- (2) *Rees v. Smith*, (1816), 2 Stark. 31; 171 E.R. 562.
- (3) *Alexander v. H. Burgoine & Sons, Ltd.*, [1939] 4 All E.R. 568; Digest Supp.
- (4) *Hobbs v. Tinling*, *Hobbs v. Nottingham Journal*, [1929] 2 K.B. 1; 98 L.J.K.B. 421; 141 L.T. 121; 30 Digest (Repl.) 267, 318.
- (5) *Shaw v. Beck*, (1853), 8 Exch. 392; 20 L.T.O.S. 211; 17 J.P. 72; 155 E.R. 1401; 22 Digest 476, 5241.

Appeal.

This was an appeal and cross-appeal from the decision dated May 1, 1956, of FINNEMORE, J., and a jury, reported [1956] 2 All E.R. 371. The facts appear in the judgment of SINGLETON, L.J.

J. D. Cantley, Q.C., and *N. C. Tapp* for the plaintiff.

J. F. F. Platts-Mills for the defendants, Dawson and Cockburn.

SINGLETON, L.J.: This is an appeal by the plaintiff from a judgment of FINNEMORE, J., who sat with a jury and who gave his judgment on May 1, 1956. The plaintiff, Frederick John Beevis, claimed damages for libel against three defendants, the first and chief of whom is George John Dawson. The other two are Gilbert Alastair William Graham Cockburn and Jasper Addis. Jasper Addis was called as a witness on behalf of the plaintiff.

The verdict of the jury was that the plaintiff should recover the sum of one farthing damages against all the defendants. Addis had not entered an appearance, and judgment against him had been signed in default.

The plaintiff asks this court to say that the verdict and judgment should be set aside, and that there should be a re-hearing of the case, and that includes a request for a re-hearing against Addis, who gave evidence on behalf of the plaintiff. Addis has not appeared or been represented on this appeal, and I say nothing more about the case against him. Obviously the main contestants are Mr. Beevis, the plaintiff, and Mr. Dawson, the first defendant.

The document of which complaint is made is at the end of the bundle of documents. It appears to be addressed to the first defendant, and it gives what purports to be the history, or some part of the history, of the plaintiff. There can be no doubt that it is defamatory of the plaintiff on the face of it. The odd thing is that it appears to be addressed to the first defendant, and there was evidence to show that the first defendant had published it in different ways. I do not profess to be familiar with the whole of the evidence which was given in the case, though a good deal of it has been read to us. Nor do I propose to read the document. I have said enough about it.

A statement of claim was delivered on behalf of the plaintiff, and a defence was delivered on behalf of the defendants Dawson and Cockburn. The defence denies publication. It sets up more than one defence; the last paragraph of the amended defence pleads that the words are true in substance and in fact, and it adds that "full particulars of justification will be delivered as ordered."

A The particulars of justification, which were delivered on Aug. 9, 1955, occupy seventeen pages of foolscap, and there are thirty-two paragraphs of them. They are very complete and on those particulars the parties went to trial. The defendants are bound by the particulars of justification which they have given.

B The plaintiff was represented at the trial by Mr. Caplan and Mr. Tapp. The defendants Dawson and Cockburn were represented by Mr. Platts-Mills. There began almost from the commencement of the case a wrangling or quarrelling or bickering between counsel, and it lasted throughout the case. During Mr. Platts-Mills' opening speech for the defence FINNEMORE, J., before whom the case was heard, said in reply to a complaint by Mr. Caplan:

"There is a lot to be complained of on both sides, if you want my view.

C I hope both of you will be careful."

It is not often that the judge has to address counsel in that way. In reply to that remark, Mr. Caplan said: "My Lord, over and over again this has happened". A little later Mr. Platts-Mills said:

D "My learned friend does not want me to go into that matter. The whole of his interventions seem to be aimed at preventing me opening to the jury the matters I want to*. I have never been so dealt with in the opening of a case in my life. It is extremely embarrassing to proceed with the opening at all when at every point I am met with a reading of long passages. FINNEMORE, J.: A lot of people have the idea that juries do not comprehend what is going on. I think they do. Mr. Platts-Mills: If your Lordship pleases. FINNEMORE, J.: Juries are intelligent people and they know what is happening. They can weigh up, rightly or otherwise, as they think fit, interruptions on either side—whether they think they are justified or not. Mr. Platts-Mills: If your Lordship pleases. FINNEMORE, J.: They are the best people in the world to do it."

F The training of one who is called to the Bar in this country is intended to help him to understand that a member of the Bar is a helper in the administration of justice. He is there to help the judge, and, when there is a jury, to help the jury, to arrive at a proper result in the dispute between the parties. If a case is conducted as this one was, the judge is deprived of the assistance which he is entitled to expect from counsel. Continuous bickering becomes a burden for everyone in court—for judge and for jury—and it is almost impossible for justice to be done if that goes on. It is not surprising if, in such circumstances, a judge gets tired or if the jury get tired; sometimes it leads to confusion. That may well have happened in this case. I hope it will be a long time before this kind of thing happens again. Jurors who are called to sit in this building, where disputes between litigants have to be decided, ought not to have their time wasted as it was in this case.

H Early in the hearing Mr. Caplan said that he did not propose to call his client, the plaintiff, at the time one might expect; he preferred to keep the plaintiff's evidence to be called in rebuttal after evidence had been given, on behalf of the defendants, in support of their justification of the alleged libel. I feel sure that the jury would have been interested to see the plaintiff. He was not called during the hearing. Quite often Mr. Caplan said that he was going to call him, and on one occasion he went so far as to say that he undertook to call him when the defendants had proved their particulars of justification. There came a time when the jury asked if a majority verdict would be accepted, and they were told that it could not be, or would not be. Some time later the jury asked if they might retire. At that stage the plaintiff's evidence had been called. The plaintiff had closed his case, subject, it was submitted, to his right to call evidence in rebuttal. Mr. Platts-Mills had opened the defendants' case for roughly a day

* Mr. Caplan had complained that Mr. Platts-Mills was opening matters which had not been pleaded.

and a half—allowing, of course, for interruptions—and he had called some evidence. The jury wished to retire. There was some discussion in the presence of the jury. A short direction was given to the jury by the judge. The jury retired. Mr. Caplan reminded the judge that perhaps the jury should have been told something else. After a considerable interval without any further direction, the jury came back to court and returned a verdict for the plaintiff, assessing the damages at one farthing. After argument, judgment was entered for the plaintiff for one farthing damages.

When the jury decided that they wished to retire at that stage—that is before the defendants' case was concluded—everyone might well have thought that the jury was about to find against the plaintiff and for the defendants. But the jury did not do so; they found against the defendants, assessing the damages at the low figure of one farthing. The defendants do not object to that; they could not well do so for the jury did what Mr. Platts-Mills had suggested that they should do. It is the plaintiff who appeals and seeks a re-hearing.

The only reason that I can see for the jury adopting that course, that is to say, finding against the defendants in the middle of the defendants' evidence, is that it was what Mr. Platts-Mills had invited them to do during his speech, as I shall show in a moment. However, they did it, and now objection is taken on behalf of the plaintiff.

The plaintiff's appeal in this court has been in the hands of Mr. Cantley and Mr. Tapp, and it has been conducted with skill and with care. Certain main points are taken. Mr. Cantley has submitted: (i) that the plaintiff was entitled to give evidence in rebuttal before the jury gave a verdict, and (ii) that the jury should not have been allowed to return a verdict until they had been directed (a) on the position in law, and (b) on the nature and effect of the evidence they had heard. The plaintiff relied on the fact that at one stage of his opening of the defence Mr. Platts-Mills had misstated the evidence. Mr. Platts-Mills was at the time opening his case, and I am inclined to think that he was doing that which he was entitled to do, though the impression given from the transcript of his opening may lead one to think that it might convey to the jury that that which he said had been reached in the evidence already given, whereas in fact it had not. I do not think that there is any real substance in that part of the submission, and I say no more about it.

There are matters of more importance. It is claimed on behalf of the plaintiff that, there being a plea of justification in the defence, the plaintiff was entitled to reserve his evidence on that part of the case until later, and to give evidence in rebuttal. That submission is based on statements of practice in several text-books. I refer to one only, GATLEY ON LIBEL AND SLANDER (4th Edn.), at p. 582:

"Where there is a plea of justification on the record it is usual, and more convenient, for the plaintiff not to call any evidence in rebuttal as part of his own case, but to leave it to the defendant to make out his plea, and then give evidence of any matters which are properly admissible to rebut the plea. The plaintiff may, however, anticipate, if he thinks fit, and give all the evidence he intends to offer in rebuttal at the outset. But he is not entitled to call some evidence in rebuttal in the first instance, and to reserve the remainder for reply to the defendant's case."

The passage is based on several authorities, of which the most important appears to be *Browne v. Murray* (1) ((1825), Ry. & M. 254), the headnote to which reads:

"In an action for a libel, where the general issue is pleaded, and also special pleas in justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case."

A ABBOTT, C.J., said (*ibid.*, at p. 254):

"In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff in the outset, thinks fit to call any evidence to repel the justification, then, I am of opinion, that he should go through all the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice that this course should be adopted, otherwise there will be no end to evidence on either side, as the defendant would be entitled again to call witnesses to answer those last produced by the plaintiff to rebut the justification."

C In a footnote to the report (*ibid.*, at p. 255) there is a note, part of which I read:

"In *Rees v. Smith* (2) ((1816), 2 Stark. 31), which was an action of trespass, for breaking and entering a dwelling-house, and seizing goods, with the general issue, and pleas in justification, LORD ELLENBOROUGH states (*ibid.*, at p. 32) that the general rule was, that 'when by pleading, or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts; that when it is known what the question in issue is, it must be met at once'."

That is followed by a reference to the change in practice which had taken place.

I doubt whether there is a hard and fast rule either way. The authorities seem to me to show that the practice is based on general convenience. It must depend of course on the issues which are raised; obviously it must depend on the pleadings in the case in which the issues are set out. If publication is admitted and justification is set up as a defence, the plaintiff is entitled to say that the onus is on the defendant; that it is for him to prove his case. Equally if, by the answer to an interrogatory, the plaintiff can prove his case, and does so, the onus on the issue of justification is on the defendant. In most cases there are other pleas, and the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of parties, and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the judge decides that one course is preferable to another, his decision should in general be treated as final. He will not deprive the plaintiff of the opportunity of reserving his evidence until he has heard the evidence of the defendant in support of the plea of justification, if he considers that any injustice can be done to the plaintiff by such a ruling. If the judge considers that the better course is that the plaintiff should be allowed to reserve his answer to the plea of justification until after the defendant's evidence in support of the plea has been given, the defendant's counsel cannot offset that by asking questions on that issue to draw the plaintiff's witnesses, as Mr. Platts-Mills suggests. It is not for the defendant to decide how the trial shall be conducted.

In these days particulars of justification have to be given, and the defendant is bound by them and cannot go beyond them. So the plaintiff knows before the hearing commences what charges he has to meet. Thus there can have been no element of surprise in the case before us. There were abundant particulars of justification given. One might have thought that a plaintiff seeking damages for libel would have been only too anxious to answer those charges. The plaintiff was not. He might have followed that which I regard as the usual practice, and have gone into the witness-box; but he did not do so. His counsel said often that he proposed to do so later. The judge told him of the position, though he did not rule either way. As to general convenience, it cannot be doubted that it would have been better had the plaintiff been called and examined and cross-examined on the particulars of justification.

That which happened in the present case gives as good an instance of inconvenience as could be found. The jury decided that they would like to retire. I suppose everyone forgot that there had been no ruling on the request that the plaintiff's evidence might be postponed until after the defendants' evidence of justification had been given. When the jury asked if they could retire, it must have been obvious to Mr. Caplan that they were inclined to take a view adverse to his client, the plaintiff, for they had been told that they could not decide against the defendants without hearing the whole of their case. It ought then to have been pointed out to the judge, by one counsel or by the other, that some evidence in support of justification had been called, that the plaintiff claimed the right to give evidence in rebuttal, and that the jury could not come to a conclusion without a decision on that point. Nothing was said about this; it may be that the judge thought, and the jury thought, that the last thing the plaintiff wanted to do was to go into the witness-box. The jury decided against the defendants on the issue of justification, of which the defendants do not complain; but the plaintiff complains that they only gave one farthing damages.

Now it is right that I should state the course that was taken. The witnesses for the plaintiff, called to prove publication, were cross-examined by Mr. Platts-Mills on other matters. There was objection by Mr. Caplan, but the cross-examination was allowed, and Mr. Platts-Mills argues from the answers that there was some evidence given by those witnesses which would tend to rebut the particulars of justification given, and that the plaintiff cannot split his case. It is claimed that his case should have been completed and all his evidence given before the defendants were called on to give any evidence.

On the fifth day, as the plaintiff's case was about to conclude, Mr. Caplan said that he had only one more witness to call, and FINNEMORE, J., said:

"Mr. Caplan, there is one point. I am not, of course, going to ask hypothetical questions, but you may want to consider at some time the question of the plaintiff himself. It is for you, of course, to decide whether to call him or not. What I want to say is this, that I rather gathered from what you said on Friday* that you indicated there was some evidence which you want him to reply to? Mr. Caplan: Yes. FINNEMORE, J.: Now, if that is so, do you want to close your case? Mr. Caplan: My Lord, with respect, the authorities are quite clear on that. FINNEMORE, J.: I am not deciding it now; but if you want to call him in the case and the defendant objects, I shall have to be satisfied that you can in fact do it. Mr. Caplan: Perhaps it might be desirable then that I should cite to your Lordship the authorities on the matter now. FINNEMORE, J.: Yes. I do not think I could decide it now, because it is purely hypothetical. I do not know what is going to happen. Mr. Caplan: Yes, my Lord. FINNEMORE, J.: I mention it now because you must take the risk. Mr. Caplan: Of course, my Lord, I understand that. As the matter is raised, may I briefly indicate what I understand the position to be. The law on the matter, as I understand it, is this: that all the evidence in rebuttal must be given at one time. When I say all the evidence, that means all the witnesses who deal with rebuttal. They cannot be split; they cannot be given some before the defendant gives his evidence and some afterwards. They have all got to be given either before or after. Now, as the usual course is that evidence in rebuttal is given after, as is stated in GATLEY, it follows that if the plaintiff is going to give evidence in rebuttal, as the evidence in rebuttal cannot be split into two parts, if the usual course of giving the evidence in rebuttal after the evidence of the defendant is followed, the plaintiff must give his evidence in rebuttal at that time; because if he gives it before, then all the evidence in rebuttal has got to be given before, which is manifestly wrong, of course, because it means

* Friday, Apr. 13, was the third day on which evidence was heard. The passage cited above occurred on Tuesday, Apr. 17.

A one is rebutting something as to which there is as yet no evidence; and that is why the usual course is that you rebut after some evidence has been given."

I think I made it clear that I do not regard the course which Mr. Caplan took as the usual course. I am not prepared to adopt the passage from GATLEY in that respect. FINNEMORE, J., replied:

B "It certainly is not the usual course in libel cases. There being evidence before the court which you want the plaintiff to explain, obviously this must be the time to do it. Mr. Caplan: My Lord, there is not as yet—FINNEMORE, J.: I thought you said there was."

C Then there occurs a long answer from Mr. Caplan which ends:

"I shall give the assurance that Mr. Beevis will under those circumstances* be called. But at the moment it is not evidence, and at the moment there is no evidence at all."

The discussion ends with this sentence spoken by FINNEMORE, J.: "Then we will deal with it if it does arise."

D The learned judge had indicated that in his view Mr. Caplan ought to call the plaintiff, if he was going to call him, before he closed his case. He had indicated that as the usual course, and he had said that if Mr. Caplan did not do it he was taking a risk, and that that was the obvious time to call the plaintiff. Mr. Caplan had other views. There began thereafter, or very soon thereafter, the opening speech of Mr. Platts-Mills on behalf of the defendants. That speech occupies something over eighty pages, which are transcribed for the purposes of the appeal.

E Certain parts of Mr. Platts-Mills' opening speech are the subject-matter of complaint. This is one sentence used by Mr. Platts-Mills:

F "The plaintiff in effect pleads that the things said about him are untrue, are falsehoods. He has to put that in his statement of claim, that the things said about him are falsely said about him, and as he says that in his statement of claim, because it is denied and Dawson says 'No; they are true', he has to prove it; but if he does not go into the witness-box, he has not proved it, and therefore you are entitled to say—indeed you are morally bound to say—that no case is made before you, because he will not put his own character in issue."

G Mr. Platts-Mills has recognised that that mis-states the law. What I fail to understand is why someone did not correct him at the time. Perhaps the judge had not heard it, as is possible if Mr. Platts-Mills was turning towards the jury. But I should have thought that someone would have heard and that that would have been corrected. It never was corrected. Counsel on both sides were H have been of experience. The jury may have attached importance to the statement of Mr. Platts-Mills—they generally pay attention to what counsel say—and the information they were given was quite wrong.

A little later Mr. Platts-Mills read to the jury an extract from a case reported in "The Times"[†], and a discussion took place between counsel. Mr. Platts-Mills said about the plaintiff:

I "My learned friend has said he will be called at the proper time, or in due time, or if it be appropriate. It will not be for my learned friend to decide that."

* Mr. Caplan had explained that he wished to call the plaintiff to rebut the evidence contained in a certain document, but said the document itself had not yet been proved by the other side. He said he would call the plaintiff if the document was so proved.

† Counsel had referred to *Lewis v. Duncan*, The Times, Dec. 15, 1922.

I suppose Mr. Platts-Mills was prepared to argue that the time for calling the plaintiff had gone. Mr. Platts-Mills said soon afterwards:

"That is why the case is now put against him because he has not gone into that witness-box at this stage; and I would add that our practice is that a person who alleges that he has been libelled goes into that box first, the first witness, the first man in to bat, to face the bowling. That is our practice. That is not binding. He can ignore it, if he likes. He need not go in at all, with the results that I am putting before you . . . It is open to you, members of the jury, therefore, to apply the wisdom of our forefathers in the law, which only reflects their experience over years of juries and their reactions. The learned judges only reflect in their dicta their long experience of knowing how ordinary men and women such as ourselves behave in judging a situation just like that we have got today. It is not open to you to award Mr. Beevis 20s., nor any other sum, but if you are not prepared to stop the case now and say 'No libel; the action may be dismissed', I invite you to award him damages, to award him the one figure that really does reflect his worth, to award him a farthing. That is open to you now. I invite you to do that, and at any time you think it is convenient you can stop the action and take that course."

That remark of counsel was contrary to practice, and, as Mr. Platts-Mills now admits, was contrary to the law. Counsel had no right to say that to the jury: see *Alexander v. H. Burgoine & Sons, Ltd.* (3) ([1939] 4 All E.R. 568).

Sometime later Mr. Platts-Mills said:

"Members of the jury, you have a public duty to face patiently this squalid and sordid inquiry, the exposure of his life. You also have a public duty, if you think it right to save the time of the court and save public expense, and if you are satisfied that the case has not been made—it is not for me to satisfy you, but if you think Mr. Beevis (the plaintiff) has not satisfied you already that he has got a good and unblemished character, and he cannot satisfy you if he has not gone into the witness-box to swear it, then you can dispose of the case now. That is open to you."

That again is wrong. The onus on the issue of justification was on the first two defendants. He continues:

"Members of the jury, if you think it right to go on, then my learned friend will have his enthusiasm for information fully satisfied. Mr. Caplan: Thank you. We should all like to have the information. Mr. Platts-Mills: And we shall give you the story. Members of the jury, you have heard already some of the more recent events"

—and then counsel told the jury more of the evidence which was coming before them if they wanted to hear it, and it became obvious that it would take a considerable time. The judge asked once how long it would take. It does not appear to have occurred to anyone that there was anything wrong in counsel telling a jury that they could send the plaintiff away with a farthing at that stage if they wished to do so, and that it would be saving public time. It appears to me, from the two passages which I have read, that it is really asking the jury to save public time, including their time, and "you can do that by finding against my client", said Mr. Platts-Mills, "and giving the plaintiff a farthing damages".

The jury ultimately found for the plaintiff and gave a farthing damages in the middle of the defendants' case. They adopted that which Mr. Platts-Mills had put to them, perhaps they were persuaded to do it, or they were helped to do it, by that which learned counsel had said to them, and no one pointed out that it was wrong. There were interruptions enough and to spare in this case, but there were none when counsel went astray in the respects to which I have referred.

A The jury were allowed to go at one stage*, but apparently they stayed somewhere and talked the matter over. Later, still during Mr. Platts-Mills' opening address, the learned judge said:

B "Mr. Caplan and Mr. Platts-Mills, the jury have sent me a question to which there is a very simple answer, 'Are we required to give a unanimous decision or can it be a majority verdict?' The answer, members of the jury, must be 'a unanimous decision'. That is the ruling in all our jury cases, although in some cases sometimes the parties may agree otherwise. But without that it must be unanimous."

Later Mr. Platts-Mills said, just before he called his first witness:

C "But I venture, even at the cost of repeating, to say that when the plaintiff has closed his case, the onus of proving his case being on him and his counsel, from that time onwards it is open to you and from now onwards to come to a certain view of the matter. If you do all come to that view fairly and on your general common view of the case, then you may think that you are justified in expressing that view in this case above all, more particularly if you attach any importance to what Mr. Hatton indicated as the basis of the case perhaps unintentionally indicated, a case where he was perhaps most closely concerned, where his money was involved. You may think you have a public duty to save the time of the court, to save public expense and indeed to save the very great expense to which both parties are subject, and act on any such view which you may form."

E Then evidence was called on behalf of the defendants. The defendant Dawson was not called. When several witnesses had been called, the jury asked if they might retire to discuss the matter for a short time. FINNEMORE, J., said:

F "Yes, you are entitled to do that. Mr. Caplan: Yes, my Lord, if the jury want to retire, of course they always can. FINNEMORE, J.: Very well. The foreman: On the point I raised yesterday, I shall not raise the point†. Mr. Caplan: My Lord, I should say this, that I would have preferred that the jury had heard the questions that I put on these documents to the witness who has produced them, because my learned friend in putting the documents said certain things about them and omitted to read certain parts of them, which make a very great difference, and perhaps it might be wrong if the jury retired at this stage while a witness for the defence was in the witness-box and had not yet been cross-examined. I think perhaps it might not be right that that should be done at this stage, but when this witness has given all his evidence and been cross-examined, then I think it might be. FINNEMORE, J.: I think, Mr. Caplan, the official witness has done nothing himself except to produce documents and give the figures. If you want to tell the jury about anything, you can. Members of the jury, you must not pay any attention to any comments which were made."

H Thereafter the learned judge said to the jury:

I "Now you are entitled to go away and discuss this matter. The only thing I ought to say to you is this: you have heard the plaintiff's case, and that is that. You have not heard all the defendants' case, if you want to hear the rest of it. The one thing I ought to say is this: You have heard Mr. Platts-Mills speak for the defendant(s) about evidence he was going to produce. You will not, of course, assume that anything that he says has been proved if the evidence has not yet been called. You can only deal with the evidence you have actually heard. The speech is not evidence

* In the course of legal argument which arose during the opening speech for the defence in the morning, the jury were told they might go away till 2 p.m., but asked if they might go to the jury room to discuss the case instead.

† On the previous day the foreman had asked whether a unanimous verdict was necessary.

on either side. The speech is only to tell you what the evidence is going to be. You must consider only what has actually been proved on one side or the other up to the moment. I think that is obvious." A

Now it is claimed that this is a misdirection or an insufficient direction to the jury, for some evidence had been called in support of the defendants' plea of justification. It is pointed out that there had been no ruling on whether the plaintiff was to be allowed to be called in rebuttal. It is said that in those circumstances the jury ought to have been told "You cannot really discuss this matter without hearing what the plaintiff's evidence is, and you cannot really hear that until you have heard the whole of the defendants' evidence". At that stage Mr. Caplan might have reminded the judge what the position was, and said to him: "May I call the plaintiff before the jury retire?" Although it must have been obvious to him that the jury were not taking a favourable view of his case, nothing of that was done. But shortly after the jury had retired something appears to have occurred to Mr. Tapp (junior counsel for the plaintiff). It is shown in the transcript of the proceedings: B C

"(At 10.50 a.m. the jury retired in charge of a sworn bailiff.) Mr. Caplan: My Lord, I have just been reminded by my learned junior of one point; that is that it is possible the members of the jury may be under the impression that so far as any evidence has been given by the defendant at all, that is all the evidence they have to consider; whereas, as your Lordship knows, it is my respectful contention that I am entitled to call evidence in rebuttal of any evidence which so far has been given of character. I think it is a matter which your Lordship will bear in mind, because otherwise there may be misapprehension on the part of the jury with regard to that. My learned friend has said so often that the plaintiff is not going into the witness-box and 'you are not going to hear him'—that they may have that impression." D E

A little later the jury sent in a question asking how they should act if they found that the words were substantially true. The judge said: F

"It* has not all been proved yet, even if they accept the evidence. Mr. Caplan: I know what they have got in mind, my Lord, and I think it is quite clear that the answer is that if it is proved substantially, one knows the law on the matter is that when they have heard all the evidence, then there is justification proved." G

Later Mr. Caplan said:

"I was wondering, my Lord, whether perhaps the better way of dealing with it was this:— at some stage in the proceedings, your Lordship will, whatever happens, have to tell the jury what the issues are and what the law is. Bearing in mind that the evidence has not yet been heard on both sides as to truth, there does not yet arise the question of law, whether, if, on the whole of the evidence, this, that or the other is proved, there is a complete defence. The question does not arise at this stage, and it might well be that that would be the best answer to send to the jury, that the question they have asked is one which does not arise at this stage." H

Nowhere does Mr. Caplan say: "May I call the plaintiff?" I

It is recorded that the jury returned into court at 12.50 p.m. FINNEMORE, J., said:

"Mr. Foreman, I do not want you to tell me anything more than just what I ask you at the moment. You just asked to come back to court. Do I gather that you have come to some decision, or not? The foreman of the jury: You are correct in assuming that we have come to a unanimous

* I.e., the whole of the alleged defamatory statement.

A decision. FINNEMORE, J.: Do either of you want to say anything before I ask them what it is ? ”

Mr. Caplan then told the judge that he thought the judge might draw their attention to the decision of this court in *Hobbs v. Tinling* (4) ([1929] 2 K.B. 1), in which the jury had stopped the case in favour of the plaintiff before the plaintiff's case was concluded. FINNEMORE, J., did not think that had much to do with the matter. Thereupon the jury returned a verdict in favour of the plaintiff with one farthing damages.

B Mr. Platts-Mills, towards the end of his submission this afternoon, said that a mistake made by counsel in his address to the jury was not sufficient to cause this court to interfere with the verdict of the jury. It must depend on that which is said, but in general I agree with Mr. Platts-Mills' submission. He drew C attention to a passage from GATLEY (4th Edn.) at p. 684. I need not read it. He ended by saying that the verdict was “ quite good enough and should be supported ”.

Mr. Cantley submitted that there were three elements to be considered. The first was the question of evidence in rebuttal. That was still open. There was D no ruling on it by the judge. The plaintiff's counsel was entitled to think, and the plaintiff was entitled to think, that he was going to be called before any verdict was given. Mr. Cantley pointed out that after the jury finally returned, having agreed on their verdict, but before the verdict was given, there was a reminder to the judge that the plaintiff was entitled to call evidence in rebuttal. He also relied on mis-statement by counsel as to the evidence, and on the invitation E given by Mr. Platts-Mills to the jury to stop the case. He said there were present those three elements, and there was no direction given to the jury. They were allowed to consider evidence of justification without being reminded that the plaintiff had asked to be allowed to be called in rebuttal. That point remained to be dealt with. Most unfortunately it seems to have slipped the judge's mind, and neither counsel reminded the judge of it. I think it was the F duty of both counsel to help the court in that respect. Neither did so. It is a great misfortune that this happened. It all arose from this bickering between counsel. The judge ought to have been asked to decide early on the mode or manner in which the case should be heard. If he had decided what was most convenient in his view, counsel should have followed that. Instead this quarrel-ling arose, and there were continuous interruptions. No doubt it troubled the judge, and he could not be expected to remember everything that took place. G But the failure to give the jury a direction on the question of evidence in rebuttal is a matter of some importance, and, when it is accompanied by the other matters which I have mentioned, I feel that it is in the interests of justice that there should be a fresh hearing between the parties. I regret it. I do not think that the fault is to be attributed to the judge. As far as I can see, he was faced with a position of great difficulty, through no fault of his own, and in a case which H did not on the face of it present great difficulty. The difficulties were created during the hearing.

In the circumstances it is right that there should be a new hearing. I do not think that the burden should be placed on another jury, though I have no reason to think that the same course of action will be followed on another occasion. I Counsel for the plaintiff and for the first two defendants agreed that, in the circumstances, if there is to be a new hearing, it should be by judge alone, and I am satisfied that that is the proper course.

In my judgment the appeal should be allowed, and there should be a re-hearing of the case before judge alone.

JENKINS, L.J.: I agree. I confess that I am reluctant to be a party to an order which will result in further time and money being expended on this lamentable case; but it appears to me that the cumulative effect of the various

matters to which reference has been made is such that the verdict and judgment in this case cannot stand. A

The matters on which Mr. Cantley relied on behalf of the plaintiff were three matters relating to Mr. Platts-Mills' conduct of the case, and the matter of rebutting evidence. As to the matters of complaint against Mr. Platts-Mills, it is perfectly plain from the transcript that Mr. Platts-Mills did tell the jury more than once that the onus was on the plaintiff to disprove the truth of the slanderous statements made about him. That is a surprising perversion of the law, and Mr. Platts-Mills does not attempt to support it. Who is to say what effect this statement may have had on the minds of the jury? It seems to me impossible to rule it out as a matter which probably did not affect the result one way or the other. For my part, I think that there is a considerable probability that it may well have affected the result. B

Then the second matter was that Mr. Platts-Mills more than once invited the jury, if they thought they had heard enough, to stop the case and award one farthing damages only. That again, as is now agreed by Mr. Platts-Mills, was a course which counsel should not take. There appears to be clear authority for the proposition that any question of the jury intervening and stopping the case is a matter between the judge and the jury, and not a matter which should be introduced to the jury by counsel on his own initiative. C

The third matter of complaint against Mr. Platts-Mills was that in the course of his speech he treated as proved various matters which had not been proved, or not sufficiently proved, although they may have formed part of the questions put in cross-examination or part of some statement made in opening of the matters which were going to be proved. We were referred to instances of this, and it was said that here or there Mr. Platts-Mills was inaccurate in his account of the evidence. However, every passage which was pointed out to us as inaccurate was the subject of a correction by Mr. Caplan, who then appeared for the plaintiff. A certain amount of latitude must be allowed to counsel in developing his case, and on the whole I do not think this third matter of complaint against Mr. Platts-Mills is one which should be allowed any weight for the present purpose. D

Then as to the matter of rebutting evidence, Mr. Cantley, as I understood his argument, put it almost as a matter of law that the plaintiff, in an action such as this, was entitled as of right to confine his evidence to proof of the publication of the libel, if indeed the publication was not admitted, leaving it to the defendant to lead what evidence he might think fit to establish any affirmative defence, such as justification, which he might seek to make out. E

For my part, I do not think the principle which is stated in *Browne v. Murray* (1) ((1825), Ry. & M. 254), to which SINGLETON, L.J., has referred, really amounts to a rule of law, or to a right to which the plaintiff may invariably lay claim as a matter of law. The first sentence of the judgment of ABBOTT, C.J. is (*ibid.*, at p. 254): F

"In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant." G

Then the learned lord chief justice went on to say that the plaintiff should not sever his evidence on the issue of justification, leading some of that evidence in presenting his own case and some of it in rebuttal of the defendant's case. I think that the principle there stated may well reflect a practice which in appropriate circumstances it is right to follow, but is subject to the overriding discretion of the court to give such directions as to the order in which the onus of proof is to be dealt with and in which witnesses are to be called as the court may find just and convenient in the circumstances of the particular case. That, I think, is borne out by an observation of PARKE, B., in *Shaw v. Beck* (5) ((1853), 8 Exch. H

I

A 392), which case was also cited to us. That was a very different case. It was a case of an interpleader issue originating in the county court, and the question was whether the plaintiff, who claimed under a certain deed the property in issue, was obliged to do anything more in the first instance than simply prove the transfer of the property to him. It was held that the plaintiff was entitled to rest simply on the production of the deed, leaving it to his opponent to make out
B his case, which I gather attacked the genuineness of the deed, even though the cross-examination of the plaintiff's witness by whom the deed was produced foreshadowed a defence of that kind. In that case PARKE, B., said (*ibid.*, at p. 399):

C "I am of the same opinion. I will not say that this was not a matter in the discretion of the judge; but I think that he ought to have exercised that discretion in accordance with the rule of practice in these matters, and that according to that rule he ought to have admitted the evidence offered in reply."

D That rule of practice, as the learned baron called it, may be the best to follow in some cases, whereas in other cases it could not but be productive of inconvenience. It seems to me that the decision must rest in the discretion of the court. Nevertheless, Mr. Caplan was perfectly entitled, if so minded, to ask the learned judge to apply the principle stated in *Browne v. Murray* (1) (Ry. & M. 254), and allow the plaintiff's evidence to be postponed until it became necessary to rebut the case of justification made out by the defendant. There is no doubt that Mr.
E Caplan did mention to the learned judge on several occasions his right to take that course, and, indeed, his intention to take that course. He expressed himself, in some, at all events, of the passages in which this matter was dealt with, in somewhat oblique terms, and I think his conduct of the case is to some extent open to criticism in that he never did say in so many words: "I must now ask your Lordship to allow me to call the plaintiff". He never said that, and in the
F result it was overlooked, apparently, that this was a point that had been raised on which the learned judge had never ruled. So it came about that, before the defendants' case was finished, the jury retired and returned with their verdict awarding the plaintiff one farthing damages only, thereby carrying out, or acting consistently with, the exhortations in that behalf which they had received from Mr. Platts-Mills.

G Mr. Platts-Mills suggested—and the learned judge I think in his judgment to some extent supported this view—that there was enough in the matters that had already been brought to light in the cross-examination of the plaintiff's own witnesses to justify the jury in taking the course that they did take. It does appear that matters little to the plaintiff's credit did come to light in the cross-examination of some of those witnesses. But the difficulty I feel in this
H matter is that there was evidence called on the defendants' side as well, and it was impossible for anyone to say that what influenced the jury in the conclusion to which they came was solely the evidence elicited from the plaintiff's own witnesses. It may have been that, but it may also have been the evidence adduced on the defendants' side, and that was evidence, which, if Mr. Caplan's submissions in regard to calling the plaintiff had been acceded to, the plaintiff should have
I been allowed, if so minded, to rebut by his own testimony. That was not done, and I think, in view of the fact that it was not done, coupled with the other unsatisfactory features to which attention has been called, that this is a case in which there should be a new trial, and accordingly that the appeal should be allowed.

PARKER, L.J.: I also agree and I can state my views very shortly.

On Friday, Apr. 20, 1956, at the sitting of the court—that being the eighth day of the trial—the jury asked to retire, and the direction they received was the

short direction which SINGLETON, L.J., has read*. I need not read it again. A
The question in this appeal is whether that direction was sufficient and adequate,
having regard to the state of the evidence and the course of the proceedings up
to that point. The position then was that the plaintiff's case was closed. Mr.
Platts-Mills had addressed the jury on behalf of the defendants, and I think some
three witnesses had been called for the defendants. At least, there had been a
whole day of evidence called by the defence to support the plea of justification. B
I will assume, without going through the evidence, that if the jury had stopped the
case and given this verdict at the end of the plaintiff's case, they would have
been justified in doing so. I will assume that there was evidence then before
them which entitled them to give the plaintiff contemptuous damages. But
that was not the point at which the verdict was given. It was given after some
evidence had been given by the defendants, and before the judge had ruled on C
the question whether the plaintiff was entitled to be called in rebuttal. Mr.
Caplan had throughout, both in opening and at many stages in the proceedings,
said that he was going to call the plaintiff, and he always said that he was going
to call him after the defendants had given their evidence as to justification.
Indeed, he went further, and gave an undertaking, qualified at first, but eventu- D
ally, I think, in such general terms that it did amount to an undertaking to the
court to call the plaintiff. No ruling had as yet been obtained. In those cir-
cumstances, it seems to me that something was called for in the way of a direction.
The jury should have been told that they had heard the undertaking given to
call the plaintiff, subject always, of course, to the judge's ruling, and that
therefore they must either ignore the evidence already given by the defence or
wait until the ruling was asked for and obtained. It is said that that had no E
effect on the verdict, having regard to the evidence already given by the plaintiff's
own witnesses. It seems to me impossible to reach that conclusion. For one
thing—and this is, as it seems to me, the most cogent evidence—during Mr.
Platts-Mills' speech and before any evidence was called, the jury asked if they
could give a majority verdict. They were told that their verdict had to be F
unanimous, and it did not become unanimous until they had had a whole day of
the defendants' witnesses. Quite apart from that, there remains the fact that
they were told by Mr. Platts-Mills that the burden was on the plaintiff to disprove
the plea of justification, and they were invited to stop the case and award the
plaintiff a farthing damages.

It seems to me that, taking those three matters together, it is impossible to
say that that direction at that stage was an adequate direction to the jury. G

The only other thing I should like to say is that in my judgment no blame is to
be attributed to the learned judge, and I would associate myself entirely with the
remarks that have fallen from SINGLETON, L.J., as to the conduct of counsel
in these proceedings.

Appeal allowed. Re-hearing before judge alone ordered. Cross-appeal dismissed.

Solicitors: *C. Butcher & Simon Burns* (for the plaintiff); *Cyril Saper* (for the
defendants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* This direction is printed at p. 845, letter H, to p. 846, letter A, ante.

A CADOGAN (EARL) AND ANOTHER v. HENTHORNE
AND OTHERS.

[QUEEN'S BENCH DIVISION (Hallett, J.), November 7, 8, 1956.]

B *Rent Restriction—Sub-tenancy—Sub-tenant of part of premises—Whole premises outside Rent Acts—Notional separate letting of sub-let part within Rent Acts—Whether landlord entitled to recover possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 15 (3)—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 41—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 15.*

C Premises within the metropolitan police district were let on a long tenancy at an annual rent of £4 and were underlet for the whole term less one day at an annual rent of £16 ls. These terms of years, after being continued by temporary statutory enactments, expired in December, 1954. The rateable value of the premises on Apr. 6, 1939, was £101; and accordingly the premises were outside the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, since those Acts applied only if the rateable value did not exceed £100. In 1944 and again in 1947 part of the premises, viz., the ground floor and basement, were sub-let and the sub-tenancy, after being similarly affected by temporary statutory enactments, expired in December, 1954; the annual rent payable for this sub-tenancy was £150. An apportionment of the rateable value between (a) the ground floor and basement and (b) the rest of the premises would have resulted in the apportioned values being within the £100 limit for the application of the Rent Acts. In an action by the landlord against the underlessee of the whole premises and his sub-tenants of the ground floor and basement, judgment was entered against the underlessee but the sub-tenants defended on the ground that they were entitled to continue in possession by virtue of the Rent Acts, particularly s. 15 (3) of the Act of 1920, s. 15 of the Landlord and Tenant Act, 1954, and s. 41 of the Housing Repairs and Rents Act, 1954. By the latter section (s. 41) the operation of the Rent Acts was, from the end of the superior letting, to be "the same as if in lieu of the superior letting there had been separate lettings of the sub-let part and the remainder of the premises . . ."

F **Held:** the sub-tenants of the ground floor and basement were entitled to the protection of the Rent Acts (by virtue of s. 15 (3) of the Act of 1920), since by s. 41 of the Housing Repairs and Rents Act, 1954, they were in the same position as if there had been separate lettings to their immediate landlord, the underlessee, of (a) the ground floor and basement and (b) the rest of the premises, with the consequences (i) that the rateable value of each of the notional separate lettings must have been such as to bring the dwelling-houses so let within the Rent Acts, and (ii) the notional separate lettings would not (by reason of s. 15 of the Landlord and Tenant Act, 1954) be excluded from the Rent Acts by the low rents attributable to them.

G **[Editorial Note.** The decision in the present case on the construction of s. 41 of the Housing Repairs and Rents Act, 1954, is that the notional lettings envisaged by the section are lettings to the immediate landlord of the sub-tenant, not to the sub-tenant. The case incidentally provides judicial authority that results of the decisions in *Cow v. Casey* ([1949] 1 All E.R. 197) and *Knightsbridge Estates Trust, Ltd. v. Deeley* ([1950] 1 All E.R. 577) are negatived by s. 41 of the Housing Repairs and Rents Act, 1954, and s. 15 of the Landlord and Tenant Act, 1954, respectively.

I For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 1019; for the Housing Repairs and Rents Act, 1954, s. 41, see 34 HALSBURY'S STATUTES (2nd Edn.) 369; and for the Landlord and Tenant Act, 1954, s. 15, see *ibid.*, 401.]

Cases referred to:

- (1) *Ford v. Langford*, [1949] 1 All E.R. 483; [1949] L.J.R. 586; 31 Digest (Repl.) 668, 7662.
- (2) *Cow v. Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565; 31 Digest (Repl.) 713, 7984.
- (3) *Knightsbridge Estates Trust, Ltd. v. Deeley*, [1950] 1 All E.R. 577; [1950] 2 K.B. 228; 31 Digest (Repl.) 713, 7983.

Action.

This was an action by the landlords of No. 1, Rawlings Street, Chelsea, in the County of London for possession and mesne profits. There were three defendants; the first defendant, Leslie Stapleton Henthorne, was an assignee of an underlease of the whole premises, and the second and third defendants were sub-tenants of the ground floor and basement, part of the premises.

By a lease dated May 18, 1883, the premises were let by the Earl of Cadogan to a Mr. Wright for a term of eighty years expiring on June 24, 1952, at an annual rent of £4. By an underlease dated June 22, 1883, Mr. Wright let the premises to a Mr. Seymour for the whole term less one day at an annual rent of £16 1s. On Sept. 16, 1912, the underlease was assigned to a Miss Brownlow. On July 15, 1944, she sub-let the ground floor and basement to the second and third defendants. On the termination of that sub-letting she let the ground floor and basement again to them for a term of five years less two days from June 24, 1947, at a rent of £150 per annum. She died on Oct. 18, 1949, and the underlease was assigned by her personal representative to the first defendant, Mr. Henthorne. The rateable value of the whole premises on Apr. 6, 1939, was £101*. There had been no apportionment of rateable value between the ground floor and basement on the one hand and the rest of the premises on the other hand, but on any such apportionment the value of the ground floor and basement would have been substantially below £100.

It was agreed that by virtue of the Leasehold Property (Temporary Provisions) Act, 1951, and subsequent legislation, the three defendants were entitled to remain in possession of their respective parts of the premises until Dec. 24, 1954. In 1955 the landlord brought this action for recovery of possession, and in it judgment was entered against the first defendant, Mr. Henthorne; accordingly the second and third defendants are hereinafter referred to as "the defendants".

H. Heathcote-Williams, Q.C., and *P. W. Medd* for the plaintiffs (the landlords).
L. A. Blundell for the second and third defendants (the sub-tenants).

HALLETT, J., stated the facts and continued: It is common ground that at common law the termination of a lease otherwise than by a surrender brings to an end the sub-lettings. Therefore, the termination at the end of the extended period of Mr. Henthorne's lease would, at common law, have brought to an end the tenancy of the defendants. Accordingly, in order to justify the retention of possession by the defendants they must point, through their counsel, to some statutory provision which justifies that retention. The defendants have relied on three statutory provisions, one in each of three Acts, contending that the combined effect of these is to give them the protection which they claim.

The first of the three Acts is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The section in question is s. 15 (3) which provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom

* By s. 3 (1) of the Rent and Mortgage Restrictions Act, 1939, the Rent Acts were applied to dwelling-houses of which the rateable value on Apr. 6, 1939, did not exceed, so far as is relevant for the present case, £100. By s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the county court may make an apportionment of the rateable value of any dwelling-house to which the Act applies.

A the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

B Mr. Henthorne's interest was determined by the effluxion of time, and if he was a tenant of a dwelling-house to which the Act of 1920 applied, then the defendants as sub-tenants to whom a part of the premises had been lawfully sub-let would be deemed to be the tenants of the landlord, viz., the plaintiffs, on the same terms as they would have held from Mr. Henthorne if the tenancy had continued. The crucial words, for the purposes of the present case, are the words "... the interest of a tenant of a dwelling-house to which this Act applies ..."

C Section 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, provides:

"If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

D The effect of that sub-section has to be considered, however, in the light of certain decisions of which the only one that I need mention is *Ford v. Langford* (1) ([1949] 1 All E.R. 483). In that case the court held that the provision merely meant that the rateable value of the house was presumed to be within the prescribed limits and did not mean that there was a presumption against the house being excluded from the Rent Acts on some other grounds.

E There are various grounds on which the application of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939, to a dwelling-house may be excluded, but in the present case I am concerned only with two of them. The first of these arises by virtue of s. 3 (1) of the Rent and Mortgage Interest Restrictions Act, 1939, by which the Rent Acts apply to a dwelling-house in the metropolitan police district only if the rateable value on Apr. 6, 1939, did not exceed £100.

F On that day the rateable value of these premises as a whole was £101, and therefore this dwelling-house, which was let to Mr. Henthorne, was not a dwelling-house to which the Act of 1920 applied. The result of that was that, if s. 15 (3) of that Act stood alone, the defendant would not derive protection thereunder from having to give up possession. The position was considered in *Cow v. Casey* (2) ([1949] 1 All E.R. 197), where it was held that, as the dwelling-house

G which was the subject of the original demise was not a dwelling-house to which the Rent Acts applied, the sub-tenant was not protected from ejection and became a trespasser when his sub-tenancy had determined. The other ground on which it is contended, and indeed conceded, that in the present case the dwelling-house of which Mr. Henthorne was the tenant was not a dwelling-house to which the Act of 1920 applied, arises from s. 12 (7) of that Act, which reads as follows:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

I In *Knightsbridge Estates Trust, Ltd. v. Deeley* (3) ([1950] 1 All E.R. 577) it was held that where the rent at which the dwelling-house was let was less than two-thirds of the rateable value, the tenancy was not within the Rent Acts and that, accordingly, the sub-tenants could not avail themselves of the concluding provisions of s. 15 (3) of the Act of 1920. In the present case the rateable value of the dwelling-house of which Mr. Henthorne was tenant was, at the appropriate time, above £100, and the rent which he had to pay, viz., £16 ls. annually, was very much less than two-thirds of that rateable value; accordingly if s. 15 (3) stood alone, the tenants could not rely on that section for two reasons,

as is conceded, I understand, by counsel for the defendants. These reasons, which are cumulative, are: (i) the ground in *Cow v. Casey* (2), viz., that the rateable value is too high, and (ii) the ground in *Knightsbridge Estates Trust, Ltd. v. Deeley* (3), viz., that the rent is too low. A

The term of the underlease was, however, extended by legislation* to Dec. 24, 1954, and, while the extended term was running, the Housing Repairs and Rents Act, 1954, and the Landlord and Tenant Act, 1954, were passed. They were both passed on July 30, 1954, but the former came into operation on Aug. 30, 1954, and the latter came into operation on Oct. 1, 1954. The latter Act, the Landlord and Tenant Act, 1954, is concerned, among other things, with the "protection of residential tenants on termination of long tenancies at low rents"—I read those words from the marginal note to s. 1. "Long tenancy" is defined in s. 2 (4) as meaning: "a tenancy granted for a term of years certain exceeding twenty-one years, whether or not subsequently extended by act of the parties or by any enactment". Section 2 (5) provides: B C

"... the expression 'tenancy at a low rent' means a tenancy the rent payable in respect whereof ... is less than two-thirds of the rateable value of the property comprised in the tenancy." D

Section 1 of the Act provides:

"On the termination in accordance with the provisions of this Part of this Act of a tenancy to which this section applies the tenant shall be entitled to the protection of the Rent Acts subject to and in accordance with those provisions." E

Mr. Henthorne was not entitled, as is apparent, to derive any benefit from those sections and the defendants were not entitled to derive benefit from them because they had not got a long tenancy. It is therefore only on s. 15 of the Landlord and Tenant Act, 1954, that reliance, so far as that Act is concerned, is placed by the defendants. Section 15 (1) reads as follows: F

"For the purposes of s. 15 (3) of the Act of 1920 ... the interest of a tenant under a long tenancy shall, notwithstanding the provisions of s. 12 (7) of that Act, not be disregarded by reason only that the rent payable in respect of the tenancy is one falling within the said sub-s. (7) . . ."

Now the interest of Mr. Henthorne was the interest of a tenant under a long tenancy, and one of the reasons why it is alleged that his tenancy should be disregarded for the purposes of s. 15 (3) of the Act of 1920 was that his rent was what is described in the Landlord and Tenant Act, 1954, as a low rent. Accordingly, s. 15 of the Landlord and Tenant Act, 1954, as counsel for the plaintiffs agrees, disposes of one of the two grounds on which it could be contended for the plaintiffs that s. 15 (3) of the Act of 1920 had no application to the present case and could not avail the tenants. This ground is the ground that the rent was less than two-thirds of the rateable value. In other words, if the tenancy in *Knightsbridge Estates Trust, Ltd. v. Deeley* (3) had been a long tenancy and if the Landlord and Tenant Act, 1954, had been passed before that case had been decided, it would have had to have been decided differently. That, however, leaves untouched the other ground on which it is submitted on behalf of the plaintiffs that Mr. Henthorne's interest in the dwelling-house in question was not an interest in a dwelling-house to which the Rent Acts applied. This other ground was that the rateable value of that house was such as to take it out of the scope of the Rent Acts. G H I

* I.e., the Leasehold Property (Temporary Provisions) Act, 1951 (30 HALSBURY'S STATUTES (2nd Edn.) 194), and the Leasehold Property Act and Long Leases (Scotland) Act Extension Act, 1953 (33 HALSBURY'S STATUTES (2nd Edn.) 319).

A Now I must turn to s. 41 of the Housing Repairs and Rents Act, 1954. This reads as follows:

B “Where a dwelling-house to which the Act of 1920 applies (hereinafter referred to as ‘the sub-let part’) forms part of premises, not being such a dwelling-house, which have been let as a whole on a superior letting, then from the coming to an end of the superior letting the operation of the Rent Acts in relation to the sub-let part shall be the same as if in lieu of the superior letting there had been separate lettings of the sub-let part and the remainder of the premises, for the like purposes as under the superior letting, and at rents equal to the just proportion of the rent under the superior letting.”

C The opening words of this section at first caused me some difficulty, because the dwelling-house that is referred to in s. 15 (3) of the Act of 1920 is the whole dwelling-house, of which part has been sub-let to the sub-tenants claiming protection. In s. 41 of the Act of 1954 the dwelling-house which is referred to in the opening words is not the whole dwelling-house, but is the part that is sub-let. In the present case this part is the basement and ground floor. Then the words

D “. . . forms part of premises, not being such a dwelling-house, which have been let as a whole on a superior letting . . .” show clearly that s. 41 is contemplating the very case where the dwelling-house in which the interest of the tenant has determined is not a dwelling-house to which the Rent Acts apply; in other words, is a dwelling-house to which s. 15 (3) of the Act of 1920 does not apply. It is in the last lines of s. 41 that one finds the crux of this case. Counsel for the plaintiffs

E submits that the notional separate lettings of the sub-let part and of the remainder of the premises are notional separate lettings of the sub-let part to the present defendants and of the remainder of the premises to Mr. Henthorne.

On this construction, since the notional rent of the sub-let part was clearly less than two-thirds of the ascertainable rateable value of that part, and since

F s. 15 of the Landlord and Tenant Act, 1954, only refers to a “low rent” paid by a tenant under a “long tenancy”, which the sub-tenants did not have, they could not avail themselves of that section to oust s. 12 (7) of the Act of 1920 and gain the protection of s. 15 (3) of that Act.

Counsel for the defendants, on the other hand, contends that the notional separate lettings referred to in s. 41 of the Housing Repairs and Rents Act, 1954,

G are notional separate lettings of the sub-let part and of the remainder of the premises to the person whom I would describe as the original tenant of the whole. Counsel says the position is the same as if Mr. Wright had let by two separate lettings to Mr. Henthorne (a) the basement and ground floor and (b) the other three floors of the premises. Counsel agrees that if that had been so and if the whole rent of the premises, namely, £16 ls. annually, had been severed into its

H just proportions attributable respectively to the basement and ground floor and to the three upper floors, and if the rateable value had also been severed, the result would have been that the rent of each of the two subjects of letting would have been less than two-thirds of the rateable value attributed to those parts of the premises and that therefore exclusion of the notional separate lettings from the operation of s. 15 (3) of the Act of 1920 by virtue of low rent would

I remain, but for s. 15 of the Landlord and Tenant Act, 1954.

On this construction, however, the dwelling-house notionally let separately to the head tenant under a “long tenancy”, and let by him in turn to the sub-tenants under a short tenancy, had clearly a rateable value of less than £100 and so was a dwelling-house to which the Act of 1920 applied and in respect of which the sub-tenants could get protection under s. 15 (3) of that Act, if s. 12 (7) of that Act was, as counsel submitted, ousted by s. 15 of the Landlord and Tenant Act, 1954.

The crucial question then is: To whom are the separate lettings mentioned in s. 41 of the Housing Repairs and Rents Act, 1954, deemed to have been made? A

As regards the argument of counsel for the plaintiffs one feature which made some impression on me was this. The actual rent paid by the defendants under the sub-letting to them was £150 annually and it seems an extraordinarily artificial result to produce, by the interpretation of s. 41 for which counsel for the plaintiffs contended, that for the purposes of the operation of the Rents Acts in relation to the sub-let part the rent should be assumed to be not £150, which it in fact was, but an apportioned part of £16 ls., say £7, which it most certainly was not. I realise that in cases concerned with rent restriction to allow oneself to be unduly influenced by the strange results which seem to follow from one construction or another is not very safe, as was indeed pointed out, I think, by the Court of Appeal in *Knightsbridge Estates Trust, Ltd. v. Deeley* (3). I think that it is a point that is worth being borne in mind, but I accept that the matter must ultimately depend on an examination of the actual wording of the enactment and a correct construction of that wording. B C

Counsel for the defendants drew attention to certain considerations on the wording of s. 41 of the Housing Repairs and Rents Act, 1954, which, in his submission, point to his interpretation being correct. His first point concerns the words: D

“ . . . the operation of the Rent Acts in relation to the sub-let part shall be the same as if in lieu of the superior letting there had been separate lettings . . . ” E

Now the superior letting was a letting to Mr. Henthorne, and counsel for the defendants submits that it would not be natural if the words of s. 41 were read as supposing that, in lieu of the superior letting to Mr. Henthorne, there had been separate lettings of the sub-let part to the defendants, and of the remainder to Mr. Henthorne, who was the only other occupier of the premises. Counsel for the defendants submits that, as a matter of construction, it is far more natural and probable that what the words mean is: F

“ . . . shall be the same as if in lieu of the superior letting to Mr. Henthorne there had been separate lettings to Mr. Henthorne of the sub-let part and of the remainder of the premises, for the like purposes as under the superior letting, and at rents equal to the just proportion of the rent under the superior letting.” G

I find myself very much impressed by that argument. The second argument which counsel put to me is, perhaps, not quite so easy to follow. It is that s. 41 of the Housing Repairs and Rents Act, 1954, is dealing with a case where the superior letting has come to an end, and the sub-letting would also have come to an end unless saved by the Rent Acts. Counsel submits that this is a section to give protection to some sub-tenants, and that it does not speak of the sub-tenancy as something which is finished; it envisages the possibility of the sub-tenancy continuing, as is shown by the words which appear in the middle of the section, viz.: H

“ . . . then from the coming to an end of the superior letting the operation of the Rent Acts in relation to the sub-let part shall be the same as if in lieu of the superior letting . . . ” I

Counsel for the defendants says that that contemplates that what is protecting the sub-tenant is an alteration in the notional position of his landlord—that is to say, in the present case, Mr. Henthorne—and not a notional alteration of the sub-tenant's own position, which is what is envisaged, so counsel contends, by the interpretation put forward by counsel for the plaintiffs.

I have now stated the arguments on the one side and the other, and can summarise the position as I see it and state my conclusion. In the first

A place, it is conceded that s. 15 (3) of the Act of 1920 would, by itself, not be sufficient to protect the defendants for the two reasons which I have given. In the second place it is conceded that s. 15 of the Landlord and Tenant Act, 1954, destroys for the purposes of the present case one of those two reasons, namely, the low rent. It is contended, however, that the other reason, namely, the high rateable value, still prevails to render the protection afforded by s. 15 (3) of the Act of 1920 not available to the defendants, who are sub-tenants. That depends on what is the true construction of s. 41 of the Housing Repairs and Rents Act, 1954. Counsel for the plaintiffs contends that there is a gap between s. 41 of that Act and s. 15 of the Landlord and Tenant Act, 1954, and that, as a result of the gap, the sub-tenants, in such a case as the present one, are still deprived of the protection of s. 15 (3) of the Act of 1920.

C In my judgment, the construction of s. 41 of the Housing Repairs and Rents Act, 1954, for which counsel for the defendants contends, is the correct one. The other construction is one that does not fit well with the wording of s. 41. I therefore uphold the construction put forward on behalf of the defendants, and in my judgment the ground on which s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920, is sought to be excluded on behalf of the plaintiffs is no longer available, and the defendants are entitled to the protection afforded by that sub-section.

Judgment for the defendants.

Solicitors: *Lee & Pembertons* (for the plaintiffs); *William Charles Crocker* (for the defendant sub-tenants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

REILLY v. BRITISH TRANSPORT COMMISSION. WOODS v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Donovan, J.), November 7, 8, 9, 1956.]

G *Railway—Look-out—Statutory duty of railway to appoint look-out—Work “for the purpose of . . . repairing the permanent way”—Lengthmen engaged on tightening nose bolts on line—Work involving use of “T” spanner—Whether “danger . . . likely to arise”—Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 1 (1), Schedule, cl. 12—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), r. 9.*

H Two lengthmen employed on the defendants' railway undertaking were instructed to tighten the crossing bolts on a section of a main railway line near a junction. They were also expected to tighten any nose bolts which they found loose, and this work involved the use of a “T” spanner which required two men to operate it. The place where the work was to be done was a place of busy railway traffic. In operating the “T” spanner the men would be likely to be looking at the ground and not to see an approaching train and they might obstruct each other's vision of the line as they pulled the cross-bar of the “T” spanner and moved it round. No look-out man was provided by the defendants. While operating a “T” spanner to tighten a nose bolt, the lengthmen were fatally injured by an express train which was travelling on the line on which they were working. The signal, which was plainly visible where the men were working, had been in the “off” position for some three minutes before the train arrived. The widow of each of the deceased men brought an action against the defendants, under the Fatal Accidents Acts, 1846 to 1908, for damages for negligence and for breach

of statutory duty under the Prevention of Accidents Rules, 1902, r. 9*, in that the deceased were "working . . . for the purpose of . . . repairing the permanent way" within that rule and the defendants had failed to provide the look-out man whom the rule required them to provide in "cases where any danger is likely to arise".

Held: (i) the defendants were in breach of duty under r. 9 of the Rules of 1902 to provide a look-out man, because (a) the operation on which the deceased men were engaged at the time of the accident was a work of repair, and, accordingly, the men were working on the line for the purpose of "repairing the permanent way", within the meaning of the rule, and (b) work involving the use of a "T" spanner was of such a kind that danger was "likely to arise", within the meaning of the rule (dicta of LORD JOWITT, L.C., and LORD PORTER in *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. at pp. 258, 267, applied), and

(ii) the defendants were also negligent at common law, but

(iii) the deceased men were guilty of contributory negligence in having failed to notice that the signal was in the "off" position, and their share of the responsibility was assessed, in each case, at one-third.

[Editorial Note.] In the absence of any context requiring the word "repair" to bear a special meaning, it bears its ordinary meaning (see p. 860, letter B, post, and cf. per JENKINS, L.J., in *Sumner v. Robert L. Priestly, Ltd.*, [1955] 3 All E.R. 445, 447). Much must depend on the context, but as the difficulty often lies in applying the ordinary meaning to a particular set of facts, some help may also be derived from comparison with the case last cited and with *Hurley v. J. Sanders & Co., Ltd.* ([1955] 1 All E.R. 833, 837).

For the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1), and Schedule, cl. 12, see 19 HALSBURY'S STATUTES (2nd Edn.) 885, 891.

For the Prevention of Accidents Rules, 1902, r. 9, see 22 HALSBURY'S STATUTORY INSTRUMENTS 239.]

Cases referred to:

- (1) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (2) *Hutchinson v. London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 36 Digest (Repl.) 114, 564.

Actions.

These were two actions against the British Transport Commission for damages for negligence and breach of statutory duty. The actions were brought under the Fatal Accidents Acts, 1846 to 1908, one by Alice Reilly, as the widow of Peter Reilly deceased, and the other by Emily May Woods, as the widow of John Woods deceased. The deceased men had been employed as lengthmen by the defendants and were fatally injured in the same accident.

On May 13, 1954, while the deceased men, in the course of their employment, were tightening the fish plate bolts of the main up fast line at Cambridge junction near Hitchin station, they discovered that a nose bolt required tightening. To tighten this bolt a "T" spanner, which had to be operated by two men, was required. While the deceased men were operating the "T" spanner,

* Rule 9 reads: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

A they were struck and killed by an express train which was travelling along the main up fast line at the same time as another train was proceeding in the same direction along the up branch line from Cambridge. The plaintiffs contended that the defendants were in breach of the obligation imposed on them by the Prevention of Accidents Rules, 1902, r. 9, in that the defendants failed to provide any persons or apparatus for the purpose of maintaining a good look-out and for giving warning against the approach of the express train while the deceased men were working on the line. The plaintiffs further contended that the defendants were negligent in that they had failed to provide or maintain a safe system of working. The defendants denied breach of statutory duty or negligence and contended (a) that the Rules of 1902 did not apply to the work of tightening crossing bolt nuts, which was the work which the deceased men C had been instructed to do on the day of the accident, and (b) that, in each case, the accident was caused, or, alternatively, contributed to, by the deceased man's own negligence in that, among other things, he had failed to observe that the signals controlling the up main line and the up branch line were in the "off" position.

D *N. R. Fox-Andrews, Q.C., and W. G. Wingate* for the plaintiffs.
Marven Everett, Q.C., and F. H. Lawton for the defendants.

DONOVAN, J.: The work which the deceased men were instructed to do on the day on which they met their deaths was to tighten up all crossing bolts that needed tightening on this part of the line. If in so doing they came across any nose bolts that also needed tightening, they would, according to the general E practice and expectation, tighten those up also. For this, they would need a different spanner from the ones which they carried for tightening crossing bolts. This different spanner is known as a "T" spanner, and one was apparently kept in a hut near the signal box close to where the accident happened. When they were struck by the express train and killed, the deceased men were engaged in tightening up a nose bolt with a "T" spanner. The defendants F contended that the work on which the men were sent out was not work of "repairing the permanent way" within the meaning of the Prevention of Accidents Rules, 1902, r. 9, and that, therefore, on this ground alone there was no breach of statutory duty in not providing a look-out man. The defendants submitted that the work of tightening bolts was more properly described as maintenance or adjustment.

G Unfortunately, the terms "repair", "maintenance", and "adjustment" are not mutually exclusive. One cannot, therefore, by describing some operation as "maintenance" or "adjustment", exclude the possibility that it is also a "repair". Furthermore, in considering whether any particular work may properly be called a repair, one must, I think, remember that our language H abounds in instances of particular operations or activities which acquire distinctive names or descriptions but still remain species of one genus of operations or activities bearing a comprehensive name. The particular name, however, becomes so much used that the comprehensive term fades into the background, until the precise question has to be answered: "Is it applicable?" For example, there are a whole host of operations which can be properly described as "cutting", but each of which has its own distinctive name: chopping, I sawing, scything, mowing—even shaving. The Divisional Court recently heard much argument on the question whether drilling was cutting, and decided that it was*. So it is, I think, with the word "repair". It covers a host of things, many of which are given distinctive names which become so popular that it becomes very easy to think of them as something different from repairs. If one's wheel nuts work loose and one takes the car to a garage, one would probably never use the word "repair" when asking for the nuts to be tightened.

* *Fallaize v. Troughton & Young, Ltd.*, ante, p. 127.

In these circumstances one must ask in such a case as the present, first, whether the word "repairing" is to be construed in some special sense or according to its everyday meaning, and then, whether the work in question comes within the interpretation adopted, whatever particular name the work may have acquired. The defendants submitted, in effect, that a special meaning should be given to the word, that is, the meaning which a railwayman would put on it, for the rule is dealing with railways. That mere fact, however, does not justify a departure from the canon of construction, namely, that words are to be given their ordinary meaning unless the contrary plainly appears. The context of r. 9 of the Rules of 1902 gives no support to the plea for some special or restricted interpretation of the word "repairing", nor do the decided cases where the rule has been considered, nor does the object of the rule. I think, therefore, that I am bound to give the word its natural meaning. A B C

In *London & North Eastern Ry. Co. v. Berriman* (1) ([1946] 1 All E.R. 255), where the House of Lords decided by a majority of three to two that the routine oiling of signalling mechanism and points on the railway was not "repairing", LORD PORTER said (*ibid.*, at p. 267):

"The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong." D

Curiously enough, LORD JOWITT, L.C., who dissented in that case, gave the very illustration of tightening a nut as being a work which would be conceded, he thought, as being a work of repair. He said (*ibid.*, at p. 258):

"It would, I suppose, be conceded that if a nut had worked loose and required to be tightened the work involved would be a work of 'repair' even although the actual work occupied only a few seconds of time." E

It is not so conceded, however, in the present case, and I must, therefore, form my own independent opinion on it.

It would be wrong in the present case to isolate the nose bolt and consider whether tightening that alone was a repair; for the men's work on this morning comprised more than that. It was to tighten all crossing bolts on this section of the line that needed tightening, and, if in the course of doing this a nose bolt was found loose, the men were expected to tighten that too. I found that on the evidence of Mr. Nye and Mr. Mowl. The question is whether this work in its entirety was a work of repair. The function of crossing bolts and nose bolts is to hold tightly together the component parts of the points at that spot. If by working loose they do not do this, then the bolts cease to perform their full duty even though they have worked loose only a little; for their function is not to work loose at all. Accordingly, when the bolts are tightened up again the result is that something which has not been doing its full duty before is now restored to full duty: and I see no difficulty in describing an operation which has that effect as a repair. Looked at in another way, a crossing bolt or nose bolt which is loose is a defective unit—even though it is only a little loose, for it should be tight, and if the defect is not made good it may get more pronounced, and serious results, for example, a derailment of a train, might ensue. To put right such a defect is, I think, reasonably and properly called a repair. I therefore come to the conclusion that the deceased men were on this morning working for the purpose of repairing the permanent way within the meaning of r. 9 of the Rules of 1902. F G H I

The next question is whether the circumstances were such that they constituted a case where danger was likely to arise, within the meaning of the rule. The defendants are naturally apprehensive about a possible construction of the rule which would put on them the obligation of providing a look-out man every time anyone worked, singly or otherwise, on a stretch of line in use for traffic, because, in a loose way, it can be said that danger must then be ever present. I do not think, however, that this apprehension need be too great. Danger is

A not constituted by the mere presence of moving trains, nor by such trains plus the presence in the vicinity of workmen. It is constituted, or "arises", only when trains and workmen are brought into close proximity one to the other, and the surrounding circumstances are such as to constitute a real risk of accident. I use the expression "real risk" in contradistinction to a remote risk, for the words in r. 9 are "danger is *likely* to arise"; and the word "likely" is important

B in this context. Thus, if a linesman is sent off by himself to inspect a length of line and tighten up, for example, fish plates, this is work which he can do with a long spanner provided for the purpose, and at the same time keep his eyes and ears open. If no special danger like fog is present, there is really no reason to expect that he will be struck by some passing train, the approach of which he could both see and hear, and which he would have ample time and space to

C avoid. I think that danger would not be likely to arise in such a case. A fortiori, where two men are sent out together to do such work, for then a double look-out can be kept.

The present case is different, and I have used the foregoing example simply to point the contrast. Here the deceased men were sent out on work which included the tightening of any nose bolt found loose. That involved the use

D of a "T" spanner. Each man would operate one end of the cross-bar, and they would be standing opposite one another and pulling in opposite directions. If the deceased men moved their position as they pulled—and they might well do so—then one or both might obscure the view of the other up or down the line at some moment or another. The deceased men would be bent a little over the spanner and might well be observing the nut which they were in process

E of tightening. The place where they would be doing this work was a place of busy railway traffic, including shunting lines on either flank, and a branch line leading off from the main line. No one, in my view, assessing the situation at the outset, could come to any other reasonable opinion than that, if the men used a "T" spanner on a nose bolt, circumstances might well combine to cause a real risk of accident. The posture which the men would naturally and probably

F adopt; the possibility of mutual obstruction of their view, albeit for fleeting moments; the difficulty sometimes encountered in getting the spanner to fit the bolt unless the spanner was first cleared of grease inside its box; the possibility that the men would become engrossed on the job—all these things combine to make the case, in my opinion, one where danger was likely to arise. It was this work which the deceased men were doing when they were killed. It is

G perhaps interesting to observe that the defendants' own witnesses were of the like opinion, although what I have just said expresses my own independent view.

That being so, there was a breach of the rule, no look-out man having been provided. The result would be the same at common law, for the defendants

H have, in my view, by r. 234 (d) of their domestic rules* indicated a standard of reasonable care. That rule imposes on the ganger an obligation to appoint someone to act as a look-out man "When work is about to be undertaken on or near lines in use for traffic and danger is likely to arise . . ." The present was such a case, but no look-out man was appointed.

On the issue of contributory negligence, I bear in mind all that was said by LORD GREENE, M.R., and by GODDARD, L.J., in *Hutchinson v. London & North*

I *Eastern Ry. Co.* (2) ([1942] 1 All E.R. 330) against too ready a finding of contributory negligence where the employers have themselves been guilty of a breach of statutory duty. In particular, I recall LORD GREENE's observation (*ibid.*, at p. 334) that it must be shown, *inter alia*, that the man had the opportunity of avoiding what happened. In the present case, had someone said to the deceased men: "Do not go on to the fast main up line yet, for a train is about to come on it", and despite that warning they had done so, no one

* The British Railway Rules, 1950.

could contest their negligence. In fact, to these two experienced men, the signal, plainly visible to them, gave just that message. It was in the "off" position for some three minutes before the train arrived, and they simply could not have looked at it as they should have done. In addition, the driver of the train was whistling to them as he approached the last two hundred to three hundred yards towards them. The evidence of the eye witnesses concurs in this, that the men took no notice whatever. This, by itself, I would not describe as negligence. Obviously the deceased men were so engrossed on their job as to be oblivious to all else. But the warning message of the signal was there for them to see; they could not have looked for the sign that a train was due, and their failure to do so must be regarded as contributory negligence. I regard what must have been a temporary and probably unaccustomed lapse on their part as carrying a lesser share of responsibility than the initial failure to assess the situation and send a look-out man, and I rate it at one-third.

[HIS LORDSHIP assessed the damages to which each of the plaintiffs was entitled under the Fatal Accidents Acts, 1846 to 1908, and awarded her two-thirds of that sum and two-thirds of the sum agreed in respect of funeral expenses.]

Judgment for the plaintiffs.

Solicitors: *Pattinson & Brewer* (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).
[Reported by MARGARET D. ABEL, Barrister-at-Law.]

Re STRATTON'S DEED OF DISCLAIMER. STRATTON AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), November 20, 21, 1956.]

Estate Duty—Disclaimer—Legacy to wife—Wife disclaiming—Wife dying within five years after disclaimer—Whether duty payable on property disclaimed—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 45 (2).

By his will a testator made a specific bequest and a specific devise in favour of his wife, and gave his residuary estate to his three sons. The testator died on Oct. 20, 1949, and his will was proved on Nov. 2, 1950. By a deed of disclaimer dated May 28, 1951, the testator's widow disclaimed and renounced all beneficial interest to which she was entitled under the specific bequest and devise. The purpose of the disclaimer was not stated in the deed and no evidence of her intentions was adduced. On June 27, 1953, the widow died, and estate duty was claimed in respect of the property disclaimed by virtue of the Finance Act, 1940, s. 45 (2) and the Finance Act, 1894, s. 2 (1) (c).

Held: estate duty was payable as claimed because (a) the inchoate right which the widow had to take the gifts made to her by the testator's will was a "right" within s. 45 (2) (in which sub-section the meaning of that word was not in any way restricted by its meaning in s. 45 (1)); (b) that right was extinguished by the disclaimer (*Re Parsons*, [1942] 2 All E.R. 496, applied; *Re Wimperis*, [1914] 1 Ch. 502, considered); (c) the extinguishment of that right was at the expense of the deceased, i.e., the testator's widow; and (d) the widow must, in the absence of evidence, be deemed to have intended the natural consequence of the disclaimer, viz., to benefit the three sons, so that the requirement of s. 45 (2) that the extinguishment of the right must have been carried out with the intention of benefiting certain persons was satisfied.

[As to estate duty on a gift by way of release of a right, see 15 HALSBURY'S LAWS (3rd Edn.) 19, para. 37.

For the Finance Act, 1940, s. 45 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 473.

A For the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as amended by the Finance (1909-10) Act, 1910, s. 59, and the Finance Act, 1946, s. 47, see 9 HALSBURY'S STATUTES (2nd Edn.) 403, 516; for the Finance Act, 1894, s. 2 (1) (c), see *ibid.*, 350.]

Cases referred to:

- B (1) *Re Wimperis, Wicken v. Wilson*, [1914] 1 Ch. 502; 83 L.J.Ch. 511; 110 L.T. 477; 44 Digest 400, 2329.
 (2) *Re Parsons, Parsons v. A.-G.*, [1942] 2 All E.R. 496; [1943] Ch. 12; 112 L.J.Ch. 65; 167 L.T. 384; 2nd Digest Supp.

Adjourned Summons.

C The plaintiffs, as executors of the will of Fanny Stratton, deceased, applied to the court by originating summons under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, for the determination of the question whether by virtue of the Finance Act, 1940, s. 45 (2), liability for estate duty arose on the death of the deceased under the Finance Act, 1894, s. 2 (1) (c) (as amended by the Finance (1909-10) Act, 1910, s. 59, and the Finance Act, 1946, s. 47), in respect of the property disclaimed by a deed of disclaimer executed by the deceased within five years of her death. The deed of disclaimer related to certain property devised and bequeathed to the deceased by her husband, who died on Oct. 20, 1949. The facts appear in the judgment.

H. E. Salt, Q.C., and *A. J. Belsham* for the plaintiffs.

J. Pennyquick, Q.C., and *E. Blanshard Stamp* for the defendants.

E DANCKWERTS, J.: The question which I have to decide is whether estate duty is payable on the death of a lady who had previous to her death disclaimed two specific gifts which had been given to her by her husband's will. The will in question was that dated July 16, 1946, of Frederick William Stratton, who died on Oct. 20, 1949, and it was proved on Nov. 2, 1950. By that will the testator, who bequeathed the residuary estate to three sons who are the plaintiffs in this originating summons, made specific bequests to his widow of twelve policies on his life for £800 each and one policy for £400 in a certain insurance company; and, secondly, a specific devise of his freehold houses and premises, Nos. 15 and 16, Bruce Grove, Tottenham, which were used in connection with his business and over which the sons were given certain rights or options, but which in the event which happened went under an alternative gift to the widow absolutely.

G By a deed of disclaimer dated May 28, 1951, the widow disclaimed and renounced all beneficial interest to which she was or might be entitled under the said will in the said policies of insurance and each of them and the bonuses and additions thereto and in the said freehold property. The disclaimer recites the gifts in the husband's will and recites that the lady is desirous of disclaiming the gifts and that she has received certain advice. It does not contain any information as to the intention or motive of the lady in disclaiming that bequest and devise. She died on June 27, 1953, which was within five years from the date of the disclaimer; and her will dated June 29, 1951, appointed the three sons the executors and trustees and was proved by them on Aug. 29, 1953. They have taken out this originating summons for the purpose of obtaining the decision of the court on the liability to duty. The amount involved is quite considerable, because the policies and freeholds are worth together some £30,000 and I understand that duty amounting to over £4,000 is involved in the case.

I It is well known that the Customs and Inland Revenue Act, 1881, included in the property which was deemed to pass on the death of a deceased by s. 38 (2) (a) the subject-matter of gifts (putting it shortly) made within three months before the death of the deceased. Various statutes*, to which I need not refer, have

* Customs and Inland Revenue Act, 1889, s. 11 (1); Finance (1909-10) Act, 1910, s. 59; Finance Act, 1946, s. 47.

increased the time within which, in case of death, duty will be payable to one year, three years and five years. The point which I have to decide arises on an extension of the meaning of "gifts", introduced by s. 45 of the Finance Act, 1940, which also contained extensive provisions about dispositions and determinations of life interests in s. 43. Section 45 has a heading or rubric: "Gifts by way of creation of burden or release of right", and it provides:

"(1) The creation by a person or with his consent of a debt or other right enforceable against him personally or against property of which he was or might become competent to dispose, or to charge or burden for his own benefit, shall be deemed for the purposes of the enactments relating to estate duty, including this Part of this Act, to have been a disposition made by that person, and in relation to such a disposition the expression 'property' in the said enactments shall include the debt or right created.

"(2) The extinguishment at the expense of the deceased of a debt or other right shall be deemed for the purposes of the said enactments to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression 'property' in the said enactments shall include the benefit conferred by the extinguishment of the debt or right."

Sub-section (2) is the provision which I have to construe, and it is claimed that the disclaimer by Mrs. Stratton of the gifts in her husband's will falls within the provisions of that sub-section.

It seems to me that there are four things which have to be established in order that duty shall be payable under that sub-section. First of all, there must be a right possessed by the deceased or owned in some way—"a debt or other right". Secondly, there must be an extinguishment of that debt or other right. Thirdly, the extinguishment must be at the expense of the deceased. And lastly, it must have been extinguished for the benefit of some person.

Before I consider the nature of a right I must refer to an argument which was advanced by counsel for the plaintiffs, that having regard to sub-s. (1) the meaning of the words "debt or other right" in sub-s. (2) must be restricted in some way. I found that argument extremely difficult to follow and not to be really helpful, because it seems to me that the subject-matter of sub-s. (2) is not necessarily the same as the subject-matter of sub-s. (1). In certain respects it is obviously different, and therefore it would be quite wrong to give a restricted meaning to the words "debt or other right" in sub-s. (2) merely because of the terms of sub-s. (1). I see no reason why the words "debt or other right" should be restricted in sub-s. (2) within any narrower field than the natural meaning of those words. In consequence, subject to any special case that may arise, "other right" must mean any kind of right; at any rate, any kind of right having a value of some kind or other.

Prima facie one would suppose that right to receive a legacy was obviously a right, and that, therefore, as the disclaimer extinguishes that right, the first two requirements of the sub-section are satisfied. An elaborate argument was put up for the purpose of showing that the effect of a disclaimer was to destroy the right to a legacy as if it had never existed. Counsel for the plaintiffs referred me to SHEPPARD'S TOUCHSTONE OF COMMON ASSURANCES and other elderly authorities for the purpose of establishing that proposition, and there is no doubt that it is perfectly correct that for many purposes the effect of a disclaimer is to extinguish a legacy as though it had never been in existence at all, because for such purposes the disclaimer relates back to the date of the testator's death. In *Re Wimperis, Wicken v. Wilson* (1) ([1914] 1 Ch. 502), WARRINGTON, J., applied that proposition to the disclaimer by a married woman of a legacy which was given to her subject to a restraint on anticipation, in such a way that he held that the disclaimer was operative and not restricted by the restraint; if the married woman had attempted to dispose of the legacy to someone else by

A release or conveyance, plainly the restriction caused by the restraint would have prevented the operation being effective. WARRINGTON, J., said (*ibid.*, at p. 509):

“ But in the present case if the married woman has in fact declined the gift she never had an estate for her separate use and has never been subject to the restraint on anticipation . . . ”

B On the other hand, I find it very difficult to reconcile that, for at any rate all purposes, with the decision of the Court of Appeal in *Re Parsons, Parsons v. A.-G.* (2) ([1942] 2 All E.R. 496). The question in *Re Parsons* (2) was whether when a husband disclaimed a legacy which he had been given by his wife, he was within the provisions of the Finance Act, 1894, in the sense that he had been competent to dispose of the legacy in question. If one applies the principle in *Re Wimperis* (1) to the greatest degree, it would seem to me that the Court of Appeal would not have reached the conclusion which they did reach, that in that case the husband had been competent to dispose of the legacy in question. It seems to me that the argument would have been, as was put up indeed in that case, that as the legacy never had any existence by reason of the disclaimer, there was nothing of which the husband was ever competent to dispose. That was rejected by the Court of Appeal, and they held that the husband was in fact competent to dispose of the legacy in question. LORD GREENE, M.R., in the course of his judgment said, after he had referred to the Finance Act, 1894, s. 22 (2) ([1942] 2 All E.R. at p. 497):

E “ That language seems to me beyond doubt to cover the case of a legatee to whom a legacy has been given and who is in a position either to take it or to transfer it to somebody else or to disclaim it as he thinks fit. The husband was in that position, as I say, during the interval between the death and the disclaimer; and I need scarcely add that the fact that for some purposes a disclaimer is to be described as making the gift or grant void ab initio does not for present purposes mean that during the period to which I have referred the competence which the sub-section is aimed at must be treated in law as not existing. The doctrine of the gift being void ab initio has nothing in the world to do with considerations of that kind.”

G Consequently, it seems to me that the decision in *Re Wimperis* (1) cannot be of wider application than the circumstances of that case require. In WILLIAMS ON EXECUTORS (13th Edn.), p. 768, which was cited to me by counsel for the plaintiffs, it is said “ that until assent or conveyance, a beneficiary has an inchoate right transmissible to his personal representatives ”. I must, therefore, treat Mrs. Stratton as having had at least an inchoate right to the legacies in question and the subject of the devise pending the execution by her of a disclaimer. An inchoate right is a right within the meaning of the word “ right ” in its ordinary sense, and therefore within the meaning required for the provisions of s. 45 (2) of the Act of 1940. If I reach that conclusion, it seems to me quite impossible to contend that the effect of the disclaimer was not to extinguish that right. Plainly it did extinguish that right.

I I come to the third requirement, the words “ at the expense of the deceased ”. It was contended on behalf of the plaintiffs that that inferred that there must be something like the putting of his hand in his pocket by the person who extinguished the debt. I cannot see why there should be any such limitation. It seems to me that the words “ at the expense of the deceased ” are not used in any technical manner but in an ordinary and natural manner which is plainly covered by the definitions contained in the OXFORD DICTIONARY of “ expense ”; the words “ cost or sacrifice involved in any course of action ” and so on are used. Consequently this requirement is satisfied.

The fourth and remaining consideration is one which gives rise to more difficulty, perhaps. It is to be regarded as a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished.

Section 45 (2) does not say that the extinguishment is to be regarded as a disposition made by the deceased in favour of the person who in fact benefits by the extinguishment of the debt or right. Consequently there is indicated some conscious intention on the part of the person who executes the disclaimer to benefit somebody else. It was pointed out by counsel for the defendants, quite properly, that this is part of an assumed transaction, a notional transaction, and not part of the actual transaction which was denoted at the beginning of the sub-section. But that will not get over the difficulty, because in the notional transaction the words are referring obviously to an actual person, the person for whose benefit a debt or right was extinguished. It is necessary, therefore, to find that there is some definite person for whose benefit the debt or right would be extinguished.

In the present case there is no evidence of any kind as to what were the intentions of Mrs. Stratton in disclaiming the benefits under her husband's will, though one cannot help having a strong suspicion that it was intended to confer a benefit on the sons, because there is no obvious reason otherwise why any such arrangement should have been entered into. I think that counsel for the defendants is right when he says that in a case of this kind one must apply the well-established rule and attribute to the person executing a transaction the intention to produce the results which naturally follow from the transaction in question. If, therefore, the result is to benefit the plaintiffs in the present case, one is entitled to presume that the intention of the execution of the disclaimer was to benefit those persons. If that is so, then the terms of the sub-section are satisfied. There may be cases in which there would be no intention to benefit the persons who in fact would receive some advantage from the execution of the disclaimer; it might be because the legatee did not wish to receive any benefit from a testator because he or she regarded the property as tainted in some way or other, or had a personal dislike for the testator. In that case in the absence of any indication in the documents, evidence might be produced to rebut the presumption of intention of the result which I have mentioned. In the present case there is no such evidence. The presumption is not rebutted, and therefore I must presume that the disclaimer was executed for the purpose of benefiting the three sons. In that case, they are the persons for whose benefit the debt or right was extinguished and they are to be treated as donees for the purpose of the sub-section.

It was argued on behalf of the Revenue that no such intention was in fact necessary. It was sufficient if a benefit were merely conferred on some person by reason of a disclaimer. I do not think that is the right construction, because the section is headed by the words which I have read: "Gifts by way of creation of burden or release of right". Consequently, this is a provision dealing with gifts, and gifts involve relationship between a donor and donee. The words to which I have referred support that construction. Accordingly, the mere fact that there was a benefit is not in itself sufficient unless one can say that the disclaimer was in fact intended or must be taken to have been intended to benefit certain persons.

In the result I reach the conclusion that the duty is payable.

Order accordingly.

Solicitors: *Mackrell, Maton & Co.* (for the plaintiffs); *Solicitor of Inland Revenue.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A Re THE TRUSTS OF THE ARTHUR McDougall Fund.
THOMPSON AND OTHERS v. FITZGERALD AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), October 30, 31, November 1, 1956.]

B *Charity—Education—Advancement of education or other charitable purposes in connection with art or science of government—Trustees to be members of Proportional Representation Society—Society empowered to remove trustees and nominate others—Objects of society not charitable—Whether trust rendered not charitable.*

C A testator bequeathed a legacy to the Proportional Representation Society "for the creation of a separate fund in connection with the society to be held at the disposal of the governing body thereof for a specific purpose at the choice and in the discretion of such governing body such fund to bear the name of 'the Arthur McDougall Fund'." The object of the society, which was admittedly not charitable, was to secure the adoption of the principle of proportional representation by the method of the single transferable vote in national, local and other elections. The testator was a member of the society for over thirty years and was its vice-president from 1934 until his death in 1938. His executor transferred the fund representing the legacy to trustees for the society. By a trust deed dated Oct. 6, 1948, trusts were declared of the fund, and it was agreed and declared by cl. 2 that the trustees constituted by the deed should "hold the fund together with all income arising therefrom upon trust to pay and apply such income from time to time for such charitable purposes including grants to persons or institutions to be employed for such charitable purposes as in the absolute discretion and opinion of the trustees (i) shall best advance and encourage education or other charitable purposes beneficial to the community in connection with the art or science of government or other branches of political or economic science, (ii) shall most tend to encourage the study of methods of government or civil commercial or social organisations". By cl. 3 it was provided that "the trustees may apply the whole or any part of the income of the fund for any or all the purposes hereinafter declared so far as the same may lawfully be applied for charitable purposes namely:—(a) the advancement of learning in matters affecting forms of government and representative assemblies whether or not such forms of government and representative assemblies shall be actual or theoretical and whether or not the same shall exist or have existed (b) the encouragement of interest in and knowledge of the science of government and civics". By cl. 10 it was provided that all trustees should be members of the society, and cl. 11 gave the officers of the society powers "to nominate a new or additional trustee or new additional trustees" and power to the executive committee of the society to remove any trustee.

H On the question whether the trusts were valid charitable trusts,

I **Held:** the trusts were charitable because (i) if cl. 2 and cl. 3 were construed alone their purpose was to provide for public instruction in methods and in forms of government and other specified subjects and not to create some merely private study and knowledge; and (ii) the deed did not show that the trusts were worded to promote the interests of the society, for, although cl. 10 and cl. 11 provided that the trustees must be members of the Proportional Representation Society, those clauses did not control cl. 2 and cl. 3, and the fact that the trustees must be members of the society did not alter the scope or character of the trusts.

Principle stated by LORD MACNAGHTEN in *Dunne v. Byrne* ([1912] A.C. at p. 410) applied.

Re *Hopkinson* ([1949] 1 All E.R. 346) and *Bonar Law Memorial Trust v. Inland Revenue Comrs.* ([1933], 17 Tax Cas. 508) distinguished.

[**Editorial Note.** A converse application of the principle stated in *Dunne v. Byrne* ([1912] A.C. at p. 410) is illustrated by *Re Spensley's Will Trusts* ([1954] 1 All E.R. 178), where the objects of a trust were held not to be restricted by the character of the trustee with the consequence that, the trusts being in that instance too wide, the gift failed.

As to character of trustees as evidence of intention to create a charity, see 4 HALSBURY'S LAWS (3rd Edn.) 267, para. 562, text and notes (a)-(g); and for cases on the subject, see 8 DIGEST (Repl.) 387, 388, 809-814.]

Cases referred to:

- (1) *Bonar Law Memorial Trust v. Inland Revenue Comrs.*, (1933), 17 Tax Cas. 508; Digest Supp.
- (2) *Re Hopkinson, Lloyds Bank, Ltd. v. Baker*, [1949] 1 All E.R. 346; 2nd Digest Supp.
- (3) *Re Cox, Baker v. National Trust Co., Ltd., Public Trustee for Ontario (Province) v. National Trust Co., Ltd.*, [1955] 2 All E.R. 550; [1955] A.C. 627; 3rd Digest Supp.
- (4) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest (Repl.) 392, 858.

Adjourned Summons.

The plaintiffs, the trustees under a trust deed dated Oct. 6, 1948, applied by originating summons dated Mar. 16, 1956, for the determination of the question, among others, whether, on the true construction of the trust deed and in the events which had happened, the plaintiffs held the Arthur McDougall Fund on valid and effective charitable trusts declared by the trust deed.

Neville Gray, Q.C., and *E. W. H. Christie* for the plaintiffs, the trustees.

G. H. Newsom, Q.C., and *G. B. H. Dillon* for the first defendant, a director and secretary of the Proportional Representation Society.

Denys B. Buckley for the Attorney-General.

UPJOHN, J.: This summons raises a question of the validity of certain trusts declared by a trust deed dated Oct. 6, 1948, the sole question being whether the trusts thereby declared are valid charitable trusts or not.

In view of the argument which has taken place before me, the history of this matter assumes an unusual importance. The trusts were declared as a result of the bounty of the late Sir Robert McDougall, who died in 1938. Sir Robert had been a member since 1906 of a well-known society, called the Proportional Representation Society. He remained a member all his life. He was a member of the executive committee from 1926 onwards and a vice-president from 1934. He made a contribution each year to the society, sometimes of substantial amounts. On three occasions they exceeded £1,000. By a third codicil to his will, which was dated May 5, 1938, Sir Robert bequeathed to the Proportional Representation Society a one-seventh share of a sum of £50,000, subject to the life interest therein of his widow

"for the creation of a separate fund in connection with the society to be held at the disposal of the governing body thereof for a specific purpose at the choice and in the discretion of such governing body such fund to bear the name of 'the Arthur McDougall Fund'."

Pausing there, Arthur McDougall was the son of Sir Robert McDougall who had unhappily been killed in the 1914-18 war. He had no connection with the Proportional Representation Society. Sir Robert died on Dec. 15, 1938, and his widow died on Apr. 4, 1945. Shortly after that, the Public Trustee, who was the executor of his will and codicils, transferred into the name of two gentlemen who were parties to the trust deed, Sir Leslie Boyce and Mr. Aneurin Williams, the money to which they were entitled under the terms of the third codicil which they held in trust for the society.

A Before I come to the terms of the trust deed, it may be convenient to say a few words about the society. The objects of the society are to secure the adoption of the principle of proportional representation by the method of the single transferable vote in national, local and other elections. That may be a very laudable object, but it is clear that it is not a charitable object for the simple reason that, as the society is seeking to alter the method of voting at
B present in force, legislation would be required, and, therefore, their principal object is to alter the law of this country. On the authorities it is clear that that cannot be a charitable object.

I will now turn to the trust deed. The parties of the first part were called the officers. The parties of the second part were the trustees to whom the Public Trustee had transferred the legacy. Then there follow as parties of the third
C part a number of gentlemen all of whom were constituted trustees for the purposes of the deed. After reciting the will and codicil and the deaths of the testator and his widow, the recitals continue:

“(v) At the annual general meeting of the society held on June 7, 1945, it was unanimously resolved that the governing body of the society was the executive committee thereof. (vi) The Public Trustee transferred into the
D names of the present trustees the stocks and shares specified in the schedule hereto (hereinafter called ‘the fund’ which expression shall be deemed to include the investments for the time being representing the same and of all or any augmentations thereof). (vii) The said executive committee having considered the terms of the recited codicil and the facts relating to the testator’s association with the society believe that the wishes of the testator
E would be best carried out by the creation of a permanent endowment or fund capable of augmentation by donation or description and otherwise and being the name of ‘the Arthur McDougall Fund’ and consequently that the fund and the income thereof should be devoted solely to charitable purposes. (viii) In pursuance of the facts lastly hereinbefore recited the said executive committee resolved at a meeting held on Dec. 4, 1947, that the
F trusts herein declared should be agreed and confirmed that the officers were thereby authorised and directed to execute this deed for and on behalf of the said executive committee and that the trustees should be appointed trustees for the purposes of this deed and the trustees have agreed to act in the trusts in witness whereof they have executed these presents. (ix) In
G further pursuance of the premises the trustees have agreed with the said executive committee to hold the fund upon the trusts hereinafter declared concerning the same and it is intended that the fund shall forthwith be transferred into the names of the trustees.”

Now follows the operative part:

“1. The fund shall be called ‘the Arthur McDougall Fund’. 2. The
H trustees shall hold the fund together with all income arising therefrom upon trust to pay and apply such income from time to time for such charitable purposes including grants to persons or institutions to be employed for such charitable purposes as in the absolute discretion and opinion of the trustees (i) shall best advance and encourage education or other charitable purposes beneficial to the community in connection with the art or science of government or other branches of political or economic science, (ii) shall most tend to encourage the study of methods of government or civil commercial or
I social organisations. 3. Not so as to limit the generality of the provisions of cl. 2 hereof the trustees may apply the whole or any part of the income of the fund for any or all the purposes hereinafter declared so far as the same may lawfully be applied for charitable purposes namely:—(a) the advancement of learning in matters affecting forms of government and representative assemblies whether or not such forms of government and representative assemblies shall be actual or theoretical and whether or not the same shall

exist or have existed (b) the encouragement of interest in and knowledge of the science of government and civics." A

Then follow three sub-clauses (c), (d) and (e) enabling the trustees to make provision for the payment of lecturers and for the provision of scholarships and prizes, for the provision and maintenance of a lecture room or lecture rooms and a reading room or reading rooms and a library or libraries, and for the preparation and publication and grants towards the preparation and publication of books, pamphlets and periodicals for the promotion of the foregoing objects. Then follow a large number of administrative clauses to which I do not think that I need refer except to point out that by those provisions the trustees were entitled to delegate certain powers of management to a body of persons called the administrative trustees. B

Now follow two very important clauses. Clause 10 provides: C

"No trustee shall be or remain a trustee and no administrative trustee shall be or remain an administrative trustee unless such trustee shall be and remain a member of the society and cessation of membership of the society shall be a ground of unfitness to act in the trusts for the purposes of s. 36 of the Trustee Act, 1925 but no purchaser shall be concerned to see that any person removed from the trusts hereof in accordance with this clause shall have ceased to be a member of the society." D

Then follow further conditions regarding the protection of purchasers. Clause 11 provides:

"(i) The majority of the chairman deputy chairman treasurer and secretary for the time being of the said executive committee shall have power to nominate a new or additional trustee or new additional trustees and effect shall be given to such nomination by a deed executed by the secretary for the time being of the said executive committee and for the purposes aforesaid such secretary shall have power to appoint a new or additional trustee or new or additional trustees hereof and to vest the property in the new and continuing trustees and the provisions of the Trustee Act, 1925, shall apply accordingly." E F

It is provided that additional trustees may be appointed notwithstanding that there is no vacancy in the office of trustee, and there is provision that a trustee or administrative trustee may resign at any time. Clause 11 further provides:

"(v) Any trustee may be removed by a resolution passed at a meeting of the said executive committee by a majority of the said committee present and voting at the meeting. (vi) Nothing herein shall affect the power of the trustees to appoint or remove the administrative trustees if any as provided by cl. 7 hereof." G

Apparently some years after that deed was executed doubts were raised as to its validity, it being clear that if the trusts were not valid charitable trusts the deed was altogether void, and the executive committee were advised to execute a second trust deed. I am not directly concerned with that, but according to the evidence that was a deed in a very different form because it provided that, unless otherwise directed, the trustees were "to provide out of the income and capital" of the fund "the salary of the secretary of the society", and the income or capital was to be applied in accordance with the secretary's direction in writing. H I

The main attack which is made on the validity of this deed is that it is said, when you look at the whole of the deed and take into account the history and the surrounding circumstances, it is clear that the real dominant purpose of this deed was not to create a charitable trust at all but to further the political objects of the society. It was not put so much as a matter of the minute construction of the deed but as a view which ought to be taken bearing in mind all its provisions.

A However, counsel on behalf of the first defendant, who represents the society, quite properly pointed out a good deal of vagueness and uncertainty in the provisions of the deed. He used that argument coupled with those important clauses, cl. 10 and cl. 11, to show that the whole object of the deed was really political; for he recognised that after the passing of the Charitable Trusts (Validation) Act, 1954, it would not avail him merely to say that some of the trusts went beyond the conception of a valid charitable trust.

B The first uncertainty to which he drew my attention was in cl. 2 (ii). He said that notwithstanding that that sub-clause was plainly governed as a matter of grammar by the earlier words "charitable purposes", the gift encouraging "the study of methods of government", and so on, was really not a charitable purpose at all: for a gift merely to promote the study of methods of government of the state, if it gave no advantage to the public, would not be a charitable purpose. He referred me to the opening words of cl. 3, and certainly it is difficult to read those words as entirely grammatical. Again, he commented on "the advancement of learning", submitting that the mere advancement of learning by itself was not necessarily charitable. He drew attention to the very vague form of sub-cl. (a) and he said that the "advancement of learning" in matters affecting forms of government which had existed in the past also covered entirely theoretical forms of government whether or not they had ever existed. He also commented on the vagueness of sub-cl. (b), pointing out that it was merely to encourage "interest in and knowledge of the science of government and civics". "Civics", he said, so far as the OXFORD DICTIONARY was concerned, only appeared in publications in the United States of America and Canada. Those vague and uncertain terms, coupled with the complete power of the society, through its executive committee, over the personnel of the trustees, showed that the powers of the executive of the society were very great. Whether the cessation by a trustee of membership of the society would be a valid ground of unfitness for the purposes of s. 36 of the Trustee Act, 1925, I think that I need not consider. Certainly it is quite plain in cl. 10 that the intention was that anyone who ceased to be a member of the society from lack of interest or something else could instantly be removed. What is even stronger, perhaps, is that under cl. 11 (v) any trustee who is proving a deviationist from the majority of the executive committee could be removed by them, and they could appoint under cl. 11 (i) persons in his place or additional to him. Therefore, there is no doubt that the society had complete control of the personnel of the trustees.

G Counsel further submitted to me that the mere fact that the settlor or trustee under the trust deed used expressions such as "charitable purposes" or "educational purposes" is by no means conclusive that the trusts are in fact charitable, and he referred me to three cases to illustrate that point. The first was *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (1) (1933), 17 Tax Cas. 508). In that case the fund had been formed by Mr. Broughton and with it Ashridge Park was purchased (and called the Bonar Law Memorial College) on certain trusts that were created. FINLAY, J., came to the conclusion that, although one of the principal objects of the trust was the provision and maintenance of an educational centre, on the true construction of the whole document its primary purpose was to promote the views of the Conservative Party. Dealing with the clause providing for the setting up of this educational centre, he said (*ibid.*, I at p. 517):

"The fact that the education was entrusted to the Conservative Party would not, I think, affect the validity of the trust if in truth it was a trust for education; but, on the other hand, if the true view is that the trust was a trust for the promotion of Conservative principles—by that I mean, I need hardly say, the principles of the political party commonly called the Conservative Party—and that the education, the lectures, and so forth, were subsidiary to that which was the main and dominating purpose, then the

fact that the lectures, and so forth, would be educative would not be sufficient to make the trust a trust for charitable purposes only."

He came to the conclusion, having considered the terms of the trust, that, taking it as a whole, it was a trust to promote political principles and, therefore, was bad. I need not consider that further, because FINLAY, J., was considering an entirely different deed. The point is also well illustrated by a more recent case, *Re Hopkinson, Lloyds Bank, Ltd. v. Baker* (2) ([1949] 1 All E.R. 346). That was on the other side of the line in the sense that it was dealing with the Labour Party. There the testator gave his residuary estate to four prominent members of the Labour Party

"as trustees of the educational fund hereinafter mentioned upon trust that they shall stand possessed of the same as an educational fund and shall apply the same both capital and income at their absolute discretion for the advancement of adult education with particular reference to the following purpose (but in no way limiting their general discretion in applying the fund for adult education), that is to say, the education of men and women of all classes (on the lines of the Labour Party's memorandum headed 'A Note on Education in the Labour Party', a copy whereof is annexed to this my will and signed by me) to a higher conception of social, political and economic ideas and values and of the personal obligations of duty and service which are necessary for the realisation of an improved and enlightened social civilisation."

It is to be observed that the Labour Party memorandum was made part of the will. VAISEY, J., having set out the relevant terms of the will, said (*ibid.*, at p. 348):

"In my judgment, there are two ways of reading the words which I have quoted. They may be read, first, as equivalent to a general trust for the advancement of adult education which, standing alone, would admittedly be charitable, the super-added purpose being treated merely as a rough guide to be followed or as a hint to be taken as to the kind of adult education which the testator had in mind, the strictly educational main purpose always being adhered to, or, secondly, they may be read as indicating that the first part is to be taken as a general direction and the second part beginning with the words 'with particular reference to' as the particular direction dominating the whole of the trust. The second of these alternative views seems to me to be the right one."

So that although the testator's will began by declaring a trust of an educational fund, the learned judge came to the conclusion on the construction of the whole will that in fact the dominating intention was to promote the views of the Labour Party and as such it was bad. There again the precise words are entirely different from the words I have to consider, so I need not consider that case further.

Re Cox, Baker v. National Trust Co., Ltd. (3) ([1955] 2 All E.R. 550), a decision of the Judicial Committee of the Privy Council, is another example of the point that the use of the word "charitable" is not conclusive. I think it will be sufficient if I say that in that case their Lordships came to the conclusion that, on its true construction, when the testator gave the income of certain property for charitable purposes for the benefit of the employees of a certain company, he used the expression "charitable purposes" not as meaning merely the relief of poverty but he included all four heads in LORD MACNAGHTEN's celebrated definition*. As the gift was confined to the employees of a company, it followed that there could in fact be no valid charitable bequest because it lacked the necessary public element.

* See *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531 at p. 583.

A In the end it comes down to a question as to the proper construction in each case. I must approach the deed trying to give a fair construction to its operative parts. The recital makes it quite plain that a charitable trust was intended to be set up, but that cannot control the operative part. It seems to me clear that so far as cl. 2 (i) is concerned, taken by itself, that is plainly a charitable trust, and the contrary was not really suggested. In my judgment, so is cl. 2 (ii),
B for grammatically it reads:

“The trustees shall hold the fund together with all income arising therefrom upon trust to pay and apply such income from time to time for such charitable purposes . . . as in the absolute discretion and opinion of the trustees . . . (ii) shall most tend to encourage the study of methods of government or civil commercial or social organisations.”

C That seems to me, standing by itself, to be a charitable trust. It is not a trust to promote the study among closed orders in some monastery; it is a charitable trust to encourage the study of methods of government for the general benefit of the public. With regard to cl. 3, there is a grammatical difficulty on which counsel for the first defendant relied, but I do not think that there can be any real doubt as to what is meant and I think that what is meant is this: not so as to limit the generality of the provisions of cl. 2, the trustees may apply the fund for the purposes set out in sub-cl. (a) and sub-cl. (b) so far as those purposes are charitable. There again, looking at cl. 3, it seems to me that sub-cl. (a) and sub-cl. (b) set out trusts which, having regard to the opening words of the clause, are plainly charitable. The fact that theoretical forms of government may be studied does not, I think, detract from that in the least. It seems to me that, as
E a matter of construction, the trust deed was trying to provide for public instruction in the matters set out and not to create some merely private study and knowledge. I think that is clear from the terms of sub-cl. (c), sub-cl. (d) and sub-cl. (e). Therefore, on the true construction of those two clauses, standing alone, I should come to the conclusion that this constituted a valid charitable trust.

F But counsel for the first defendant rightly urged on me that I must not look at those clauses alone. I must look at the whole of the deed and all the surrounding circumstances. I have summarised cl. 10 and cl. 11 and I need not repeat their substance. Counsel says that the existence of those clauses, coupled with the testator's well-known interest in the society, entitles me to give a different construction to cl. 2 and cl. 3 from that which I have already stated. It must be
G noticed that, unlike *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (1) and unlike *Re Hopkinson* (2), there is no context in cl. 2 and cl. 3 dealing with the substance of the trusts which shows that in fact the trusts were intended to further political objects and promote the purposes of the society. It seems to me an entirely different case from those which I have mentioned. I cannot see
H anything in cl. 10 and cl. 11 which controls the trusts in cl. 2 and cl. 3. Where one finds a charitable trust declared, the fact that the trustees must be persons of a certain persuasion cannot really affect the matter. They are always subject to the control of the Attorney-General. The principle is quite clearly stated in *Dunne v. Byrne* (4) ([1912] A.C. 407 at p. 410):

I “It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.”

It seems to me these trusts in cl. 2 and cl. 3 are reasonably described as educational trusts. I think that has been made sufficiently clear by making it plain that they are in express terms to be for “charitable purposes”. There are a very large number of charitable purposes which can be carried out in compliance with the provisions of cl. 2 and cl. 3, and I cannot see that the fact that the trustees have to be persons who are members of the society can alter that. I venture to

think that the contrary argument really comes to this: that the trustees might commit a breach of trust and might, therefore, apply the moneys wrongly in furthering the objects of the society. I should add this. No one in fact suggests that they have committed any breach of trust. No one suggests that this is a sham deed to hide the real purpose, which is to further the objects of the society. It is a deed which is to be read on its true and fair construction, and I come to the conclusion that valid charitable trusts are thereby declared and I must declare accordingly.

Declaration accordingly.

Solicitors: *T. S. Stallabrass* (for the plaintiffs); *Pollard, Stallabrass & George Martin* (for the first defendant); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SUGDEN v. SUGDEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), November 15, 1956.]

Divorce—Maintenance of wife—Death of divorced husband—Order made against him in his lifetime to pay maintenance for children—Proceedings against husband's executrix to make maintenance payments out of husband's estate in respect of periods after his death—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 41), s. 1 (1).

By s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, on the death of any person all causes of action (with certain exceptions) "... subsisting against ... him shall survive against ... his estate."

The wife having obtained a decree absolute of divorce on her petition, an order was made in 1946 that the husband should pay to her maintenance for the two children. The husband made regular payments under the order until his death in June, 1955. Thereafter the executrix of the husband's estate paid certain sums, but not the full amount, under the order.

On a summons against the husband's executrix to show cause why payments due under the order should not be made out of the husband's estate,

Held: the executrix was bound to make payments under the order from the husband's estate since that order created an enforceable claim against him in his lifetime which therefore survived against his estate by virtue of s. 1 (1) of the Act of 1934 (observations of HODSON, J., in *Dipple v. Dipple*, [1942] 1 All E.R. at p. 235, and of SACHS, J., in *Mosey v. Mosey & Barker*, [1955] 2 All E.R. at p. 393, applied).

Appeal allowed.

[As to the effect of the husband's death on the wife's claim for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 433, para. 973; and for cases on the subject, see 27 DIGEST (Repl.) 611, 5729 and 674, 6418-6422.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 792.]

Cases referred to:

- (1) *Dipple v. Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 27 Digest (Repl.) 611, 5729.
- (2) *Richards v. Richards & Flockton*, (1940), 111 L.J.P. 20, n.; 27 Digest (Repl.) 573, 5291.
- (3) *Hyde v. Hyde*, [1948] 1 All E.R. 362; [1948] P. 198; [1948] L.J.R. 641; 27 Digest (Repl.) 629, 5898.
- (4) *Burroughes v. Abbott*, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 35 Digest 92, 17.
- (5) *Mosey v. Mosey & Barker*, [1955] 2 All E.R. 391; [1956] P. 26; 3rd Digest Supp.
- (6) *Beaumont v. Beaumont*, [1933] P. 39; 102 L.J.P. 4; 148 L.T. 247; 27 Digest 536, 4830.

- A (7) *Re Boyd, Ex p. McDermott*, [1895] 1 Q.B. 611; 64 L.J.Q.B. 439; 72 L.T. 348; 4 Digest 92, 834.
 (8) *Waterhouse v. Waterhouse*, [1893] P. 284; 62 L.J.P. 115; 69 L.T. 618; 27 Digest 626, 5870.

Appeal.

- B The wife appealed against an order of Mr. Registrar KINSLEY dismissing her summons dated Sept. 25, 1956.

- On Feb. 12, 1945, the wife was granted a decree absolute of divorce on the ground of the husband's desertion. On July 31, 1945, Mr. Registrar HAWKES made an order that the husband should pay to her maintenance at the rate of £270 per annum less tax for herself and at the rate of £300 per annum less tax for each of the two children. Subsequently the wife re-married and on Apr. 25, 1946, Mr. Registrar LONG made an order by consent that the husband

- C "do pay or cause to be paid to [the wife] during their joint lives until further order . . . maintenance for herself at and after the rate of 1s. per annum . . . and that [the husband] do pay or cause to be paid to [the wife] until further order until Adam Sugden and Ann Sugden the children issue of the marriage between the parties shall respectively attain the age of twenty-one years . . . maintenance for the said children at and after the rate of £300 per annum less tax for each child . . ."

- D The order of July 31, 1945, was varied accordingly. Adam Sugden was born on Dec. 23, 1936, and Ann Sugden was born on Apr. 21, 1940.

- E The husband subsequently re-married. He died in June, 1955. Until that date all payments due under the order in favour of the children had been made, but thereafter the executrix of the husband's estate (who was his widow) made certain payments which were not the full amount due; by Sept. 10, 1956, the arrears under the order amounted to £202. On Sept. 25, 1956, the wife issued a summons against the executrix of the husband's estate to show cause why she should not pay the arrears of maintenance out of the husband's estate and thereafter make the payments as they fell due. On Oct. 4, 1956, Mr. Registrar KINSLEY dismissed the summons. The wife appealed and the appeal came before KARMINSKI, J., who adjourned the case into open court for argument.

G. H. Crispin for the wife.

P. R. Hollins for the husband's executrix.

- G KARMINSKI, J., stated the facts and continued: The point raised does not appear to have been directly covered by authority. I would like to add that my task has been much simplified by some of the recent decisions on similar points which have dealt with matters of this kind. Briefly the position so far as the estate of the husband is concerned has been called into existence by the Law Reform (Miscellaneous Provisions) Act, 1934. Section 1 (1), which is of vital importance in the present case, reads as follows:

- H "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery."

- I The first case in which this sub-section came to be discussed in this Division was, I think, *Dipple v. Dipple* (1) ([1942] 1 All E.R. 234). That was a case of a wife who had obtained a decree nisi of divorce and had applied for maintenance for herself and the child, and had indeed obtained an interim order for maintenance; thereafter certain negotiations were proceeding for permanent maintenance and security, but before the matter could be dealt with the husband died,

and letters of administration were granted in respect of his estate. The matter came before the court on the question whether in those circumstances the wife could obtain an order against the former husband's personal representative for secured maintenance under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925*. The application was dismissed by HODSON, J., because, as he put it (*ibid.*, at p. 235), the wife had

" . . . merely the right to ask the court to exercise discretionary powers in her favour."

That, as the learned judge emphasised, was something essentially different from her having an enforceable claim against the husband, and he distinguished a case which he had not long before decided (but which had not been reported), *Richards v. Richards & Flockton* (2) ([1940], 111 L.J.P. 20, n.), where on a taxation of costs he allowed the taxation to proceed against the personal representative of a co-respondent who had died after the decree; because, as HODSON, J., pointed out ([1942] 1 All E.R. at p. 236), the order for costs having been made against the co-respondent in his lifetime, there was an enforceable claim against him which was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934. I have to remind myself that in the present case the consent order made in favour of the children was made some nine years before the death of the husband.

In *Hyde v. Hyde* (3) ([1948] 1 All E.R. 362), a similar point was considered by BARNARD, J. There the successful petitioner was the wife, and she took out a summons against the executors of her late husband, the respondent, to show cause why they should not be ordered to execute a deed giving effect to an order of this court dated Feb. 14, 1947. The date is important because in that case the respondent died some six weeks later, in April, 1947. It is not necessary to go through the arguments of the learned counsel who appeared in that case and which are fully reported, but I notice with interest that counsel for the wife argued that *Richards v. Richards & Flockton* (2), referred to in *Dipple v. Dipple* (1), established that there was a cause of action where the court had once made an order. BARNARD, J., in a reserved judgment, considered the whole position, and referring to a decision of P. O. LAWRENCE, J., in *Burroughes v. Abbott* (4) ([1922] 1 Ch. 86), pointed out that that judge referred to the learned President of this Division [SIR HENRY DUKE] who in turn is reported ([1922] 1 Ch. at p. 97) to have asked P. O. LAWRENCE, J., to deal with the matter in order to avoid any separate application to this court. BARNARD, J., pointed out ([1948] 1 All E.R. at p. 364):

" The President does not seem to have entertained any doubt that he also had jurisdiction."

And BARNARD, J., added these words (*ibid.*):

" Common sense seems to dictate that this court should make effective its own orders, and that is the only order I propose to make."

Lastly I turn to the decision of SACHS, J., in *Mosey v. Mosey & Barker* (5) ([1955] 2 All E.R. 391). In that case there were cross-applications resulting from the husband respondent dying before the security ordered had been satisfied, the executors of the deceased respondent seeking by a cross-application to vary the order by deleting so much of it as related to the gross sum to be secured for the child of the marriage. A number of matters were fully considered in the reserved judgment of SACHS, J., which do not directly affect the point before me. At the start of his judgment, having recited the facts, SACHS, J., said this (*ibid.*, at p. 393):

" The question is whether the above order can be enforced against the sole executor of the husband or whether the death of the husband results in the wife having as from that date no rights under the order. There are

* Now replaced by the Matrimonial Causes Act, 1950, s. 19 (2): 29 HALSBURY'S STATUTES (2nd Edn.) 407.

- A two decisions since the enactment of the Law Reform (Miscellaneous Provisions) Act, 1934, which touch closely on the above question. The first is *Dipple v. Dipple* (1), where HODSON, J., held that the right of a wife to apply for an order under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was not a 'cause of action' within s. 1 (1) of the Act of 1934: accordingly where before the death of the husband the wife had made an application under s. 190 (1) but had not reached the stage of obtaining an order, her claim could not survive his death."
- B

SACHS, J., then referred to *Hyde v. Hyde* (3), the decision of BARNARD, J., and added this (*ibid.*):

- C "Counsel for the executor's main and much pressed argument was that the court has here no jurisdiction to deal with a matter arising in a divorce suit after the death of one of the parties, on the short ground that there is no fund in court or other res on which to found the post-death jurisdiction. He relied in substance on passages in pre-1934 decisions, such as *Beaumont v. Beaumont* (6) ([1933] P. 39). Decisions and dicta before the Act of 1934 must be looked at with care to see whether they would have been the same today: and if *Richards v. Richards & Flockton* (2) was rightly decided, as I would respectfully agree that it was (cf. *Re Boyd, Ex p. McDermott* (7), [1895] 1 Q.B. 611 at p. 614, per LORD ESHER, M.R.), the test since 1934 is not 'is there a res?' but 'does the order create an enforceable claim?' Indeed that case disposes of counsel's main argument and thus of his suggestion that the wife's case must stand or fall according to whether or not the order then and there created an equitable charge."
- D
- E

SACHS, J., added this ([1955] 2 All E.R. at p. 394):

- F "Further, the order, in my view, creates an enforceable claim if the court can and will exercise its powers to ensure the order is enforced in relation to the husband's assets during his lifetime. For that purpose it does not matter whether the power is exercised by means of an appropriate injunction or by other means. If authority is needed to establish that the order in the present case was enforceable at all material times, then *Waterhouse v. Waterhouse* (8) ([1893] P. 284) can be relied on as showing how a court can aid a wife even before decree absolute where the husband is bound to secure to his wife maintenance out of a portion of his property not as yet specified."
- G

- H Counsel for the husband's executrix in the present case argued that there is, or was, no cause of action where the money claimed had not accrued due during the lifetime of the husband, and he argued that logically an order of this kind must cease at the death. In my view that argument, though interesting, is not sound. I think the principle here is that this order made in 1946 has created an enforceable claim as against the estate. I would at once say that the argument suggested by counsel as to the "joint lives" attaching itself to that part of the order dealing with the children's maintenance has not attracted me and I think that it is unsound on the wording of the order.
- I

- The question which I have to ask myself is whether or not this is a cause of action which attaches to the order and can be enforced by the wife. This, in my view, applying the test suggested by HODSON, J., is not a case of a wife who has merely a right to ask the court to exercise discretionary powers in her favour. It is, as I think, a case where there is in existence, and was during the lifetime of the husband, an enforceable claim against him. If, during his lifetime, he had failed to comply with the order of maintenance for the children the usual remedies could have been applied by execution, if necessary by attachment, to enforce the court's order. I hasten to add that no such course was ever required because the

husband complied with the order punctually and in full. But if he had failed, there would have remained in the wife's hands the effective weapons of execution known to this court. A

In my view, therefore, the answer to the summons is that the executrix of the estate is liable to pay out of the estate the sum of £202, being the arrears of the order in favour of the children outstanding. It is not an easy case and I would like to say at once that I am obliged to counsel for the care and skill with which they have argued it. Having come to a clear conclusion, even though I am differing from the learned registrar, I have not thought it necessary to reserve my judgment. The appeal will be allowed. B

Appeal allowed.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.* (for the wife); *Blundell, Baker & Co.* (for the husband's executrix). C

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

THE CORCHESTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Willmer, J.), October 29, 30, 31, November 1, 16, 1956.]

Shipping—Collision—Suspension of master's certificate—Court of formal investigation—Report and annex read out in open court—Report subsequently altered—Altered report to be disregarded—Report recommending suspension of certificate—No clear decision to suspend—Whether suspension valid—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 470 (1) (a), (2), (3). F

The Corchester, a single screw steam collier of 2,374 tons gross, and the City of Sydney collided in the early morning of Feb. 19, 1956, and the Corchester sank with the loss of eight lives. For about twenty-five minutes before the collision, the officer of the watch, the second officer, had been alone on deck with the helmsman, out of communication by voice-pipe with the appellant, the master of the Corchester, who had gone below. The appellant had thus had no part in the navigation of the Corchester during the material time before the collision. A court was constituted under the Merchant Shipping Act, 1894, s. 466, to hold a formal investigation into the circumstances of the collision. By s. 470 (1) (a) of the Act a court holding a formal investigation into a shipping casualty is empowered to cancel or suspend a master's certificate if the court finds that the loss of any ship has been caused "by his wrongful act or default", and by s. 470 (2) where a question of cancellation or suspension is involved, the court is required to state its decision in open court. At the conclusion of the hearing the court read out its report, the questions and answers, and the annex to the report. In the report the court recommended, as regards the appellant, that his master's certificate should be suspended for three months; in the annex to that report it was stated that the court was unable merely to censure the master for his indirect contribution to the casualty "and suspends his certificate for three months". That report and annex were duly submitted to the G
H
I

A Minister of Transport and Civil Aviation in accordance with s. 470 (3) of the Act. Subsequently the court altered the written report by inserting the words that the collision was caused "by the fault or default of those in charge of both ships" and stating that it suspended the appellant's master's certificate for three months (instead of merely recommending that suspension). On appeal,

B **Held:** there was no valid order suspending the master's certificate for the following reasons—

(i) the amended report must be totally disregarded as regards the appellant because the alterations in it were improper (see p. 885, letter H, post) since (a) they were not part of the decision read out in open court as required by s. 470 (2) of the Act of 1894 and (b) they were made behind the back of, and without notice to, the appellant (observations of SCRUTTON, J., in *Inland Revenue Comrs. v. Hunter*, [1914] 3 K.B. at p. 425, applied); and

C (ii) the original report, which was the governing document, contained no clear decision to suspend the appellant's certificate and, even if the annex could be read with the report in order to arrive at the decision, the result reached was ambiguous (see p. 886, letter I, post); and

D (iii) a finding that the casualty was caused by the appellant's wrongful act or default was a necessary pre-requisite to an order under s. 470 (1) (a) suspending an officer's certificate (observations of SIR JAMES HANNEN, P., in *The Arizona* (1880), 5 P.D. at p. 127, applied), but in the present case, although on the basis of the commissioner's findings the appellant was open to some degree of criticism, the Divisional Court, as an appellate tribunal, was not prepared to make a finding of a wrongful act or default on the part of the appellant (see p. 887, letter I, post).

E Per CURIAM: it is desirable that, where an officer's certificate is suspended, the report itself should contain an express finding that the casualty was caused by a wrongful act or default on his part, but, if the decision is stated in the report, the fact that the finding is contained only in the annex and not in the report is not a sufficient ground for upsetting the decision (see p. 888, letter A, post).

Appeal allowed.

G [Editorial Note. Emphasis is placed on the need for findings to be clear where a quasi-penal jurisdiction is being exercised (see p. 888, letter C, post).

As to appeals by masters against cancellation or suspension of their certificates, see 1 HALSBURY'S LAWS (3rd Edn.) 121, para. 285, note (i), and 30 HALSBURY'S LAWS (2nd Edn.) 921, para. 1261, note (t); as to cancellation or suspension of certificate on ground of wrongful act or default, see 30 HALSBURY'S LAWS (2nd Edn.) 918, para. 1256, note (k); and as to requirement that judgment be given in open court, see *ibid.*, 920, para. 1260, note (n); and for cases on the subject, see 41 DIGEST 914, 8054, 8055.

H For the Merchant Shipping Act, 1894, s. 466, s. 470, see 23 HALSBURY'S STATUTES (2nd Edn.) 635, 637.

I For the Shipping Casualties and Appeals and Re-hearings Rules, 1923, see 20 HALSBURY'S STATUTORY INSTRUMENTS 127.]

Cases referred to:

(1) *MacCarthy v. Agard*, [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595; Digest Supp.

(2) *Sutherland & Co. v. Hannevig Brothers, Ltd.*, [1921] 1 K.B. 336; 90 L.J.K.B. 225; sub nom. *Re Sutherland & Co. & Hannevig Brothers, Ltd.*, 125 L.T. 281; Digest Supp.

- (3) *Cooper v. Cooper*, [1940] 3 All E.R. 579; [1940] P. 204; 110 L.J.P. 10; 164 L.T. 192; 2nd Digest Supp. A
- (4) *Inland Revenue Comrs. v. Hunter*, [1914] 3 K.B. 423.
- (5) *The Kestrel*, (1881), 6 P.D. 182; 45 L.T. 111; 1 Digest 234, 1601.
- (6) *The Arizona*, (1880), 5 P.D. 123; 49 L.J.P. 54; 42 L.T. 405; 41 Digest 914, 8054.
- (7) *Re Polemis & Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; sub nom. *Polemis v. Furness, Withy & Co., Ltd.*, 90 L.J.K.B. 1353; 126 L.T. 154; 41 Digest 419, 2620. B
- (8) *British Columbia Electric Ry. Co., Ltd. v. Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 38 Digest 317, 361.
- (9) *Ewer v. Board of Trade*, (1880), 7 R. (Ct. of Sess.) 835; 17 Sc. L.R. 604; 41 Digest 913, e. C
- (10) *The Carlisle*, [1906] P. 301; 95 L.T. 552; 75 J.P. 97; 1 Digest 234, 1604.

Appeal.

The appellant, the master of s.s. Corchester, appealed against a decision of a court of formal investigation dated July 17, 1956, suspending his master's certificate for three months. D

In the early hours of the morning of Feb. 19, 1956, a collision occurred in the vicinity of Haisborough Light Vessel, off the Norfolk coast, between s.s. Corchester and s.s. City of Sydney as a result of which the Corchester sank with the loss of eight lives. A court of formal investigation, consisting of a commissioner of wrecks and two assessors, was constituted under the Merchant Shipping Act, 1894, s. 466, to inquire into the circumstances surrounding the collision. The hearing took place on July 11, 12 and 13, 1956. On July 17, 1956, the commissioner read in open court the report, the questions and answers, and the annex to the report. It was stated in the report, inter alia: E

"The court . . . recommends that the master's certificate of [the master of the City of Sydney] and the mate's home trade certificate of [the second officer of the Corchester] be suspended for twelve months from the date of the collision. It further recommends that the master's certificate of [the appellant] be suspended for three months from the date of the collision." F

In the annex to the report it was stated, inter alia: G

"... the court finds itself unable merely to censure [the appellant] for his indirect contribution to this casualty, and suspends his certificate for three months from the date of the collision." H

Subsequently, the report was altered so as to read:

"The court . . . find for the reasons stated in the annex hereto, that the aforesaid collision was caused by the fault or default of those in charge of both ships and it suspends the master's certificate of [the master of the City of Sydney] and the mate's home trade certificate of [the second officer of the Corchester] for twelve months from the date of the collision. It further suspends the master's certificate of [the appellant] for three months from the date of the said collision." I

The grounds of the appellant's appeal, as amended, were

"(i) That the court did not either in its decision given in open court or in its original report sent to the Minister of Transport and Civil Aviation do more than recommend the suspension of my certificate as distinct from suspending it and that such recommendation is null and void. (ii) That the court did

- A not either in its decision given in open court or in its original report to the Minister . . . make it clear whether it was only recommending the suspension of my certificate or actually suspending it, and that accordingly such decision and report, so far as they relate to the question of suspension of my certificate, are null and void. (iii) That although the court attempted to cure the defect or defects in its decision and original report . . . by
- B altering the said report and sending a fresh report to the Minister, such alteration was not lawfully or properly made and such fresh report was not lawfully sent. (iv) That the court made no finding in its original or altered report or in the respective annexes thereto that the loss of s.s. Corchester, or the loss of the lives of eight of her crew, or the serious damage to s.s.
- C City of Sydney, were caused by my wrongful act or default. (v) That the evidence before the court did not justify any such finding as aforesaid. (vi) That by reason of the matters in (iv) and (v) above the court had no jurisdiction to suspend my certificate . . .”

H. V. Brandon for the appellant.

- D *J. V. Naisby, Q.C.*, and *G. N. W. Boyes* for the Minister of Transport and Civil Aviation.

Cur. adv. vult.

Nov. 16. **LORD MERRIMAN, P.:** The judgment which WILLMER, J., will read is the judgment of the court.

- E **WILLMER, J.,** read the following judgment: This is an appeal by Captain Ernest George Northcott, the master of the steamship Corchester, against the decision of a court of formal investigation, constituted under s. 466 of the Merchant Shipping Act, 1894, to inquire into the circumstances attending a collision between the Corchester and the steamship City of Sydney, which occurred in the vicinity of the Haisborough Light Vessel in the early morning
- F of Feb. 19, 1956. In consequence of the collision the Corchester sank, with the loss of eight lives. The court, which consisted of a commissioner assisted by two assessors, found, according to the report embodied in the record before us, that the collision was caused by the fault or default of those in charge of both ships, and suspended the master's certificate of the master of the City of Sydney and the mate's home trade certificate of the second officer of the Corchester
- G for a period of twelve months. The court also suspended the appellant's master's certificate for a period of three months.

- This appeal concerns only the suspension of the appellant's certificate. There has been no appeal by the master of the City of Sydney, or by the second officer of the Corchester, who were respectively the officers in charge of the navigation of the two ships at the material time. During the material period preceding the collision the appellant was not on the bridge of his ship, having gone below for the purpose of relieving himself and having tea some twenty-five minutes before the collision. He returned to the bridge only a few seconds before the collision. The appellant, therefore, had no part in the navigation of his ship during the material time, having left the second officer in sole charge.
- I In these circumstances, it does not appear necessary to describe in detail the manoeuvres of the two ships which led to the collision, and the following summary will suffice.

The Corchester was proceeding in a north-westerly direction, in the course of a voyage from Erith to West Hartlepool in ballast. The City of Sydney was proceeding in a south-easterly direction, in the course of a voyage from Middlesbrough to Newport, also in ballast. The visibility on the morning of the collision was variable, due to intermittent snow flurries. At the time when the appellant

left the bridge of his ship to go below it was relatively clear, but at the time of the collision the visibility had closed in, due to snow, and was no more than about a quarter of a mile. In spite of the poor visibility both vessels were proceeding at full speed until after they sighted each other. Both were equipped with radar, and in each case the echo of the other was observed when the ships were still a considerable distance apart. The second officer of the Corchester observed that the echo of the City of Sydney remained on a constant bearing; but he took no steps to alter either the course or speed of his ship. He did not sound any fog signals, and heard none from the City of Sydney, though the latter was found by the court to be sounding. After the echo of the City of Sydney had been observed to approach nearer, the second officer of the Corchester twice endeavoured by means of the voice-pipe to summon the appellant to the bridge; but he obtained no reply, because the voice-pipe connected only with the master's cabin, whereas the appellant was in the saloon. At the last moment—just before the vessels sighted each other—he sent the steward, who had appeared on the bridge with tea, to find the appellant. After the vessels sighted each other the Corchester turned to port under port wheel, and sounded two short blasts; the City of Sydney turned to starboard under starboard wheel. Both vessels worked their engines full speed astern, but the collision nevertheless happened, the stem of the City of Sydney striking the starboard bow of the Corchester with considerable force at a broad angle. The first that the appellant knew of any trouble was when he heard the signal of two short blasts sounded by his vessel. On hearing this he rushed up on the bridge, and arrived just as the collision was about to take place. The deck watch on board the Corchester consisted of the officer of the watch (in this case the second officer) and three men. Of these three men one was at the wheel; one was supposed to be on the look-out on the forecastle-head, and was so thought by the appellant to be, but apparently unknown to the appellant he had gone off watch at day-break; the third man was the stand-by man, but he was not on the bridge, and was thought to be in the galley. At the material time, therefore, the second officer and the helmsman were the only persons on deck.

The material portion of the annex to the report which deals with the appellant's conduct is in the following terms:

"The court is of the opinion that the second officer of the Corchester should not have been left without any assistance in the matter of radar observation, of keeping look-out, of sounding any necessary fog signals and of seeing that the course was maintained. There should have been a look-out posted on the forecastle and there should have been a man readily available to send for the master. The master had gone below at about 0700 hours, whilst the visibility, though low, was sufficient. Unfortunately, he remained below and not in touch with the voice-pipe in his cabin and although the second officer at a late moment, blew down that voice-pipe on two occasions and finally sent the steward, who had appeared on the bridge with tea, the master's first information of anything unusual was the hearing of his ship's helm signal; whereupon he came on the bridge, arriving just before the collision. The evidence gave the impression that the discipline maintained on the Corchester was lax and that her master ought to have seen that so long as he was below there was somebody who could be instantly sent for him and in the uncertain visibility due to passing snow showers, the master should have been more on the alert. In spite of the submissions of the Ministry of Transport and Civil Aviation the court finds itself unable merely to censure the master for his indirect contribution to this casualty, and suspends his certificate for three months from the date of the collision."

A When the appeal was opened before us our attention was immediately drawn to what, in our judgment, can only be described as a grave irregularity on the part of the commissioner in the preparation and publication of the report. Section 470 (2) of the Act provides:

B “Where any case before any such court as aforesaid* involves a question as to the cancelling or suspending of a certificate, that court shall, at the conclusion of the case or as soon afterwards as possible, state in open court the decision to which they have come with respect to the cancelling or suspending thereof.”

C Following the usual practice, the commissioner complied with this requirement by reading out in open court the whole of the report, the questions and answers, and the annex to the report. We were informed, however, that the report and the annex, as originally drafted and as read out in court, differed in material respects from the report and annex as they are now before us, and as they were in due course published by H.M. Stationery Office. In particular, the report, as read out, contained no finding that the collision was caused by the fault or default of those in charge of both ships. Moreover, the last sentence of the report, D which deals with the certificate of the appellant, was in the following terms:

“It [the court] further recommends that the master’s certificate of Captain Ernest George Northcott be suspended for three months from the date of the . . . collision.”

E In this respect there was a discrepancy between the report, as read out, and the annex, which in this respect was in the same terms as are now before us, and which stated that the court suspended the appellant’s certificate for three months. There were other discrepancies, not material to this appeal, between the report and the annex as they were read out and as they now appear. By F s. 470 (1) (a) of the Act a court holding a formal investigation into a shipping casualty is empowered,

“if the court find that the loss . . . of . . . any ship . . . has been caused by his wrongful act or default . . .”

G to cancel or suspend the certificate of a master. No provision is made for the court making any recommendation for the cancellation or suspension of a certificate, and no machinery is provided enabling the Ministry or any other authority to act on any such recommendation.

H On the report being sent to the Ministry by the commissioner, as required by s. 470 (3) of the Act†, the Treasury Solicitor’s representative having conduct of the case immediately conceived a doubt as to the validity of the report, so far as it concerned the appellant, having regard to the fact that it contained no operative order for the suspension of the certificate, but merely a recommendation on which the Ministry was powerless to act. He, therefore, called on the commissioner privately and pointed out the difficulty. After discussion the commissioner decided to meet the difficulty by amending the terms of the I report. This he proceeded to do, making various alterations to the wording of both the report and the annex, including the two material alterations to the report itself, to which reference has already been made. He then caused the

* This description includes a court holding a formal investigation into a shipping casualty under Part 6 of the Merchant Shipping Act, 1894.

† The functions of the Board of Trade under this sub-section and other functions were transferred ultimately (by S.R. & O. 1946 No. 375) to the Minister of Transport who (by S.I. 1953 No. 1204) became the Minister of Transport and Civil Aviation.

whole to be re-typed and re-signed by himself and the two assessors, and forwarded the new and amended report to the Ministry. This latter is the document which was subsequently published by the Ministry and is contained in the record before us. Correspondence which passed between the commissioner and the Treasury Solicitor's representative has been placed before us, and from this it appears that the commissioner took the view that he was fully entitled to alter the wording of the report so as to clear up a possible ambiguity. It remains to add that the interview between the commissioner and the Treasury Solicitor's representative took place, and the alterations to the report and annex were made, without notice to, and without the knowledge of, the appellant or his legal advisers, and before notice of appeal was given. It is true that after notice of appeal was given it occurred to the representative of the Treasury Solicitor, as is shown by his letter of Aug. 9, 1956, to doubt the propriety of making any alteration at that stage. We think that the propriety was equally open to doubt at the earlier stage, but the fact that notice of appeal had been given did at least afford an opportunity, which was not taken, of bringing the matter to the notice of the appellant. It is to be observed that, as regards the master of the City of Sydney, whose certificate was suspended for twelve months from the date of the collision on the face of the report itself, the annex as read in court reads:

"The court recommends that his certificate be suspended for twelve months from the date of the accident",

which has been altered in the record before us by substituting for "recommends that" the word "suspends" and deleting the words "be suspended". We find ourselves unable to accept the view expressed in the letter of July 25, 1956, from the commissioner to one of the assessors that any of these alterations can be described by any stretch of language as either "minor corrections" or "slight alterations".

On these facts being brought to our attention we thought it right to grant leave to amend the notice of appeal, so as to raise the question whether there ever was a valid order suspending the appellant's certificate. It was argued on the one side that the decision, and the only decision, of the court in relation to the appellant was that contained in the concluding sentence of the report; that, since this contained no valid order for the suspension of the appellant's certificate, it was of no effect; and that the commissioner, having stated the decision in open court, and having once submitted his report to the Ministry, was *functus officio* and had no jurisdiction to amend its terms, and certainly not behind the back of, and without notice to, the appellant. On behalf of the Ministry it was contended that the decision of the court was to be collected, not from the report alone, but from the report and the annex together, both of which were read in full in open court; that, on a fair reading of the two documents taken together, it was the plain intention of the court to suspend the appellant's certificate; and that in these circumstances the commissioner was not acting outside his powers in altering the wording of the report and annex, so as to make plain what had always been the intention of the court.

It should be made plain at once that no lack of bona fides, on the part of either the commissioner or of the Treasury Solicitor's representative, has been suggested. At the same time we are abundantly satisfied that the action of the commissioner in altering the wording of the report, after the decision had been stated in open court, was improper and without jurisdiction. We do not accept the contention that, even in its original form, the report, when read in conjunction with the annex, showed a manifest intention on the part of the court to order the suspension of the appellant's certificate. On the contrary, we

A think the true inference is that the commissioner made a mistake of law, in that when preparing the original report he had not in mind what were the exact duties and powers of the court, as defined by s. 470 (1) (a) of the Act, in relation to suspension of a certificate. So far as the High Court is concerned, the power to amend the wording of an order once made, whether under R.S.C., Ord. 28, r. 11, or under the inherent jurisdiction of the court, is strictly limited. The principles on which the High Court acts are stated in the ANNUAL PRACTICE (1956 Edn.) at p. 465, in the notes to R.S.C., Ord. 28, r. 11, in words which were expressly approved by GREER, L.J., in *MacCarthy v. Agard* (1) ([1933] 2 K.B. 417 at p. 424) as follows:

C “The error or omission must be an error in expressing the manifest intention of the court; the court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order, such as a mistake due to a misunderstanding of a rule or statute. If the order as drawn correctly expressed the intention, it cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the court is procured by fraud or misrepresentation.”

D Similarly the power of an arbitrator to alter the wording of an award once published is limited to the correction of an accidental slip or omission—see s. 17 of the Arbitration Act, 1950*. *Sutherland & Co. v. Hannevig Brothers, Ltd.* (2) ([1921] 1 K.B. 336), furnishes a good illustration of what an arbitrator has no jurisdiction to do.

E In the present case, however, we are dealing with the decision of a tribunal whose jurisdiction is wholly statutory, and unless what the commissioner did can be shown to be within the four walls of the statute he could have no jurisdiction. It is true, as has been pointed out to us, that a court holding a formal investigation under the Merchant Shipping Act, 1894, is given, by s. 466 (10), all the powers of a court of summary jurisdiction. It is further true that a court of summary jurisdiction has the power to correct an accidental slip or omission in any order made by it—see *Cooper v. Cooper* (3) ([1940] 3 All E.R. 579 at p. 584)—but it has not been, and could not be, suggested that its powers extend beyond that. What, in our judgment, it is vital to observe is that, in the case of a court holding a formal investigation, the procedure for announcing the decision and submitting the report is expressly laid down by the provisions of the enabling statute. Attention has already been drawn to the words of G s. 470 (2), which provide that in case of suspension of a certificate the decision must be stated in open court; but it is not unimportant to bear in mind also the provisions of sub-s. (3), which provides for the sending to the Ministry of a full report on the case. No provision is made for submitting an amended or corrected report to the Ministry; and no decision to suspend or cancel a certificate is valid, unless stated in open court. The report in its present amended H form has never been read in open court, and the only decision stated in open court was that contained in the report in its original form.

This alone, in our judgment, is sufficient to justify the conclusion that the report in its present amended form, as far as it concerns the appellant, must be totally disregarded. If there is any room for doubt, we think that such doubt is removed when it is remembered that the alterations to the original report were made behind the back of, and without notice to, the appellant or his advisers. In *Inland Revenue Comrs. v. Hunter* (4) ([1914] 3 K.B. 423), SCRUTTON, J., said (*ibid.*, at p. 428):

I “. . . I think it right to say that the well-known rule that no communication shall be made by one party to a judicial tribunal without the knowledge of the other party is of the greatest importance, and should be

* See 29 HALSBURY'S STATUTES (2nd Edn.) 103.

strictly observed. This is especially so where the communication leads to the alteration of an existing award, and is made orally, so that no record of what it was exists. While, as I have said, no improper motive is imputed to the subject's solicitors, I think their action was a breach of a well-established rule of great importance, and, as such, most regrettable."

The principle there stated applies with full force to what was done in the present case. The failure to give notice to the appellant's advisers was all the more regrettable, having regard to the fact that, as appears from the letter from the Treasury Solicitor's representative to the commissioner of Aug. 8, 1956, it was known before the amended report was published that this appeal had been lodged. For these reasons we are satisfied that the report in its present amended form must be totally disregarded, and this appeal must be treated as an appeal from the decision contained in the original report, as read in open court, and as originally submitted to the Ministry.

The question then arises whether, in view of the terms of that report, there ever has been any valid suspension of the appellant's certificate. The report, which is in the statutory form provided by the Shipping Casualties and Appeals and Re-hearings Rules, 1923*, Part I, Form 3, purports to set out the findings and decision of the court. It is true that the form provides that the report shall be accompanied by an annex, but it is plain from the introductory wording of the printed form of the report that the primary purpose of the annex is to set out in detail the reasons for the findings. In saying this we are not losing sight of the fact that the instructions on the form require it to be stated in the annex, *inter alia*, whether the certificate of any officer is suspended, and if so for what reasons. This does not, however, in our judgment, militate against the view that the report itself is intended to be the governing document. The commissioner, having read the report in open court, sufficiently discharged the duty laid on him by s. 470 (2) of the Act of stating the decision to which the court had come. Although it is customarily done, there was no obligation on his part to read the whole of the annex in open court. In such circumstances we do not see how anything said in the annex can be relied on for the purpose of contradicting the plain words of the report itself. This view is, we think, confirmed by the decision in *The Kestrel* (5) ((1881), 6 P.D. 182). The report in that case set out, in an exemplary way, a precise statement of the wrongful acts and defaults found against the master, on the strength of which his certificate was suspended. It was complained, however, that the reasons for the decision, as contained in the annex to the report which was subsequently published, differed from those which had been stated orally in court at the time when the decision was announced and the report read. It was held that this circumstance was immaterial, since the court was at liberty, when submitting the report and annex to the Ministry, to give different reasons for its decisions from those which had been announced in court.

If we are wrong in our view that the report itself is the governing document, and must be taken to override any contrary expressions contained in the annex, and if it be right that the report and annex must be read together in order to ascertain the decision of the court, the only result is that the decision is ambiguous. We should not in any event think it right that an officer should receive the punishment of having his certificate suspended on the strength of an ambiguity. It is to be remembered that a court holding a formal investigation is exercising a quasi-penal jurisdiction, and for that reason, if for no other, is under a duty to state its decision in the clearest possible terms. It follows, therefore, that whether the report is read by itself, or whether it is read in conjunction with the annex, we are unable to find that there has ever been any valid order suspending the appellant's certificate. On that ground alone the appellant is entitled to succeed on this appeal.

* S.R. & O. 1923 No. 752; 20 HALSBURY'S STATUTORY INSTRUMENTS 127, 134.

- A Apart from this, however, it has been further argued that, even if the report be read as containing any clear decision to suspend the appellant's certificate, such decision is vitiated by the absence of any clear finding that the loss of the Corchester was caused by any wrongful act or default on the part of the appellant. It is contended that by the clear words of s. 470 (1) (a) of the Act it is only on such a finding that a court holding a formal investigation has jurisdiction to
- B suspend a certificate. It is not without interest to observe that the report, as originally worded, contained no express finding of wrongful act or default on the part of anybody. When, however, the report was amended, a finding was inserted that the collision was caused by the fault or default of those in charge of both ships, no doubt because it was considered that such a finding was desirable in order to support the orders for suspension in the case of the master of
- C the City of Sydney and the second officer of the Corchester. We entertain no doubt that the expression "those in charge of both ships" was intended to refer to the officers respectively in charge of the navigation of the two ships. Neither in its original nor in its amended form does the report contain any express finding that the collision was caused by wrongful act or default on the part of the appellant. On the other side it was urged that, in spite of the
- D absence from the report itself of any express finding against the appellant, it is sufficient if such a finding appears from the report and annex when read together. The paragraphs of the annex in which the conduct of the appellant was reviewed have already been read, and it was argued that the criticisms of his action therein contained amounted to a sufficient finding of wrongful act or default on his part causing or contributing to the collision.
- E Counsel for the appellant, in presenting his argument on this aspect of the case, submitted, rightly in our view, that the problem must be broken down into three separate questions, as follows: (i) In order to found jurisdiction to suspend the appellant's certificate must there be a finding against him that the casualty was caused by his wrongful act or default? (ii) If so, must such finding be stated expressly in the report itself, or is it sufficient that it is contained only
- F in the annex? (iii) If the latter, does the annex contain a sufficient finding (a) that there was a wrongful act or default on the part of the appellant, and (b) that such wrongful act or default was a cause of the casualty? As to question (i), we entertain no doubt that the answer must be in the affirmative. In our judgment the only possible construction of s. 470 (1) (a) of the Act is that a court holding a formal investigation has jurisdiction to suspend a master's
- G certificate only on a finding that the casualty was caused by his wrongful act or default. This point was discussed, but not decided, in *The Arizona* (6) ((1880), 5 P.D. 123), to which our attention was called. In that case there was at least some doubt whether there was any finding by the court that the casualty was caused by wrongful act or default on the part of the master. It was, however, unnecessary to determine this question, since the appeal succeeded
- H on the ground that, even assuming there was such a finding, the evidence in the case was not such as to justify it. In the course of his judgment in that case SIR JAMES HANNEN, P., said (*ibid.*, at p. 127):

I "Although I have said that we do not think it necessary to determine that question of law now, yet it is undoubtedly worthy of observation that neither in the formal report, nor in the reasons for it which have been given, does the learned judge state anything from which it can be inferred that he entertained the opinion that the default of the master was the cause of the casualty."

From this we think that it can be inferred that, had it been necessary to decide the point in that case, the learned President would have decided, as we do, that the suspension of a certificate can only be supported on a finding that the casualty was caused by wrongful act or default. With regard to question (ii),

while we think it desirable that, where an officer's certificate is suspended, the report itself should contain an express finding that the casualty was caused by a wrongful act or default on his part, we are of opinion that, provided the actual decision is stated in the report, the fact that the finding on which it is founded is contained only in the annex could not possibly be held to be a sufficient reason for upsetting the decision.

It is necessary, therefore, to consider closely the answer to question (iii), namely, whether in the present case the annex to the report does contain a sufficient finding against the appellant to justify the suspension of his certificate. The material paragraphs of the annex have already been read, and we think it right to say at once that in our view the findings against the appellant have been stated in a most unsatisfactory manner. Having regard to the quasi-penal nature of this jurisdiction, it is most important that, where an officer's certificate is ordered to be suspended, there should be express findings in the clearest possible terms (a) that he was guilty of a specific wrongful act or default, and (b) that the casualty was caused or contributed to thereby. It cannot be right to state the criticisms of an officer's conduct in such vague terms as to leave it in doubt whether a finding that the casualty was due to his wrongful act or default is to be spelled out of the words used. In this case the material paragraphs of the annex are so worded as to give rise to just such a doubt. The paragraph in which the criticisms against the appellant are summarised begins with the words "The evidence gave the impression"—not, we think, a very happy way in which to introduce what is said to be a finding of wrongful act or default. Similarly, to say that the appellant's certificate is to be suspended "for his indirect contribution to this casualty" is, to say the least of it, an unfortunate way in which to express a finding that the casualty was caused by his wrongful act or default. This expression was seized on by counsel for the appellant as meaning that there was in fact no causal connection between the appellant's behaviour and the collision. Relying on the decision in *Re Polemis & Furness, Withy & Co., Ltd.* (7) ([1921] 3 K.B. 560), he contended that that which is indirect cannot in law be regarded as a cause at all, and on this ground alone he argued that the suspension of the appellant's certificate could not stand. We are not prepared to accede to this argument, for we do not think that a matter of this kind is to be determined by the attachment of a particular epithet to "cause" (see per LORD SUMNER, giving the judgment of the Board, in *British Columbia Electric Ry. Co., Ltd. v. Loach* (8), [1916] 1 A.C. 719 at p. 727). At the same time we do think it right to emphasise that, in a case such as the present, where the actual manoeuvres leading to the collision were those of the second officer, and where the whole gravamen of the criticism of the appellant was that he was not there when he ought to have been, the circumstances were such as to call insistently for a specific finding whether the appellant's absence was a cause of the casualty. Furthermore, the criticisms made of the behaviour of the appellant, while indicating—if they are justified—some degree of dereliction of duty on his part, are not of such a kind as would necessarily or as of course justify a finding of wrongful act or default against him, so as to import penal, as opposed to civil, consequences. Here again the circumstances were such as to call for a specific and clear finding whether the behaviour of the appellant did amount to a wrongful act or default.

Having made these comments on the way in which the findings of the court have been stated in the annex to the report, we proceed now to consider whether it is possible to spell out from the criticisms made of the appellant's conduct a finding that the casualty was caused by his wrongful act or default, so as to justify the suspension of his certificate. Those criticisms, as we understand them, may be analysed as follows: The discipline maintained on board the Corchester was lax; from that resulted (i) the fact that no look-out was posted on the fore-castle head when there should have been one, and (ii) the fact that the master

A absented himself from the bridge for twenty-five minutes in doubtful visibility, without taking steps either (a) to ensure that means were readily available to summon him back to the bridge if required or (b) himself to remain on the alert for any alteration in the conditions. As to (i), it appears to have been conceded in the court below, and it was conceded before us, that the absence of a look-out on the fore-castle head could not be regarded as a cause contributing to the collision, for the reason that, had such a look-out been posted, and had he heard the fog signals of the approaching City of Sydney, this would not have told the second officer in charge on the bridge any more than he already knew from his own observation of the radar. This point, therefore, disappears out of the case.

As to the second point, it has been assumed, and we are prepared to assume, that, had the appellant been on the bridge, he would not, with his experience, have made the same error in interpreting the radar observations as appears to have been made by the less experienced second officer. When considering the propriety or otherwise of the appellant's absence from the bridge, we think that there is some force in the complaint made by counsel for the appellant that he was deterred from developing in full his argument on this point, having regard to the observations made by the commissioner in the course of the argument. Furthermore it is right, we think, to bear in mind that the very faults in navigation of which the second officer was found guilty—namely, his failure to reduce speed and his failure to sound fog signals—are of themselves directly relevant to the question whether the appellant was sufficiently on the alert. Either a fog signal or a change in engine speed would immediately have called the appellant's attention to the fact that conditions had changed. As it was, his first information of anything unusual was, as is found, the hearing of his ship's helm signal—which came only after the ships had already sighted each other. The question whether, in the particular circumstances, the appellant was justified in absenting himself from the bridge, and remaining out of touch with the navigating officer for so long, appears to us to be very largely one of seamanship, on which we should be guided by the advice of the Elder Brethren*. We have, therefore, sought their advice on this point. We wish to make it clear, however, that in doing so we have not thought it necessary to refer to the evidence, or to consider whether on the evidence the criticisms of the appellant's behaviour, as set out in the annex to the report, were justified. Our question to the Elder Brethren is based on the findings stated in the annex to the report, and for the purposes of the question we assume, without deciding, that those findings are justified. We have thought it right to reduce to writing both our question and the answer of the Elder Brethren thereto.

Our question is as follows:

H “On the basis that it is found that the visibility was uncertain due to passing snow showers, but that at the time the master left the bridge the visibility, though low, was sufficient, and, having regard also to the following circumstances: (i) that his vessel was navigating in the Would; (ii) that there was no one on the bridge readily available to send for him; (iii) that he was not immediately in contact with the voice-pipe in his cabin; and (iv) that his first information of anything unusual was the hearing of his ship's helm signal, whereupon he came on the bridge, arriving just before the collision; I was it unseamanlike conduct on the part of the master to remain below in the saloon for a period of about twenty-five minutes?”

To that question the Elder Brethren have returned the following answer:

“No special precautions desirable because they were in the Would for a ship engaged regularly on the coast. Accepting the fact that there was no one on the bridge readily available to send for him, and that he placed himself

* Commodore R. L. F. HUBBARD, R.D., R.N.R., and Captain R. J. GALPIN, R.D., R.N.R., Trinity Masters.

in a position out of contact with the voice-pipe, in our opinion the master by such action opens himself up to criticism in regard to unseamanlike conduct. We consider the master was wrong in remaining so long out of touch with the officer of the watch. We feel that he was not seriously to blame when it is considered this was a small ship and the ease with which any sound from the bridge by either fog signal, mouth whistle or telegraph would have reached him."

We accept unreservedly the advice tendered to us by the Elder Brethren, and on the basis of that advice we are satisfied that on the findings of the commissioner the appellant would be open to some degree of criticism from the point of view of seamanship. At the same time it is plain that the Elder Brethren, even on the assumption of the commissioner's findings, are disposed to take a lenient view of any shortcomings on the part of the appellant. In this we agree. We wish to make it plain, however, that nothing in this judgment is to be taken as encouraging any relaxation of the principle that, unless compelled by unavoidable necessity, it is the duty of the master to be on deck at all times when the safety of the vessel requires his personal supervision (see *Ewer v. Board of Trade* (9) ((1880), 7 R. (Ct. of Sess.) 835). If, in spite of the lenient view of his conduct taken by the Elder Brethren, we were to find that wrongful act or default was established, we think that there would be no doubt that it could be said to have caused, or at least to have contributed to, the collision, in the sense that the master's presence on the bridge would in all probability have prevented the mistakes made by the second officer. Even so, we should have felt ourselves unable to hold that a punishment of suspension of his certificate for three months was justified, particularly as counsel for the Minister was expressly instructed not to press for any suspension at all.

We revert, however, to the point that there is no specific finding of wrongful act or default on the part of the appellant, and we are not prepared as an appellate tribunal to make any such finding. In the absence of such a finding, there would not be, for reasons already given, any jurisdiction to suspend the appellant's certificate. On this ground also the appellant is entitled to succeed on this appeal.

[On the question of costs counsel for the Minister informed their Lordships that no order had been made by the court of formal investigation, and he referred to *McMILLAN ON INQUIRIES* (at pp. 116 and 117) and to *The Carlisle* (10) ([1906] P. 301). Their Lordships then ordered the costs of the appeal to be paid by the Minister to the appellant.]

Appeal allowed.

Solicitors: *Ingledeu, Brown, Bennison & Garrett* (for the appellant); *Treasury Solicitor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

A JACKSON (INSPECTOR OF TAXES) v. LASKERS HOME
FURNISHERS, LTD.

[CHANCERY DIVISION (Danckwerts, J.), November 13, 1956.]

B *Income Tax—Deduction in computing profits—Capital expenditure—Repair to hereditament—Lease of old premises in disrepair—Lessees' covenant to reinstate—Compensating rent reduction in earlier years—Whether expenditure deductible—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D.*

C Premises which had not been occupied since 1934 and which were in a bad state of repair were let in 1952 on a fourteen years' lease to the taxpayers for occupation for their business. The taxpayers covenanted "forthwith to reinstate the demised premises including the repair of the main roof and plaster install electric light and heating and to install a new shop front . . ." In return for this undertaking they were granted a reduction in the rent of £1,000 to a peppercorn in the first year, and to £700 in each of the next six years. They incurred expenditure of £2,295 on this work in the tax year, and claimed to deduct it in arriving at their profits for income tax purposes.

D **Held:** the expenditure was not deductible in computing the taxpayers' profits for income tax purposes, since it was expenditure of a capital nature on accumulated repairs or alterations of the premises.

E Dictum of LORD GREENE, M.R., in *Henriksen v. Grafton Hotel, Ltd.* ([1942] 1 All E.R. at p. 682) applied.
Appeal allowed.

[As to capital expenditure not deductible in computing profits under Sch. D, see 17 HALSBURY'S LAWS (2nd Edn.) 158-161, paras. 325-327; and for cases on the subject, see 28 DIGEST 47-49, 242-252.]

F For the Income Tax Act, 1952, s. 137, Sch. D, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.]

Cases referred to:

G (1) *Highland Ry. Co. v. Balderston (Surveyor of Taxes)*, (1889), 2 Tax Cas. 485; 28 Digest 48, 246h.

(2) *Law Shipping Co., Ltd. v. Inland Revenue Comrs.*, (1923), 12 Tax Cas. 621.

(3) *MacTaggart (Inspector of Taxes) v. Strump*, (1925), 10 Tax Cas. 17; [1925] S.C. 599; 28 Digest 47, 244i.

(4) *Green v. Favourite Cinemas, Ltd.*, (1930), 15 Tax Cas. 390; Digest Supp.

H (5) *Inland Revenue Comrs. v. Adam*, (1928), 14 Tax Cas. 34; [1928] S.C. 738; Digest Supp.

(6) *Henriksen v. Grafton Hotel, Ltd.*, [1942] 1 All E.R. 678; [1942] 2 K.B. 184; 111 L.J.K.B. 497; 167 L.T. 39; 24 Tax Cas. 453; 2nd Digest Supp.

Case Stated.

I The taxpayers appealed to the General Commissioners of Income Tax for Manchester against an assessment to income tax made on them under Sch. D to the Income Tax Act, 1952, for 1953-54 in the estimated sum of £4,400 in respect of the profits of their business of retail furnishers. The question for determination was whether expenditure incurred by the taxpayers in the relevant year amounting to £2,295 was an allowable deduction in computing the profits of the business. The expenditure was incurred in respect of premises demised to the taxpayers for business purposes and the taxpayers contended that the expenditure was necessary solely for the rehabilitation of the premises and was

therefore an admissible deduction. The Crown contended that, since the expenditure was incurred in order to render the premises fit for occupation, it was capital expenditure and inadmissible as a deduction in computing the taxpayers' profits. The commissioners held that the expenditure less £275 was incurred by the taxpayers in respect of the reinstatement of and repair to the demised premises and that the reduced sum of £2,020 was deductible. The Crown appealed. A
B

F. N. Bucher, Q.C., and Sir Reginald Hills for the Crown.

N. E. Mustoe, Q.C., and P. E. Whitworth for the taxpayers.

DANCKWERTS, J.: I have come to the conclusion that the determination of the commissioners cannot stand in this case. The case relates to an expenditure of £2,295 made by the taxpayers, Laskers Home Furnishers, Ltd., in pursuance of the terms of a lease which they obtained of Nos. 68 and 70, Oldham Street, in the City of Manchester. The lease was for fourteen years from Mar. 25, 1952, and they took the premises because their previous lease was apparently about to expire in 1953, and they would shortly require premises. C

The lease was determinable by notice by the landlord at the expiration of ten years if he required to do certain things in respect of the premises. The rent was to be a peppercorn for the first year, then £700 a year for six years, and £1,000 a year for the remaining years. D

The case was remitted by ROXBURGH, J., to the commissioners to find further facts so that it could be properly determined. There are thus two Cases Stated by the commissioners (the General Commissioners for Manchester Division) setting out the facts which they had found. E

In the first Case, they stated that the only question before them was whether or not expenditure incurred by the taxpayers, a company dealing in furniture,

"in the relevant year amounting to £2,295 as hereinafter mentioned was an allowable deduction in computing the profits of the business. We were asked to give our decision in principle only, leaving the figures to be agreed on the basis of our decision." F

Then they said: "Mr. Lasker, a director of the [taxpayer] company, gave evidence before us", and they say his evidence, which they accepted, can be summarised as follows: G

"(1) The [taxpayers] as the result of the termination of the lease of the premises which [they] had previously occupied had negotiated for and obtained a lease of nearby premises, 68 and 70 Oldham Street in the City of Manchester. (A copy of such lease was put in evidence before us, and may if necessary be referred to as part of this Case.) (2) Under the terms of the lease the said premises were demised unto the [taxpayers] for the term of fourteen years . . ." H

The covenant which gave rise to the expenditure is in para. 2 (4) of the lease, which was granted in common form in consideration of the rent thereafter referred to, and the covenant and the conditions thereafter contained. This covenant is in these terms: I

"Forthwith to reinstate the demised premises including the repair of the main roof and plaster install electric light and heating and to install a new shop front to the reasonable approval of the lessors' architect."

The ordinary repairing covenant to keep the whole of the said demised premises in a proper state of repair follows.

A Sub-paragraph (4) of the findings is:

"The [taxpayers] pursuant to the above mentioned covenant incurred expenditure in the relevant year amounting to £2,295 of which £1,767 was in respect of the reinstatement of the demised premises and general repairs £40 in respect of repairs to the roof £338 in respect of electrical repairs and £150 in respect of the electric supply installation."

It will later appear that it is necessary to bear in mind the sum of £150. After the contentions on behalf of the respective parties, they conclude:

C "We were of opinion that the expenditure incurred by the [taxpayers] could fairly be said to be in respect of the reinstatement of and repairs to the demised premises and decided that the sum of £2,295 should be allowed as a deduction in computing the profits of the [taxpayers] for income tax purposes . . ."

D It is not surprising that, as a result of that meagre Case, the matter was remitted to the commissioners to state a further Case. In the fresh Case, they say again what the point of their decision was, and they give their decision in principle only. They say:

E "We heard the evidence of Mr. Lasker, a director of the [taxpayer] company, which we accepted and were of opinion that the expenditure incurred by the [taxpayers] could fairly be said to be in respect of the reinstatement of and repairs to the premises and decided that the sum of £2,295 should be allowed as a deduction in computing the profits of the [taxpayers] for income tax purposes . . ."

That is merely a repetition of what they had decided on the previous occasion, which, as will appear shortly, was varied by the decision on the second occasion.

F Then they say:

"And whereas at the hearing on Aug. 1, 1956, evidence was given by Mr. Lasker and by Mr. Matheson, a director of A. & M. Matheson, Ltd., who were the contractors mainly concerned with the work which the [taxpayers] had done at the premises.

G "The facts found by us on the evidence are as hereinafter set forth.

"1. The premises, consisting of the ground floor and first and second floors, had not been occupied since 1934 and were in a very bad state of repair."

H That is not surprising if the premises had been unoccupied, as it seems, for a period of some eighteen years.

I "2. As a result thereof the landlords had agreed to reduce what would have otherwise been a rent of £1,000 for each of the fourteen years of the lease to a peppercorn rent for the first year £700 for each of the next six years and £1,000 for each of the remaining seven years on the understanding that the [taxpayers] would do the initial work to put the premises in a good state of repair.

"3. Mr. Matheson had made a survey of the premises towards the end of 1951 and had found that about one-fifth of the roof was in holes. This had resulted in about one-fifth of the roof timbers being rotten and also about one-sixth of each of the three floors, mainly around the stairs. The gutters had been largely stripped of lead and the brickwork was saturated to a depth level of eight feet from the eaves and was so rotten that a penknife could easily be pushed into the bricks. The work done by A. & M. Matheson, Ltd.

to put the above matters right had involved the using of 2½ standards of timber, nearly two thousand slates and about twenty thousand bricks. The shop front had been in the form of a small arcade or foyer and was of metal construction. It was badly rusted and parts were boarded up. It was taken out and replaced by a new straight shop front of wooden construction and on less elaborate lines than the original one had been. No major structural alterations were involved. The expenditure on the new shop front was about £600 and it would have been less expensive to have repaired and renovated the old one. Parts of the plaster inside the premises had perished and these parts were made good. It was necessary to fit a new rising main for the toilets and renew the plumbing system and this work was done. No additional toilet accommodation was provided but an Ascot heater was fitted. The outside stonework and woodwork required painting and the interior decorating and this work also was done. Apertures were cut in the party wall between 68 and 70 Oldham Street on the first and second floors to facilitate the use of these floors as showrooms in connection with the [taxpayers'] business as retail furnishers. Previously these floors had been used as offices. The cost of this work was approximately £60. Plaster board partitioning was put up on the first and second floors and also on the ground floor together with a cash desk. The cost of this work was approximately £65. The electric wiring system was renewed, the old one being beyond repair.

"4. On the additional evidence adduced before us we have arrived at the conclusion that the whole of the said sum of £2,295 is not allowable as a deduction in computing the profits of the [taxpayers] and that this sum should be reduced by £275, the allowable deduction thus being £2,020."

They give no indication of how the sum of £275 is allocated, but a guess suggests that it is made up by adding £60 for the apertures and so on and £65 for the plaster board partitioning and the cash desk, and, treating it as a capital expenditure, the cost of the electric wiring being renewed, which happens to be a sum of £150, as shown in the previous Case; and those three sums added up together come to £275. Even then the commissioners did not find the whole of the facts necessary to appreciate the case. The parties have agreed certain facts which, I think, may be treated as part of the Case.

The taxpayers apparently went into occupation on May 17, 1952, and the lease was signed a month later, on June 10, 1952. By the time the taxpayers went into occupation it appears that the electric wiring work had just been finished or was finished on that day, May 17, 1952, but that the builders did not actually finish their work until about a month later, June 26, 1952.

The contention of the Crown is that this was wholly in the nature of capital expenditure and therefore not allowable as a deduction for the purposes of the annual profits and gains of the taxpayers' trade. Reliance was placed by counsel for the taxpayers on s. 137 of the Income Tax Act, 1952, which specifies matters which may not be deducted for the purpose of arriving at the profits of the year. I do not think that section has much to do with this Case, because it does not settle the question to be decided: was this capital or was it revenue expenditure? Consequently, it is necessary to consider the matter, not so much on the wording of that section, but on the general principles which have been applied by the courts to similar cases under the Income Tax Acts.

Highland Ry. Co. v. Balderston (Surveyor of Taxes) (1) ((1889), 2 Tax Cas. 485), does not really help very much. Certain tracks, etc., had been purchased from another company, and work had to be done to make the railway suitable for use by the purchasing company; I think that was plainly expenditure of a capital nature. *Law Shipping Co., Ltd. v. Inland Revenue Comrs.* (2) ((1923), 12 Tax Cas.

A 621), seems to me more in point. I am not clear whether the company was an existing company or had been newly formed, but from the indications of the case it may well have been in the shipping business before. The company purchased a ship for £97,000 when it was due (in fact overdue) for a survey. Consequently, when the ship was put on to survey a large sum had to be expended on repairs to comply with requirements, including a large amount of accumulated repairs
 B during the period in which it belonged to the vendors and was used by them in their trading operations. Out of the sum of £51,000 odd, £12,000 was allowed as expenditure on repairs during the purchasing company's ownership, and the rest, £39,000, was disallowed as a deduction in ascertaining the profits of the purchasing company.

C The principle of that case—and I think a principle is discernible as argued by counsel for the Crown—is this: that the accumulated repairs could not properly be attributed to the period of trading of the purchasing company, who acquired the capital asset subject to legal repairs, but were properly attributable to the period of trading of the vendor, which was quite a different matter.

D Certain cases involving the payment of premiums on the acquisition of leases decided, as one would expect, that a transaction could not be disguised by merely making the premium payable over a series of years by annual instalments: *MacTaggart (Inspector of Taxes) v. Strump* (3) ((1925), 10 Tax Cas. 17); *Green v. Favourite Cinemas, Ltd.* (4) ((1930), 15 Tax Cas. 390), in which ROWLATT, J., adopted some of the language used in the earlier cases; and *Inland Revenue Comrs. v. Adam* (5) ((1928), 14 Tax Cas. 34), in which a building contractor had to pay a sum to acquire the use over a period of eight years of a site for dumping the surplus materials which he had to dispose of. In those cases an attempt was made to set the more or less disguised premiums against the annual profits after the first payment. In *Henriksen v. Grafton Hotel, Ltd.* (6) ([1942] 1 All E.R. 678), which dealt, not with premiums but with payment of monopoly value in respect of licensed premises, certain statements of LORD GREENE, M.R., assist me very
 E much in coming to my conclusion in this case. A series of licences were granted by the licensing authority on successive occasions for periods of three years, and a lump sum for the monopoly value was fixed in respect of each period of three years. On the other hand, the licensing authority allowed the payments of the lump sums to be spread over the three years in each case. It was claimed that those sums were deductible as trading expenses attributable to the trading
 F operations of the licensee and were deductible from his profits.

G On its facts the case obviously has not much to do with the present one, but LORD GREENE, M.R., makes remarks which seem to me to be eminently applicable to the present case. He says (*ibid.*, at p. 682):

H “One other argument must be mentioned. It was said that, whatever the position might be in the case where, e.g., a freeholder obtains a licence and makes the necessary payments, there is a difference where the payments are made by a lessee under a covenant in that behalf contained in his lease. I do not follow this. If a payment is of such a nature as to preclude its deduction when made spontaneously, I cannot see that its nature is affected by reason of the fact that it is made under a covenant with a third party.
 I Capital improvements are often made under a covenant in a lease. I have never heard it suggested that the cost of making them can be deducted by the lessee in computing his profits for income tax purposes. An attempt was made to rescue this argument from shipwreck by saying that, if the lessor had undertaken to bear these payments and had consequently exacted a higher rent, the full rent could have been deducted as an expense. This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in income

tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or vice versa."

In some of the cases to which I have referred the tenants were induced to adopt a form of transaction which involved their bearing the burden of what might have been allowed as deductions if they had been payable as rent. The fact that they might have done this in another way, paying an equivalent sum in the form of rent, did not get them out of their difficulties. The same applies in the present case. The landlords might have agreed to a lease of fourteen years, as in the present case, and an annual rent of £1,000 a year, and in that case no doubt the tenants would have been entitled to deduct £1,000 rent, I suppose, in each year. But the different plan was adopted which it turns out may perhaps have unfortunate results for the tenants [the taxpayers]. The rent had been reduced in the first seven years to nothing substantial in the first year and by about £300 a year in each of the following six years. The result is that there is not rent of the same amount in those years from which they could deduct any income tax he had paid. It seems to me that, in consideration of those reductions of rent, the taxpayers agreed to do work which otherwise the landlords might have been required to do, and they did work which represented a capital expenditure required on their acquisition of the premises for the purposes of their trade. It seems to me plainly that it was work of a capital nature, and expenditure of a capital nature, and was dealing with the accumulation of repairs or alterations (of small nature perhaps but none the less alterations) of the premises to suit their business. Therefore, it had nothing in common with the current expenditure on repairs of the property which fall to be made under a lease. Consequently, the only possible and reasonable conclusion on the facts is that this work and expenditure were of a capital nature, and the commissioners must have misdirected themselves in law, as their conclusion is not a reasonable one in all the circumstances. The appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Clutton, Moore & Lavington*, agents for *Ralph C. Yablon, Temple-Milnes & Carr*, Bradford (for the taxpayers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

NOTE.Re THOMAS (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), November 21, 1956.]

B

Executor and Administrator—Administrator—Inventory and account—Administration revoked and grant to new administrator—Order requiring former administrator to exhibit on oath an inventory and account of estate of deceased—Failure to comply with order—Application for committal.

C

[As to a cessate administrator calling on an original administrator to exhibit an inventory and account, see 16 HALSBURY'S LAWS (3rd Edn.) 196, para. 339, note (t); and for a case on the subject, see 23 DIGEST 197, 2290.

As to the power of the court to require personal representatives to bring in inventories, see 16 HALSBURY'S LAWS (3rd Edn.) 297, para. 569, note (o); and for cases on the subject, see 23 DIGEST 319, 3832-3839.]

D

Case referred to:

(1) *Taylor v. Newton*, (1752), 1 Lee, 15; 161 E.R. 7; 23 Digest 197, 2290.

Motion.

The plaintiff in this probate action, Mrs. Beatrice Maud Johnson, applied for an order to commit the defendant in the action, James Mark Thomas, for contempt.

E

The deceased died leaving a will dated Dec. 28, 1950. On Aug. 14, 1951, the defendant, the deceased's brother, obtained a grant of letters of administration of the estate of the deceased. The plaintiff, the deceased's sister, then brought an action propounding the will dated Dec. 28, 1950, and on Feb. 22, 1956, DAVIES, J., found in favour of the will. The grant of letters of administration to the defendant was accordingly revoked, and letters of administration with the will annexed were granted to the plaintiff. On Oct. 11, 1956, on a summons issued by the plaintiff, Mr. Registrar WILKINSON ordered the defendant to exhibit on oath a true and perfect inventory and account of the estate of the deceased. The defendant failed to comply with that order and the plaintiff now moved to commit him for contempt. Counsel for the plaintiff stated, however, that the plaintiff had no desire to send the defendant to prison but was anxious to obtain information about the assets of the deceased's estate. The defendant had paid certain legacies and the funeral expenses but had not accounted for the larger part of the estate. Counsel also said that the total estate was, however, small and the present procedure had been adopted in order to involve the estate in the least expenditure.

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C. H. Gage for the plaintiff.

The defendant appeared in person.

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KARMINSKI, J., raised the question whether or not the court had power to deal with the matter by ordering the defendant to exhibit an inventory and account after his grant of letters of administration had been revoked by the court, and continued: My attention has already been drawn to the authorities. As far as I know this course has never been followed before in cases where the original grant has been terminated by the court, although it has been done in the case of a cessate grant. The fact that there are no authorities on this very point may be only because it has been taken for granted since 1752 that this is the right practice. There is a considered authority on it as far as cessate grants are concerned [*Taylor v. Newton* (1) ((1752), 1 Lee, 15)].

C. H. Gage: I submit that this method is available and that it is an appropriate method which involves the estate in the least expenditure.

KARMINSKI, J.: I have looked at the authorities and the text-books, and I think the court has power in a case of this kind. There is no distinction between a cessate grant where the original grant has come to an end and a second grant of this kind where the original grant has been terminated by the order of the court in a probate action. [His LORDSHIP, having heard the defendant in person, adjourned the motion for fourteen days on the defendant undertaking to hand over all the papers and documents relating to the estate in his possession to the plaintiff's solicitors within three days.]

Order accordingly.

Solicitors: *Piesse & Sons* (for the plaintiff).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re SCULLARD'S ESTATE. SMITH AND ANOTHER v. BROCK AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 20, 1956.]

Domicil—Widow—Separation of spouses—Intention of wife to acquire domicil of choice—Intention expressed during existence of marriage—Husband pre-deceasing wife by six weeks—No further expression of intention by wife after husband's death—Whether widow's domicil changed after husband's death.

In 1893 the testatrix married A.S., who was at all material times resident and domiciled in England. In 1908 she left him, taking the children of the marriage with her. She never resided with her husband again. From 1910 until about 1921 she resided in Guernsey. In or about 1946 she returned to Guernsey and expressed the intention of remaining there for the rest of her life. All her personal possessions were moved to Guernsey, her realisable investments were sold and the proceeds were re-invested in bearer bonds or war stock and taken to Guernsey, and certain settled funds in which she had a life interest were invested by the trustees in investments which would be exempt from United Kingdom death duties on the death of a person domiciled out of the United Kingdom. A cottage was bought for the testatrix, and she resided in Guernsey continuously for the rest of her life. On Feb. 4, 1955, the testatrix' husband died, but she never knew of his death. The testatrix died on Mar. 19, 1955. Until about a fortnight before her death she was in sufficient possession of her faculties to understand the import of anything that she was doing. On the question of her domicil at the date of her death,

Held: the testatrix' domicil at the date of her death was in Guernsey, because she had clearly shown the intention of acquiring a domicil of choice in Guernsey, and, although she could not acquire a domicil for herself during the continuance of her marriage, after the death of her husband her intention became effective in law without the necessity of any new overt act on her part.

Re Cooke's Trusts ((1887), 56 L.T. 737) considered.

Re Wallach ([1950] 1 All E.R. 199) distinguished.

[As to domicil of married women, see 7 HALSBURY'S LAWS (3rd Edn.) 24, para. 45; and for cases on the subject, see 11 DIGEST (Repl.) 355-357, 241-260.]

A Cases referred to:

- (1) *Re Cooke's Trusts*, (1887), 56 L.J.Ch. 637; 56 L.T. 737; 11 Digest (Repl.) 331, 51.
- (2) *Re Wallach, Weinschenk v. Treasury Solicitor*, [1950] 1 All E.R. 199; 11 Digest (Repl.) 355, 246.
- (3) *Gout v. Zimmerman*, (1847), 5 Notes of Cases, 440; 9 L.T.O.S. 412; 11 Digest (Repl.) 355, 242.
- (4) *In the Goods of Raffanel*, (1863), 3 Sw. & Tr. 49; 32 L.J.P.M. & A. 203; 8 L.T. 211; 164 E.R. 1190; 11 Digest (Repl.) 353, 221.
- (5) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441; 11 Digest (Repl.) 326, 22.

Adjourned Summons.

- C The plaintiffs, Francis Armitage Smith and Humphrey Livingstone Gilks, as the executors of the will and codicils of the testatrix, Ethel Mary Scullard, applied to the court by originating summons for the determination of the question whether the testatrix was at the date of her death domiciled in England or in the Island of Guernsey.

- D *P. R. Oliver* for the plaintiffs, the executors.

J. L. Arnold for the first, second and third defendants (children of the testatrix), the fourth defendant (the former wife of the second defendant), and the sixth and seventh defendants (the children of the second and fourth defendants).

G. B. H. Dillon for the fifth defendant, the wife of the second defendant.

- E **DANCKWERTS, J.:** This is an unusual and rather interesting case on the question of domicile. The will of the testatrix was made on Mar. 8, 1937. She made two codicils, on Feb. 25, 1950, and on Oct. 30, 1950, respectively. She died on Mar. 19, 1955, surviving her husband by about six weeks. In the will she describes herself as of "White Lodge, Nackington, Canterbury, in the county of Kent". In the first codicil she describes herself as "Ethel Mary Scullard", her married name, "more usually known as Ethel Mary Scott", which is the name she adopted, "at present residing at Les Buttes, Torteval, Guernsey, Channel Islands, formerly of White Lodge, Nackington, Canterbury, in the county of Kent", and in the second codicil she describes herself in a similar manner. Under the will and codicils the testatrix' residuary estate is settled on her three children on trusts under which they would not take absolutely, whereas if her domicile was in Guernsey, and not in England, the will would be subject to the law of Guernsey, which would give one half of the estate absolutely to her three children and, therefore, alter the provisions contained in the will.

- G The testatrix was married once only, namely, on July 1, 1893, to Albert Victor Scullard, who died on Feb. 4, 1955. There were three children of the marriage [the first, second and third defendants]. I need not trouble about what has happened to the children and their issue, if any. It is stated in the affidavit of Mr. Francis Armitage Smith, a solicitor and an executor of the will, that the husband of the testatrix was born in England of English parents, and that, to the best of Mr. Smith's knowledge, information and belief, the husband was at all material times up to his death both resident and domiciled in England.
- I The testatrix had been separated from her husband for many years at the date of his death and for upwards of nine years prior to her death had resided continuously in the Island of Guernsey. She left certain real estate in South Africa, but no real estate in England or Guernsey. She left free personal estate in England to the value of about £7,000 net and personal estate in Guernsey to the value of £9,000 gross, £7,500 net. Further details of the life of the testatrix, as set out in para. 10 of Mr. Smith's affidavit, are as follows. In about the year 1908 the testatrix and her husband and children were living in Cornwall. In

that year the testatrix left her husband, taking the children with her and never again resided with him. She assumed the name of "Scott", and the children were brought up under that name. Save that thereafter she made her husband a cash allowance through her solicitors, she had no further communication with him, nor did she make any attempt to find out his address. The testatrix moved to Guernsey in 1910 and remained there until about 1921 when she went to Canada. At that date both the second defendant, Albert Holroyde Scott, and the first defendant, Edna Mary Brock, and her husband (who was a Guernsey man) were living in Canada. In or about 1930 the testatrix returned to England because of the poor health of the third defendant, Denys Parker Scott, who required constant medical care. She remained in England until 1946 or 1947 when she again returned to Guernsey. Her object in moving was to be near her daughter, the first defendant, who had returned to Guernsey with her husband in about 1933. At that time the testatrix expressed the intention of spending the rest of her days in Guernsey. All her personal possessions and furniture were moved to Guernsey and all her realisable investments were sold and the proceeds were reinvested in bearer bonds or $3\frac{1}{2}$ per cent. war stock and taken to Guernsey. The trustees of two settled funds to which she was entitled for life were informed and the trust funds were, so far as possible, invested in investments which would be exempt from United Kingdom death duties on the death of a person domiciled out of the United Kingdom. The position with regard to that appears to be that, while residence may be sufficient to enable her to avoid income tax, she would have to be domiciled outside the United Kingdom in order to avoid estate duty on her personal estate. Originally the testatrix rented a house in Guernsey, but in December, 1949, at her request a cottage was purchased for her occupation with part of a sum of £2,000 which she had voluntarily settled on certain trusts for herself during her life. Thereafter the testatrix resided in Guernsey until her death. It appears that she had an accident in which she broke her thigh some time in 1953, and in October, 1954, she suffered a slight stroke and was removed to hospital. She was not informed of her husband's death, and died without knowing of it. There is medical evidence which indicated that she was about eighty-six years old when she died, and she retained sufficient possession of her faculties to understand the import of anything that she was doing until about two weeks before her death—that is, until about four weeks after the death of her husband.

I think that I should read para. 11 of Mr. Smith's affidavit. He says:

"My firm has acted as solicitors for the testatrix and for members of her family for upwards of twenty-four years past and I am able to depose to the facts set forth in the last foregoing paragraph hereof in part from records in the possession of my said firm, in part from statements made by the testatrix herself, and in part from information given to me by the [first] defendant Edna Mary Brock. In particular the intention of the testatrix to spend the rest of her days in Guernsey was expressed by her to me in 1946 and instructions for the alterations of the trustee investments hereinbefore referred to were given by my firm on her behalf."

It is rather strange that there is no affidavit by the first defendant, who, one would have supposed, would be in a position to say more about the expressed intention of the testatrix than anybody else would. The evidence by a doctor and a nurse, which has been put in, really goes to nothing more than that after her husband's death until about two weeks before the testatrix' own death she was capable of understanding and expressing the intention as regards her permanent home or domicile, if in fact she had any such intention. There is, however, no evidence of any expression of intention after the death of her husband on Feb. 4,

A 1955, and before her own death six weeks later. On the evidence as a whole, I think it right to say that, although I criticised the absence of certain affidavits in certain respects, there is sufficient to enable me to come to the conclusion that, at any rate after about 1946 or 1947, the testatrix had formed a definite intention to make Guernsey her permanent home.

B The difficulty arises in this way. It appears that, as long as the testatrix was married, although she was separated from her husband as completely as possible short of judicial separation, she could not form an effective intention to change her domicile from that of her husband. It is stated in 7 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 24, para. 45, under the heading "Married women":

C "A woman acquires the domicile of her husband on marriage, and during the existence of the marriage the domicile of the wife follows that of the husband. Even a decree of judicial separation does not render the wife capable of acquiring a separate domicile, for such a decree does not affect her status as wife. The wife acquires the husband's domicile if she lives with him in the country of his domicile, not only by construction of law, but also as a matter of fact. On the dissolution of the marriage by the death of the husband, or by divorce a vinculo, the power of the wife to acquire a domicile for herself revives, and she is free again to exercise her own choice of domicile for herself and her infant children in her custody; but until she exercises this power her domicile remains that of the husband at the time the marriage was dissolved."

E It was contended by counsel for the fifth defendant, who wishes to establish that the testatrix's domicile was English, that, as the testatrix did not express any intention during the short period after her husband's death, she could not have acquired a domicile in Guernsey and, therefore, her domicile remained that of her husband, namely, in England.

F I was referred to two cases, one of which was *Re Cooke's Trusts* (1) ((1887), 56 L.T. 737), a decision of STIRLING, J. The facts in that case were as follows. In 1839 an Englishwoman, while still an infant, married in France a Frenchman, from whom she separated in 1845. There were children of this marriage. In 1849 an act of separation of property between the husband and wife was made by the Royal Courts of Jersey, where the wife was then residing. In 1853, believing her husband to be dead, she went through the ceremony of marriage with an Englishman, and went with him to live in New South Wales, where she remained until her death in 1879. In 1877 her husband died—apparently she did not know of that—and in 1878 she made a will disposing of her property as if she were an Englishwoman. It was held that she was, at her death, domiciled in New South Wales, and that the disposition made by her will was valid.

H STIRLING, J., said (56 L.T. at p. 738):

I "If either of the contentions put forward on behalf of the children prevailed, the viscountess would have been unable to dispose of part* of the property. Unquestionably the viscountess by her marriage acquired a French domicile, and so long as the husband, the viscount, lived, could not acquire any other. The viscount died in 1877, and from that time until her death she resided in New South Wales, as in fact she had done for many years previously. That she went to that country and resided there with the intention of making it her permanent home is not disputed, and there is no reason to doubt that that intention continued during the period which elapsed between the death of the viscount in 1877 and her own death in 1879. There existed, therefore, during that period the two elements

* By art. 913 of the Code Napoleon, a person can dispose of only a one-third part of his property as a gift by acts during his life, or by will, if he leaves two children.

necessary for the acquisition of a domicile of choice, namely, actual residence and intention permanently to reside. But it is said, notwithstanding that, that a new domicile was not acquired. It was contended that for that purpose there must be an election of domicile, and that the viscountess never elected; that she went to New South Wales and lived there because she believed herself to be the petitioner's wife, and exercised no choice in the matter. That contention appears to me to be well founded to this extent, that no doubt the motive for her residence was the desire of the viscountess to enjoy the companionship of the petitioner, whom she believed to be her husband, but at the same time I think that the existence of any particular motive is immaterial except so far as it throws light on the intention of the person as regards residence. The motive in the present case is entirely consistent with an intention to permanently reside in New South Wales, and that being so, I am of opinion that there exist the only ingredients necessary for the acquisition of a domicile, namely, the factum and the animus manendi, and consequently that the viscountess was, at the time of her death, domiciled in New South Wales. Even if not so, still it appears to me that the domicile of the viscountess at the time of her death was not French. Her French domicile was an acquired one, and consequently capable of being abandoned without the necessity of acquiring a new domicile of choice."

That is a case which supports the claims of those who contend in the present case that the testatrix had acquired a domicile of choice in Guernsey.

On the other hand, counsel for the fifth defendant relies on *Re Wallach, Wein-schenk v. Treasury Solicitor* (2) ([1950] 1 All E.R. 199), a decision of HODSON, J., in the Probate, Divorce and Admiralty Division. The headnote to that case reads:

"In 1906 the intestate, a woman, married E.W. whose domicile of origin was German. In 1943 E.W. died in England where he had been living since 1939. Five days after her husband's death the intestate died. On the trial of an issue to determine the domicile of the deceased, the learned judge found as a fact that E.W. had acquired a domicile of choice in England. HELD: a widow retains her late husband's last domicile until she changes it, and, therefore, the intestate's domicile was English."

HODSON, J., said (*ibid.*):

"In this action, which concerns the estate of Mrs. Lucie Wallach, who died on July 21, 1943, the plaintiff claims to be the lawful second cousin of the deceased, who died domiciled in France or, alternatively, Germany, and, as such, to be one of the persons entitled in accordance with the law of France or Germany to share in her estate. The plaintiff denies that the Treasury Solicitor, the defendant, has an interest in the estate. The Treasury Solicitor, by his defence, denies the allegations as to domicile and the interest of the plaintiff and alleges that the deceased died intestate and domiciled in England, without leaving anyone entitled, by virtue of the Administration of Estates Act, 1925, s. 46 (1), to share in her estate, so that the Treasury Solicitor is the only person entitled to succeed to it. On these pleadings an issue was directed to be tried as to the domicile of the deceased. The deceased, having been a married woman until five days before her death and being then a widow, according to the accepted principles of English law retains her late husband's domicile until she changes it: see DICEY'S CONFLICT OF LAWS (6th Edn.), p. 111, which contains the following rule: 'A widow retains her late husband's last domicile until she changes it'. Counsel for the plaintiff, who has argued that this rule is wrong, referred me to a case in the Prerogative Court of Canterbury, *Gout v. Zimmerman* (3) ((1847), 5 Notes of

A Cases, 440), the headnote to which reads: 'A testatrix, born at Smyrna, of Dutch or Russian parents there residing, under the protection of the Dutch consulate at Smyrna, married to a British subject, and, after his death, continuing to reside during the remainder of her life in the Levant, makes a will, disposing of property in England, in the English form: HELD, that her British domicile acquired by marriage had not been changed, nor

B had her domicile of birth reverted, and the protest to the jurisdiction of the court overruled'. The proposition advanced by counsel is that the domicile which a woman acquires by marrying a man is a sort of mantle which she wears during her coverture and during her coverture only, and that when she becomes a widow she reverts automatically to her domicile of origin. That proposition was not advanced in *Gout v. Zimmerman* (3) or in another case to which I was referred, namely, *In the Goods of Raffel* (4) ((1863), 3

C Sw. & Tr. 49), where it was assumed that the rule which I have mentioned applied without any argument to the contrary being put forward. The proposition that the domicile which a married woman takes from her husband can be dropped in that way is based by counsel for the plaintiff on the use of the word 'dependent', which is used in this connection, because her domicile is said to be dependent on that of her husband, and counsel argues that when a woman's husband dies there is no reason why she should not shed her domicile with her coverture and no binding authority that she does not do so.

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"Counsel for the Treasury Solicitor, on the other hand, pointed out that the proposition has been universally accepted as one of the principles of English law for a long time and it would lead to manifest inconvenience if the contrary were to be established as the law because this form of dependent domicile applies equally to infants. Counsel instanced a case of commorientes where, for example, a woman, although, apparently, dying at the same moment as her older husband, is deemed by the Law of Property Act, 1925, s. 184, to have survived him. She, having had no opportunity of changing her domicile after his death, would be deemed, if the proposition of counsel for the plaintiff were correct, to revert automatically to her domicile of origin which might entail a most troublesome inquiry.

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"The speeches delivered in the House of Lords in *Udny v. Udny* (5) ((1869), L.R. 1 Sc. & Div. 441) all point against the validity of the proposition of counsel for the plaintiff—in particular, that of LORD WESTBURY where he used this language (L.R. 1 Sc. & Div. at p. 457): 'Other domicils, including domicile by operation of law, as on marriage, are domicils of choice'. He, therefore, included the domicile which counsel for the plaintiff prefers to call a dependent domicile under the heading of domicile of choice and that seems to me to be the appropriate heading under which to put it because when a woman marries a man she exercises a choice in the marriage and takes the consequences of that choice which in law involves the acquisition of his domicile. There is no reason why, if it is a domicile of choice, it should be lost in a way different from that in which any other domicile of choice can be lost, namely, by abandonment. Having arrived at this conclusion, I need not consider in detail the question of the domicile of origin of Mrs. Lucie Wallach herself. The domicile I have to consider is the domicile of Mr. Eugene Wallach, her husband, to whom she was married in 1906 in Frankfurt, Germany. His domicile of origin was German, he having been born in 1874 in Kassel. [HODSON, J., reviewed the evidence and concluded:]—I find that he acquired a domicile of choice in this country which existed at the time of his death. The issue, therefore, falls to be determined in favour of the Treasury Solicitor as to the English domicile and it is unnecessary to make any further finding."

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It seems to me that *Re Cooke's Trusts* (1) and *Re Wallach* (2) reached quite different results, and it appears fairly clear that *Re Cooke's Trusts* (1) was not cited to HODSON, J. I think, however, that the two cases are reconcilable. In *Re Wallach* (2) it is plain that the husband and wife had not parted. They were living together, apparently, until the husband's death and there was no conscious effort or intention of any kind on the part of the wife to change her domicile, whether it is called domicile as a dependent or domicile of choice: she was living with her husband, committed to live with him, and used his domicile, as far as she exercised her mind at all. On the other hand, in *Re Cooke's Trusts* (1) the wife had been parted for many years from her husband, believed him to be dead, and during his lifetime had an overt intention to change her domicile to that of one in New South Wales, and, therefore, had shown an intention which was entirely absent in *Re Wallach* (2). The whole matter, to some extent, is rather unreal, because, generally speaking, the question of domicile in regard to its legal effects is not present to the mind of a woman in that position. All that she is thinking about is where she is going to spend the rest of her days and where her permanent home is going to be.

In the present case the evidence is stronger in some respects. There are perfectly good reasons of a legal nature why the testatrix might have been advised to change her domicile deliberately from England to Guernsey because of the effect which it might have with regard to death duty on her death. In those circumstances, I cannot see why an intention which, as I found on the evidence, the testatrix was plainly shown to have in her mind during her lifetime, namely, to make her permanent home in Guernsey, but which could not be effective in law until her husband was dead, should not be effective in law in accordance with her intention when he died and she survived him. I have come to the conclusion in the present case that the intention which the testatrix had formed during her lifetime was only prevented by a legal situation from being transferred into a legal fact, and I do not see why it should not be assumed that her intention continued after the death of her husband, and why one should come to the conclusion that some new overt act was required when previous evidence is all consistent with there having been no different intention during her life. Accordingly, in the present case I have come to the conclusion that the testatrix had an intention to acquire a domicile of choice in Guernsey and that that intention was effective in law.

Declaration accordingly.

Solicitors: *Moon, Gilks & Moon* (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

A
CENTRAL NEWBURY CAR AUCTIONS, LTD. v. UNITY
FINANCE, LTD. AND ANOTHER (MERCURY MOTORS
Third Parties).

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 4, 5, 8,
B November 15, 1956.]

Estoppel—Estoppel in pais—Estoppel by negligence—Sale of motor car—Car registration book and car delivered by true owner on faith of proposal for hire-purchase—Hire-purchase proposal not accepted by finance company—Sale of car by proposed hire-purchaser to innocent third party who re-sold—Whether true owner estopped from denying the title of the third party.

C *Sale of Goods—Motor car—Registration book—Whether document of title.*

The plaintiffs, who were motor car dealers, had bought a second-hand car at an auction, acquiring the registration book in which the last owner, A., had not signed his name. As dealers, the plaintiffs did not register any change of ownership on their purchase. Subsequently they agreed with C. for his acquiring the car on hire-purchase. They took from C. another car in part exchange, and he completed a form of proposal for hire-purchase of the car which the plaintiffs were selling. The proposal was on the basis that a finance company would buy the car. In a dealer's statement to the finance company the plaintiffs agreed to sell the car to the finance company and stated that delivery of the car would not be made to C. except on instructions from the finance company. Notwithstanding this statement, the plaintiffs delivered the car and its registration book to C. The finance company, when the proposal was communicated to them, rejected it, as the address given by C. was fictitious. The car was subsequently sold by a man representing himself to be A., the person last named as owner in the registration book, to the third parties. The third parties' manager compared the signature on the receipt that he took from the vendor of the car with the last signature in the registration book which purported to be the signature of A., and checked that the car was not on hire-purchase. Subsequently the third parties parted with the car on hire-purchase of it by the second defendant, the car being bought on this occasion by another finance company, the first defendants. The plaintiffs brought an action for damages for conversion of the car against the second finance company and the ultimate hire-purchaser.

Held (DENNING, L.J., dissenting): by delivering the car registration book, as well as the car itself, to C. the plaintiffs had not given him the means of appearing to be the owner or of having apparent authority to sell the car, since the registration book was not a document of title to the car, and since delivery of the car without more would not have amounted to giving C. apparent authority to sell it; and therefore the plaintiffs, who were the true owners of the car, were not estopped from denying the title of the third parties to sell the car to the first defendants, and were entitled to recover damages for its conversion.

Per MORRIS, L.J.: it cannot be assumed that the person in possession of a car and its registration book is the owner of the car. The absence of a registration book when a car is being sold will naturally give rise to much inquiry. The existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership (920, letter G, post; and see p. 915, letter H, post, cf., p. 912, letter G, post.)

Appeal allowed.

[As to estoppel by negligence, see 15 HALSBURY'S LAWS (3rd Edn.) 243, para. 451; and for cases on the subject, see 21 DIGEST 399-402, 1595-1618.]

Cases referred to:

- (1) *Thompson v. Palmer*, (1933), 49 C.L.R. 547.
- (2) *Grundt v. Great Boulders*, (1937), 59 C.L.R. 675.
- (3) *Farquharson Brothers & Co. v. King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 1 Digest 377, 828.
- (4) *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] 1 All E.R. 52; [1938] A.C. 287; 107 L.J.P.C. 25; 158 L.T. 269; Digest Supp.
- (5) *Johnson v. Crédit Lyonnais Co.*, *Johnson v. Blumenthal*, (1877), 3 C.P.D. 32; 47 L.J.Q.B. 241; 37 L.T. 657; 42 J.P. 548; 1 Digest 332, 476.
- (6) *Fuller v. Glyn, Mills, Curry & Co.*, [1914] 2 K.B. 168; 83 L.J.K.B. 764; 110 L.T. 318; 3 Digest 271, 846.
- (7) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; Digest Supp.
- (8) *Moyce v. Newington*, (1878), 4 Q.B.D. 32; 48 L.J.Q.B. 125; 39 L.T. 535; 43 J.P. 191; 39 Digest 685, 2709.
- (9) *R. v. Atkinson*, (1799), 2 East, P.C. 673; 15 Digest 875, 9613.
- (10) *Lickbarrow v. Mason*, (1787), 2 Term Rep. 63; 6 East, 20, n.; 100 E.R. 35; 39 Digest 614, 2115.
- (11) *Babcock v. Lawson*, (1878), 4 Q.B.D. 394; *affd.* C.A., (1880), 5 Q.B.D. 284; 49 L.J.Q.B. 408; 42 L.T. 289; 39 Digest 535, 1460.
- (12) *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521; 64 L.J.Q.B. 308; 72 L.T. 98; 1 Digest 377, 824.
- (13) *Commonwealth Trust v. Akotey*, [1926] A.C. 72; 94 L.J.P.C. 167; 134 L.T. 33; 39 Digest 636, 2322.
- (14) *Abigail v. Lapin*, [1934] A.C. 491; 103 L.J.P.C. 105; 151 L.T. 429; Digest Supp.
- (15) *Nanka-Bruce v. Commonwealth Trust*, [1926] A.C. 77; 94 L.J.P.C. 169; 134 L.T. 35; 39 Digest 534, 1457.
- (16) *Eisinger v. General Accident Fire & Life Assce. Corp'n., Ltd.*, [1955] 2 All E.R. 897; 3rd Digest Supp.
- (17) *Pearson v. Rose & Young, Ltd.*, [1950] 2 All E.R. 1027; [1951] 1 K.B. 275; 2nd Digest Supp.
- (18) *Joblin v. Watkins & Roseveare (Motors), Ltd.*, [1949] 1 All E.R. 47; 2nd Digest Supp.
- (19) *Jerome v. Bentley & Co.*, [1952] 2 All E.R. 114; 3rd Digest Supp.
- (20) *Swan v. North British Australasian Co.*, (1863), 2 H. & C. 175; 32 L.J.Ex. 273; 159 E.R. 73; 21 Digest 291, 1036.
- (21) *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L.J.Ch. 561; 86 L.T. 491; 1 Digest 376, 823.
- (22) *Tsang Chuen v. Li Po Kwai*, [1932] A.C. 715; 101 L.J.P.C. 193; 148 L.T. 44; Digest Supp.
- (23) *Bishopsgate Motor Finance Corp'n., Ltd. v. Transport Brakes, Ltd.*, [1949] 1 All E.R. 37; [1949] 1 K.B. 322; [1949] L.J.R. 741; 2nd Digest Supp.

Appeal.

This was an appeal by the plaintiffs from a decision of His Honour JUDGE KIRKHOUSE JENKINS on June 2, 1956, in Newbury County Court, when he dismissed the plaintiffs' action, which was an action for damages for conversion of a motor car, on the ground that they were estopped by their conduct from denying the title of third parties to the car. The third parties had bought the car in good faith from a swindler, to whom the plaintiffs had delivered the car with its registration book in anticipation of a hire-purchase transaction for the acquisition of the car from them becoming binding. The plaintiffs were motor dealers and the true owners of the car. From them one Cullis acquired the car on a purported hire-purchase transaction and sold it to the third parties, who also were motor dealers, representing himself to them by a different name as the last purchaser named in the car registration book, possession of which and

A also of the car had been delivered to him by the plaintiffs. From the third parties the car was acquired by the second defendant by hire-purchase, the car being sold on that transaction to the first defendants, a finance company. The facts appear in the first judgment.

J. T. Molony, Q.C., and Eric Stockdale for the plaintiffs.

B *G. J. Bean* for the third parties.

Cur. adv. vult.

Nov. 15. The following judgments were read.

DENNING, L.J.: In July, 1947, a new Morris car was registered with the Dorset County Council with the index number CFX 805 and a registration book was issued for it. In October, 1948, the first change of ownership was registered. C It remained thenceforward in the same ownership until Jan. 23, 1955, when the car was sold to one, Mr. C. Ashley, of 11, Beaulieu Road, Christchurch. It was then registered with the Hampshire County Council in the name of C. Ashley. The space in the log book for "2nd change" was filled in with Mr. Ashley's name and address, with the date stamp "22nd January 1955" against the entry, stamped this time by the Hampshire County Council. Mr. Ashley did not D trouble, however, to sign his name in the space provided for the purpose. This appears to be a common failing, as neither of the two previous owners had done so.

In September, 1955, Mr. Ashley appears to have put the car into a sale by auction at Southampton when it was bought by a dealer for £278. The dealer was Mr. John Rolls, acting on behalf of the Central Newbury Car Auctions, Ltd., the plaintiffs. The plaintiffs took possession of the car and the registration book, E but they did not register themselves as the owners. There is no need for a dealer to register a transfer to himself, so long as he is holding the car only for re-sale and is intending to use it only with trade plates. In that case he need not send in the registration book or fill in a "change" space but he ought to notify the council that he holds the car. This is a considerable advantage to a dealer, because it means that the registration book contains the names of fewer F owners and is more valuable on that account. I think we should assume that the plaintiffs, as dealers, notified the council that they held the car, but they did not register any change of ownership to themselves. So Mr. Ashley's name still remained in the book as if he was the latest owner.

The plaintiffs held the car and the registration book until Nov. 4, 1955, when a distinguished-looking stranger arrived at their showroom, wanting to buy a G car. He came in a Hillman Minx car and offered to leave it in part exchange. Mr. Rolls showed him the Morris which he had in stock, and it was eventually arranged that he should take the Morris on hire-purchase terms, and leave the Hillman in part exchange. He gave his name as Cullis. In order to carry out the transaction, the plaintiffs got Cullis to sign forms for hire-purchase whereby a finance company, South Western Securities, Ltd., would buy the Morris car H from the plaintiffs for £337 10s. and let it on hire-purchase to Cullis. In calculating the instalments, a finance charge of £40 10s. had to be added to the price of £337 10s., making £378 in all, less £112 10s. allowance for the Hillman in part exchange, giving a net amount of £265 10s. payable by Cullis by twenty-four monthly instalments. Cullis signed a proposal form in which he offered to enter into a hire-purchase agreement with the finance company. In that form I he gave his permanent address as 32, Grange Road, Swindon, Wilts., and his employer's name as Franklin, Cromwell Street, Swindon. In addition, the secretary of the plaintiff company signed a dealer's statement in which they agreed to sell the car to the finance company for £337 10s., the property to pass as soon as the finance company accepted the proposal, credit to be given for the £112 10s. The dealer's statement also contained the words:

"We recommend the proposed hirer who has completed the proposal form as being a suitable and responsible person to enter into the proposed

hire-purchaser agreement . . . Delivery of the vehicle has not been made to the proposer and will not be made to the proposer except on your instructions. It is further agreed that this transaction shall be upon a pro forma basis only until you notify us of your acceptance."

The reference to a pro forma basis is to be explained by the fact that, in addition to those two documents, two further documents were signed in anticipation of the deal going through. One was a form of hire-purchase agreement signed by Cullis. The other was a form of receipt for the car signed by Cullis. They would not be effective until the finance company accepted the proposal. To use the words of Mr. Rolls himself, "Forms are tentative pending the transaction going through. The finance company can refuse or accept".

Now comes the significant thing which has given rise to all the trouble. The plaintiffs, having got those forms signed and the Hillman car in their possession, did not wait to see if the finance company accepted the proposal. They straightway let Cullis have the Morris car and the registration book applicable to it. He drove off with the car and the log-book and they never saw him again. The plaintiffs sent the documents off by post that night to the finance company. The very next morning the finance company telephoned to say that they thought Cullis was bogus. The address he gave in Swindon was fictitious. There was no such address. They refused, of course, to accept the proposal. The plaintiffs tried to get in touch with the employers but they were also fictitious. The plaintiffs then told the police. They also made inquiries about the Hillman Minx car which Cullis had left with them; and they discovered that it was not his to sell. It was on hire-purchase. They paid £100 to the lender so as to get it clear for themselves. The judge finds that Cullis was a swindler and that the statements made by him were a tissue of lies.

Three days later, on Nov. 7, 1955, a man driving the Morris car called at the Mercury Garage, the third parties' garage, at Birkenhead, many miles from Newbury. He was probably Cullis but he did not give that name. He gave the name of Ashley, which was, it will be remembered, the name shown in the registration book as that of the latest owner. He had signed "C. Ashley" in his own handwriting in the space provided for the purpose. He produced the registration book and explained that he wanted to sell the car. The manager of the Mercury Garage tested the car. He also took steps to see if the car was on hire-purchase. There is a convenient machinery set up by the trade for ascertaining this. The finance companies have established a hire-purchase institute where they keep a register of every car which is on hire-purchase. Whenever a dealer wants to know if a car is on hire-purchase, he only has to telephone his finance company and they will tell him almost at once. In this case, the manager of the Mercury Garage ascertained within an hour that there was no hire-purchase on the Morris. He took the man's word that he was Ashley (the latest owner in the registration book) and agreed to buy the car for £200. He took delivery of the car and the log-book, and he gave the man a crossed cheque for £200 in favour of C. Ashley and got a receipt from him for the money. The man returned later, however, with a plausible request asking the manager to open the cheque. The manager had noticed that the signature "C. Ashley" on the receipt was the same as the last signature on the log-book. He thought that verified his identity. The man had also a van-load of furniture outside and said he was moving into the district, which engendered confidence. So the manager opened the cheque. He cancelled the crossing and the man got £200 from the bank. He has not been seen since. Mercury Motors, the third parties, afterwards sold the Morris car to Unity Finance, Ltd., the first defendants, who let it on hire-purchase terms to Mr. Powell, the second defendant.

When the plaintiffs found out what had happened to the Morris car, they claimed that it still belonged to them and that they were entitled to have it back. When it was not returned, they brought an action against the first

A defendants and the second defendant for damages for conversion of it; and those defendants have brought in Mercury Motors as third parties. The value of the Morris has been agreed at £240.

The judge found that the plaintiffs had been guilty of culpable negligence in letting Cullis have the Morris car and the log-book. He said:

B "The plaintiffs trusted Cullis implicitly and were the victims of an impudent confidence trick, but the plaintiffs were most casual and negligent in their conduct of the business . . . Mr. Rolls (their director) was casual in the extreme and gave no thought to the possibility of the finance company rejecting the proposal . . . It is difficult to imagine such a reckless proceeding . . . It is difficult to imagine a worse example of culpable neglect in a commercial transaction than that of delivering a car with the registra-
C tion book."

He thought that their conduct was such as to estop them from asserting that the Morris car still belonged to them. He therefore gave judgment for the defendants. I should point out, however, that the judge thought that the third
D parties were not as prudent as they might have been. He said that it would have been prudent for the manager to persist in giving a crossed cheque or at least in postponing the transaction for a day or two, but he acted in good faith and had no suspicion of fraud.

This case raises the ever-recurring question: Which of the two innocent persons is to suffer by the fraud of a third? It is the familiar contest between the original owner who had been deceived into parting with his property, and the
E innocent purchaser who has been deceived into buying it. The original owner relies on the general principle that no man can acquire a title to a chattel from anyone who has himself no title to it: whereas the innocent purchaser says that the original owner is estopped from asserting that principle against him. The innocent purchaser says that the original owner has taken so large a part
F in enabling the rogue to dispose of the property that he should not be heard to deny the purchaser's title to it. In other words, the owner is precluded by his conduct from denying the rogue's authority to sell within the meaning of s. 21 of the Sale of Goods Act, 1893. The judge has held in this case in favour of the innocent purchaser. The original owner appeals to this court.

Seeing that here we are considering the doctrine of estoppel by conduct, I would like to state the basis of it. It is this: starting with an innocent person who has been led to believe in a state of affairs which he takes to be correct
G (in this case the third party has been led to believe that the rogue was the owner of the car) and has acted on it, the first question is how has this innocent person been led into this belief? If it has been brought about by the conduct of another (in this case by the conduct of the original owner) who, though not solely responsible, nevertheless has contributed so large a part to it that it would
H be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it. In so stating the basis of estoppel by conduct, I am relying on the well-considered analysis by DIXON, J., in *Thompson v. Palmer* (1) ((1933), 49 C.L.R. 547), and *Grundt v. Great Boulders* (2) ((1937), 59 C.L.R. 675). His formulation of the principle is the most satisfactory that I know. As he points out, the basis of estoppel
I is that it would be unfair or unjust to allow a party to depart from a particular state of affairs which another has taken to be correct; but the law does not leave the question of fairness or justice at large. It has defined with more or less completeness the kinds of participation by a party which will suffice to work an estoppel against him. They are to be found in the decided cases. We are here concerned with the conduct of a true owner in letting a chattel out of his possession. The question is what conduct on his part is regarded by the law as so serious that it would be unfair or unjust to allow him afterwards to claim it from an innocent purchaser?

To the question thus posed, I answer that on the authorities the mere fact that the true owner is careless in the custody of his goods or in the indicia of title to his goods is not sufficient to prevent his afterwards asserting his title to them. If he leaves his house wide open so that thieves enter and steal his goods, he can recover them from any person into whose hands they come, unless they have been sold meanwhile in market overt. If he entrusts his servant with the custody of goods, and the servant turns dishonest and sells them to outsiders, the true owner can recover them, no matter that he was careless in trusting the servant so far. The cases of *Farquharson Brothers & Co. v. King & Co.* (3) ([1902] A.C. 325) and *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (4) ([1938] 1 All E.R. 52) fall into that category. In those cases the delivery orders and railway receipts were, in LORD WRIGHT's words (*ibid.*, at p. 61), "no more significant for this purpose than the possession of the goods would have been". Applying those cases to illustrations put in argument, I would say that, if the true owner carelessly leaves his log-book in his car and a thief steals both car and log-book then the true owner can recover them from anyone into whose hands they come. So, too, the true owner could recover them if he had entrusted both car and log-book to his servant for some purpose, e.g., so as to get the licence renewed, and the servant had turned thief and sold them.

Likewise at common law, the mere fact that the true owner consents to someone else being in possession of his goods, or of the indicia of title to the goods, is not sufficient to prevent his afterwards asserting his title to them (see *Johnson v. Crédit Lyonnais Co.* (5) (1877), 3 C.P.D. 32) unless he deposits them with an agent or broker so as to clothe him with apparent authority to dispose of them (see *Fuller v. Glyn, Mills, Curry & Co.* (6), [1914] 2 K.B. 168). This rule of the common law was thought by Parliament to be too favourable to the true owner. It has therefore been modified by the Factors Act, 1889, s. 2 and s. 9, and the Sale of Goods Act, 1893, s. 25. There is a lesson to be learnt from this. The courts, in favouring the original owner at the expense of the innocent purchaser, have run counter to the needs of a commercial country. As SCRUTTON, L.J., has pointed out:

"The history of the Factors Acts is restriction of their language by the courts in favour of the true owner, followed by reversal of the court's decisions by the legislature";

see *Folkes v. King* (7) ([1923] 1 K.B. 282 at p. 306). It is common ground that those Acts do not apply to this case.

In all the cases of which I have spoken so far, the true owner has only been careless in the custody of his goods or has only consented to another having possession of them. He has not done anything to part with the property in them. Herein lies an important distinction. It is one thing to part with possession of your goods. It is quite another to part with the property in them. If a man is induced to part with the property in his goods or with the power of disposing of them, then, even though he is induced thereto by the fraud of a rogue, he cannot afterwards avoid the transaction as against an innocent person who takes in good faith and for value (see *Moyce v. Newington* (8) (1878), 4 Q.B.D. 32). The technical reason sometimes given is because fraud makes a transaction voidable and not void; but the real reason is because the owner intended to part with the property in the goods, or has behaved as if he so intended. It may be that he only intended to pass the property in the goods conditionally on being paid or on some other condition, but nevertheless he cannot recover them from the innocent purchaser. It would be unjust to allow him to do so when he intended to part with the property in them and has armed the rogue with the goods or the means of disposing of them. He may have made some private conditions or reservations, but they cannot affect an innocent purchaser who has no knowledge of them. The owner has behaved as if he intended to pass the property and must take the consequences.

- A In so stating the law I have had in mind the classic distinction between obtaining goods by false pretences and larceny by a trick. It has long been accepted that, if the goods have been obtained from an owner by false pretences, he cannot recover them from an innocent purchaser; whereas, if they have been obtained by larceny by a trick, he can. The distinction between the two is that in obtaining by false pretences the owner intends to part with the property in the goods, whereas in larceny by a trick he only intends to part with the custody or possession. The cases show that, if a person, through the fraudulent representation of another, delivers to him a chattel, intending to pass the property in it to him or to someone else (*R. v. Atkinson* (9) (1799), 2 East, P.C. 673) or to give him power to pass the property in it at the present or some future time, conditionally or unconditionally (*Folkes v. King* (7), per BANKES, L.J., [1923] 1 K.B. at pp. 293-296 and per SCRUTTON, L.J., at pp. 306-308), the fraudulent person cannot be indicted for larceny but only for obtaining the chattel by false pretences. I realise that in the criminal law the distinction between false pretences and larceny has ceased to be of practical importance because, on a charge of one, a man may now by statute be convicted of the other*; but the distinction is a real one which has its parallel in the civil law.
- D Apart altogether from the criminal law about false pretences, the cases show that, if a man intends to part, not only with the possession of goods, but also with the property in them or the power of disposing of them, he is not entitled to recover them from an innocent purchaser, nor is he entitled so to recover them if he has behaved as if he had that intention by arming the recipient with all the documents necessary to that end. It is this explanation which underlies such decisions as *Lickbarrow v. Mason* (10) ((1787), 2 Term Rep. 63): *Babcock v. Lawson* (11) ((1878), 4 Q.B.D. 394), *Henderson & Co. v. Williams* (12) ([1895] 1 Q.B. 521) and *Commonwealth Trust v. Akotey* (13) ([1926] A.C. 72). A close analogy in land law is to be found in *Abigail v. Lapin* (14) ([1934] A.C. 491). I would say a word about *Commonwealth Trust v. Akotey* (13), which has sometimes been criticised. It should be read with the companion case next to it in the Law Reports, *Nanka-Bruce v. Commonwealth Trust* (15) ([1926] A.C. 77). The justice of the decision then becomes apparent. In the one case the owner parted with the property to the rogue. In the other case he behaved as if he had. In each case the innocent purchaser was held to be protected. It would be deplorable if in the one case the innocent purchaser was protected and the other not. It would, as the Privy Council said, bring confusion into mercantile transactions and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (10).
- G Applying these principles to the present case, I think it is quite plain that when the plaintiffs handed the Morris car to Cullis they intended to part with all their property in it; to the finance company, not to Cullis, but that makes no difference. They intended to part with the property just as much as if they had agreed to sell it to Cullis. They intended that the transaction should go through on hire-purchase terms; but that only meant that the sale was in law to the finance company, not to Cullis. The "dealer's statement" which they signed shows that they intended that the property should pass "as soon as the finance company accepted the proposal". That condition about the finance company's acceptance was a private condition or reservation which did not derogate from the intention of the plaintiffs to part with the property. It did not enter their heads that the finance company would refuse to accept the proposal. They assumed without question that the finance company would accept. That is why they handed over the car and log-book to Cullis without any thought of seeing him again. They did not verify his address. They did not even ask him where he was going. Once he left their showrooms, he was gone beyond trace. So was the Morris car and log-book. I do not suppose

* See the Larceny Act, 1916, s. 44 (3), (4); 5 HALSBURY'S STATUTES (2nd Edn.) 1039.

they would have dreamt of letting him have it but for the fact that they had got the Hillman in part exchange. They had the Hillman in their hands and they meant to keep it. Just as they intended to take the property in the Hillman unto themselves, so at the same time they intended to part with the property in the Morris. Even now they do not mean to part with the Hillman or give any credit for it. If they are right in their claim in this action, they will recover the Morris car, or its full value which comes to the same thing, and they will keep the Hillman as well: and Mercury Motors will be worse off by £200. That does not seem to me to be right. I know that the Hillman is not worth as much as the plaintiffs thought it was, because it was on hire-purchase and they had to pay £100 to clear it, but they could have found that out beforehand if they had telephoned to the Hire-Purchase Institute. At any rate, it was worth something and they are so much the better off for having it.

This case seems to me to bear a striking resemblance to the recent decision of LORD GODDARD, C.J., in *Eisinger v. General Accident Fire & Life Assce. Corp., Ltd.* (16) ([1955] 2 All E.R. 897), where the owner handed over a car and log-book to a distinguished-looking stranger in return for a worthless cheque. The only difference is that in that case there was a sale to the rogue himself and here there was a sale on hire-purchase. There the rogue passed a worthless cheque. Here he signed a worthless hire-purchase form. LORD GODDARD in that case said (*ibid.*, at p. 898):

“The claimant did not lose the car; he lost the proceeds of sale.”

So here you cannot say that the plaintiffs lost the Morris car. What they lost was the money they expected to receive from the finance company; and that was entirely their own fault, because they parted with the car when they ought not to have done. It should be remembered that, in the “dealer’s statement”, they told the finance company that they would not deliver the car to Cullis except on the instructions of the finance company. Yet they did deliver it, and by so doing effectively debarred themselves and the finance company from any hold over it. This shows that they did not intend to reserve any property in themselves. They intended to hand over the car to Cullis beyond recall, in the expectation that they would get their money from the finance company. At any rate, if they had not got that intention, they behaved as if they had.

The point is brought home by the fact that they handed over the log-book to Cullis. Everyone knows that the log-book is good evidence of title; see *Pearson v. Rose & Young, Ltd.* (17) ([1950] 2 All E.R. 1027). The wise owner keeps it at home or in a place separate from the car. Thieves who steal cars know it well enough. Hence the devices to which the criminal courts become accustomed. If a thief wishes to dispose of a stolen car, not having its log-book, he will get hold of the log-book of some other car and alter the number of the stolen car to conform with the number in the log-book, or he will alter the number in the log-book to correspond with the number of the car. To dispose of a car without the log-book is as difficult as to dispose of land without the title deeds. In each case the thief must resort to forgery if he wishes to get rid of it to an innocent person. The plaintiffs must have been aware of the importance of the log-book. They must have known that, when they handed both car and log-book over to Cullis, they were arming him with complete dominion over it, subject only to the rights of the finance company which they assumed would come into force but which were not in fact then in force, as they well knew. They clearly intended to reserve no dominion over the car themselves.

How, then, does the matter stand? An innocent purchaser, who buys both car and log-book, acts on the assumption that the seller is the owner of them. That is a very reasonable assumption to make, at any rate when the purchaser has checked and found that it is not on hire-purchase. Unbeknown to the purchaser, the seller is a rogue. It would be unfair and unjust to allow the original owner to go behind that assumption when he himself intended to part

A with the property in the car, or at any rate behaved as if he intended to part with it, and has armed the rogue with both car and log-book, and thus enabled him to dispose of them.

B It is said, however, that the original owner owed no duty to the innocent purchaser. I do not agree. When the original owner handed over the car and log-book to a complete stranger, intending to part with the property in them, he ought to have foreseen the possibility that the stranger might try to dispose of them for his own benefit to someone or other. That is what does happen when you hand over goods to a stranger reserving no right to yourself. The original owner owed a duty to any person to whom the stranger might try to dispose of them. The case comes within the words of LORD WRIGHT in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (4) ([1938] 1 All E.R. at p. 62):

C “The duty may be, in the words of BLACKBURN, J., ‘to the general public of whom the person is one’ . . . His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority.”

D I would dismiss the appeal.

HODSON, L.J.: The plaintiffs’ claim is for damages for conversion of a motor car. In the event of the claim succeeding, damages have been agreed at £240. By their amended defence, the first defendants have alleged that the plaintiffs, by their conduct, are estopped from denying the authority of one Frank Cullis to sell the car in question because they permitted him, being a stranger to them, to take possession of the car and its registration book without having made any or sufficient inquiries about him and before he was accepted as a client by a hire-purchase company.

E This defence succeeded before the learned county court judge, who gave judgment against the plaintiffs on the ground that this plea was established. The facts were as follows: In September, 1955, the plaintiffs bought the car, a Morris, for £278, and received the registration book therewith. On p. 3, in the column headed

F “Name and address of the person registered with the council whose date stamp is affixed hereto as the person keeping the vehicle the particulars of which are given on p. 7”,

G there appears this entry: “2nd change, C. Ashley, Bonniebrae, 11 Beaulieu Road, Christchurch” followed by the signature “C. Ashley.” In the same space is the date stamp of the Hampshire County Council dated Jan. 22, 1955. The probabilities are, though there is no specific evidence of this, that the date stamp and the whole of this entry except the signature were on the book at the time of the purchase in September, 1955.

H On Nov. 4, 1955, a man who was a complete stranger to the plaintiffs, giving his name as Frank Cullis, arrived at the plaintiffs’ showroom in Newbury at about 4.30 p.m. in a Hillman car. A deal was arranged on the terms that Cullis would hand over the Hillman to the plaintiffs at a price of £112 10s. and the plaintiffs would sell the Morris to a finance company and the finance company would enter into a hire-purchase agreement with Cullis. Cullis signed a proposal form addressed to the finance company giving the necessary particulars, including his address, which he gave as 32, Grange Road, Swindon, and that of his employers. Both of these pieces of information turned out to be false. Cullis was not the owner of the Hillman and disappeared, having been permitted by the plaintiffs to drive the Morris away and to take the registration book with it.

I Cullis had also signed an undated printed memorandum of agreement between the finance company and himself, whereby the company purported to sell the Morris car to the hirer on the terms contained in the agreement. He also signed a

receipt for the Morris car dated Nov. 5, 1955. These forms were prepared by the plaintiffs in his presence in anticipation of the transaction going through. A

The transaction fell through because the finance company discovered that Cullis was a rogue; but the plaintiffs had trusted Cullis. There was no contractual relationship between the plaintiffs and Cullis and they were the victims of larceny by a trick. The plaintiffs had a good title to the Morris car and simply permitted Cullis to drive it away and take the registration book with him. B

The subsequent history of the matter is that on Nov. 7 a man driving a Morris car, no doubt the man who had called himself Cullis three days earlier, arrived at the Mercury Garage, Birkenhead, now passing under the name of Ashley, produced the registration book (presumably having himself signed "C. Ashley" in the appropriate space) and sold the car to the Mercury Garage for £200 in cash. The car was sold to Unity Finance, Ltd., the first defendants, who entered into a hire-purchase agreement with the second defendant, whose name appears now on the registration book in the space reserved for third change. C

The plaintiffs rely on the maxim *Nemo dat quod non habet*. The question for determination was thus stated by the learned county court judge: What representation did the plaintiffs make by the unconditional delivery of the car together with the registration book to a stranger? D

First it is to be noticed that the registration book is not a document of title as defined by s. 1 (4) of the Factors Act, 1889. This was pointed out by CROOM-JOHNSON, J., in *Joblin v. Watkins & Roseveare (Motors), Ltd.* (18) ([1949] 1 All E.R. 47). An examination of the book shows that its primary purpose is to show who is the person liable to pay the road fund licence tax in respect of the vehicle. On pp. 3 and 4 there is a column headed E

"Name and address of the person registered with the council whose date stamp is affixed hereto as the person keeping the vehicle the particulars of which are given on p. 7",

and at the foot of each of those pages in leaded type appear these words:

"Important. The person in whose name a vehicle is registered may or may not be the legal owner of the vehicle." F

It is quite true, as CROOM-JOHNSON, J., pointed out, that in the motor trade a wise purchaser of a car asks that the registration book may be handed over too, as it is usually some evidence of bona fides unless the vendor has stolen both car and book at the same time. Since the keeper of the car is specifically instructed to keep the book in a safe place not in his car, a stolen car will not normally be accompanied by the registration book. This point was emphasised in *Pearson v. Rose & Young, Ltd.* (17) ([1950] 2 All E.R. 1027) (a case arising under the Factors Act, 1889), where the decision of the court was that a mercantile agent dealing with a car without the book was not dealing in the ordinary course of business. G

The mere handing over of a chattel to another does not create an estoppel, and there will be no estoppel unless the doctrine of ostensible ownership applies, as, e.g., when the owner gives the recipient a document of title or, as has often been said, invests him with the indicia of ownership. This doctrine was first applied by a common law court to a commercial transaction by ASHHURST, J., who pronounced in *Lickbarrow v. Mason* (10) ((1787), 2 Term Rep. 63 at p. 70), the famous dictum: H

"We may lay it down as a broad general principle, that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." I

This dictum has been said to be too wide for general application. See the observations of LORD LINDLEY in *Farquharson Brothers & Co. v. King & Co.* (3) ([1902] A.C. 325 at p. 343), where he pointed out that it could not be relied on

A without considerable qualification. The noble Lord thought (*ibid.*, at p. 343), that the word "enable" introduced an element of error. The EARL OF HALSBURY, L.C., in the same case, speaking of the word "enabled" as used by an American judge (SAVAGE, C.J.), in like context, said (*ibid.*, at p. 332):

B " . . . in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty ? "

C As DONOVAN, J., pointed out in *Jerome v. Bentley & Co.* (19) ([1952] 2 All E.R. 114 at p. 118), everything depends on the construction of the word "enabled" in ASHHURST, J.'s dictum, for, if I carelessly leave my front door open so that a thief walks in and steals my silver, I have in a sense enabled him to steal it by not locking my door; but that does not prevent my recovering it from some innocent purchaser from the thief otherwise than in market overt.

D In *Lickbarrow v. Mason* (10), the facts were that an unpaid vendor of goods shipped them to the purchaser and indorsed to him the bill of lading. The purchaser transferred the bill of lading to a sub-purchaser and became insolvent before the arrival of the goods. The vendor asserted a right to stop the goods in transitu, but it was held that he could not assert this right against the sub-purchaser because, by his conduct in indorsing over the bill of lading to the purchaser, the vendor had enabled the purchaser to represent himself as the owner of the goods and so to deceive the sub-purchaser. The word "enabled" was therefore not apparently used in any extended sense by ASHHURST, J.

E It is said that the negligence of the plaintiffs in parting with the registration book was a breach of a general duty owing to the whole of the public or at any rate that section of it who might become purchasers of motor cars, for, as BLACKBURN, J., said in *Swan v. North British Australasian Co.* (20) ((1863), 2 H. & C. 175 at p. 182), there

F " . . . must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy . . . "

G This conception of duty was accepted by the Privy Council in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (4) ([1938] 1 All E.R. 52) where the topic of estoppel was discussed at length.

H The plaintiffs do not deny that, by negligently allowing the registration book to fall into the hands of the thief, they facilitated his fraudulent conduct, but they deny that they were in breach of any duty owing to the general public any more than the man who leaves his house unlocked as in the example given by DONOVAN, J. In my judgment the case falls to be determined, not on a consideration of negligence, but on what is the nature of the representation made by the delivery of the registration book. The book itself is not a document of title; its terms negative ownership and it contains no representation by the plaintiffs or anyone else that the thief was entitled to deal with the car as his own. I think that counsel for the plaintiffs was right in saying that, while a person in possession of a chattel may reasonably be thought to be the owner when he offers it for sale, the case of a person in possession of a motor car does not differ in kind, although the absence of the registration book detracts from the signification of possession.

I The case is entirely different where, as in *Henderson & Co. v. Williams* (12) ([1895] 1 Q.B. 521) in the words of LORD HALSBURY (*ibid.*, at p. 525):

" There may be a question where, although no property had in fact passed, yet the true owner has allowed another person to hold himself out as the

owner in such a way as to make an innocent person enter into a contract, which contract being performed cannot be set aside.”

An interesting example of the application of the same doctrine appears in *Abigail v. Lapin* (14) ([1934] A.C. 491), a case dealing with a conflict of equities. The Privy Council rejected the view of the majority and accepted that of the minority of the High Court of Australia. In the dissenting judgment of two members of the High Court of Australia, GAVAN DUFFY and STARKE, JJ., there is found this passage (*ibid.*, at p. 499):

“In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail . . . ”

Applying the principle to the facts of this case I cannot say that the plaintiffs armed the thief with the power to go into the world as the absolute owner of the Morris motor car. The handing over of the registration book had no such effect.

Rimmer v. Webster (21) ([1902] 2 Ch.D. 163), is another example. That was a case where certain stock had been transferred to a broker by the owner, with instructions to sell it, but the broker abused his position as transferee of the stock in order to borrow money for his own purposes on its security. FARWELL, J., held that the borrower's equity must prevail, thus stating the principle (*ibid.*, at p. 173):

“ . . . when . . . the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee.”

This decision was approved by the Privy Council in *Tsang Chuen v. Li Po Kwai* (22) ([1932] A.C. 715) and also in *Abigail v. Lapin* (14).

In my opinion in this case the plaintiffs did not give the thief the means to represent himself as the owner of the Morris car by handing him a document which stated the precise opposite.

Similarly, *Fuller v. Glyn, Mills, Curry & Co.* (6) ([1914] 2 K.B. 168), discussed by the Privy Council in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (4), was a case where the plaintiff had left share certificates in the hands of the stockbrokers. The certificates were in the name of the person from whom the plaintiff had bought the shares and bore on them an indorsed form of transfer executed by the seller. The stockbrokers used the certificates to obtain an advance for themselves. On their bankruptcy, the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it and, if produced to a third person, calculated to convey to that third person that such an authority existed. Such cases lend no authority in my view for the proposition that a car registration book, if produced to a third person, is calculated to convey to that person that authority exists to deal with the car as owner. I would allow the appeal.

MORRIS, L.J.: The plaintiffs were undoubtedly the owners of a Morris car and the question arises whether, as a result of any of the events that occurred, they have been deprived of their ownership. Being utterly deceived by an apparently trustworthy man calling himself Cullis, they gave him possession of the car. Cullis was not going to buy the car from the plaintiffs. The project was that the car would be sold by the plaintiffs to a hire-purchase company from whom Cullis would hire. In these circumstances, it is not suggested that the

A provisions of s. 9 of the Factors Act, 1889, or of s. 25 of the Sale of Goods Act, 1893, became applicable; nor is it suggested that Cullis was a mercantile agent or that s. 2 of the Factors Act, 1889, applies. The situation is not therefore governed by the decision in *Pearson v. Rose & Young, Ltd.* (17) ([1950] 2 All E.R. 1027).

The Morris car was later sold by someone to Mercury Motors in Birkenhead.
 B Whether such person was Cullis, then calling himself Ashley, or was someone else who called himself Ashley, he had no sort of right or authority to sell. There was no sale in market overt as in *Bishopsgate Motor Finance Corp'n., Ltd. v. Transport Brakes, Ltd.* (23) ([1949] 1 All E.R. 37). How then is it said that the third parties acquired a title to the car? *Nemo dat quod non habet*. It is said that the plaintiffs are "precluded from denying" the authority of such person,
 C whoever he was, to sell. Section 21 (1) of the Sale of Goods Act, 1893, provides:

"Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

D Now it is clear that the person who purported to sell the Morris car to the third parties was not the owner of the car and he did not sell it under the authority or with the consent of the owner. The suggestion is therefore that, if possession of a car and of its registration book is given to someone who has no authority to sell but who wrongly purports to sell, the true owner may lose his ownership.

E Perhaps, however, the suggestion is more limited and should be stated as being that, if an owner negligently gives possession of a car and of its registration book to someone who has no authority to sell but who wrongly purports to sell, the true owner may lose his ownership. The element of negligence so introduced involves and implies a duty to take care and to be circumspect in regard to one's own property. That in turn raises the question to whom the duty is owed. So
 F as to cover every potential purchaser, it must therefore be asserted that the owner owes a duty to the whole world.

What is said in the present case is that the plaintiffs gave Cullis possession both of the car and of the registration book and were negligent in so doing. It is said, therefore, that, because of their conduct in being negligent, they are precluded from denying that Cullis had any authority to sell. In other words, it is said
 G that they cannot be heard to say to the defendants that Cullis had no right to sell. Why? Not because they were deceived by Cullis into letting him have the car—but because they also let him have the registration book. This must involve that if A gives to B possession of A's car with its registration book, A cannot be heard to say that he has not given to B an "authority to sell". This proposition seems to me to be far-reaching and to involve giving to a registration book a
 H significance which it does not possess.

When Cullis presented himself at Birkenhead, he was a complete stranger to the third parties. They accepted what he said to them. They believed that he was Mr. Ashley, who was selling his own car. They, of course, did not know that the car belonged to the plaintiffs and had no sort of thought of the plaintiffs in their mind. There was no question of any kind of representation from the
 I plaintiffs. The third parties proceeded to buy because they were duped by Cullis. Cullis would not have had the registration book but for the decision of the plaintiffs to allow him to have it, but, so far as the third parties were concerned, they merely knew what Cullis said to them, coupled with the fact of his physical possession of the car and the registration book. If the plaintiffs are to be precluded from denying Cullis's authority to sell, it seems to me that it must be because of the mere circumstance that they gave possession of the book as well as the car to Cullis. If they had given the car and book to Cullis in circumstances which involved no criticism on them and without any carelessness, the situation

would have been exactly the same so far as the third parties are concerned. A
Therefore, it seems to me that the plaintiffs should only lose their ownership
or be precluded from asserting it if it can be said that, by parting with their car
and its registration book, they endowed the possessor of these with an apparent
authority to sell. The proposition must be that, though no apparent authority to
sell can be assumed from mere possession of a car nor from mere possession of a
car registration book, the possession of a car with its book carries an apparent B
authority to sell. If the third parties can assume that Cullis had a right to sell
because Cullis had the car and its book, then it seems immaterial whether the
plaintiffs put Cullis into possession because they were deceived without any
carelessness on their part or because they were deceived and were in some ways
careless. It cannot be that ownership is lost on the basis of enduring punishment
for carelessness. The improvident householder who has left a window open at C
night which gives easy access for a thief is not in a worse position in asserting
ownership of stolen articles than is the cautious householder who has checked the
secure closing of his house.

It is doubtless true that criticism, particularly when available in the light of
after events and after acquired knowledge, can be levelled against the plaintiffs;
but it hardly seems entirely appropriate that the criticism should come from the D
Birkenhead purchasers, the third parties. Are the plaintiffs to be estopped
by negligence while the purchasers may be negligent with impunity? Nor does
it seem fitting to weigh in the balance the respective criticisms of the actions of
the parties and to see in which direction the scales are tipped. The particulars
of negligence in this case were pleaded as follows:

“Further the plaintiff company is estopped from denying the authority E
of one Frank Cullis to sell the said Morris motor car by reason of the following
facts: Particulars of conduct raising estoppel: the plaintiff company per-
mitted the said Frank Cullis who was a stranger to them to take possession
of the said motor car and its registration book without having made any or
any sufficient inquiries about the said Frank Cullis and before he was
accepted as a hirer by a hire-purchase company.” F

It is certainly correct that the plaintiffs did give Cullis possession of the car
and the book without checking the truth of what he told them and before he was
accepted as a hirer by a hire-purchase company. They made the mistake of
being deceived by a plausible trickster. The evidence was that Cullis appeared
“distinguished”; he was well spoken and well dressed. His talks with Mr. Rolls G
lasted for half an hour. He had brought with him a Hillman car, which he said
was his own and which he left with Mr. Rolls: he purported to sell it in part
exchange. (The evidence in regard to this car is incomplete. The evidence does
not show whether a registration book for it was handed over. The car was in fact
on hire-purchase but the evidence does not show who was the hirer. The evidence
is that Mr. Rolls had later to pay £100 to a finance company in respect of it. As H
there is no mention of having to pay anyone else or of having to deal with anyone
else, the inference would appear to be that Cullis was the hirer of the car.) But
if the plaintiffs are to be criticised for being deceived by Cullis and for not
verifying what he said, it seems to me that similar criticism could apply against
the third parties. When Cullis went to see them, he called himself Mr. Ashley.
The evidence of Mr. Clarke, of the third parties, was that the man was “Dis- I
tinguished looking—not a man you would take to be a crook”. Mr. Clarke did
make an inquiry whether the Morris car was on hire-purchase; but no inquiry
was made whether the man really was Mr. Ashley. He was unknown to the
third parties, and they made no inquiries about him. They were impressed by
his distinguished appearance just as the plaintiffs had been a few days earlier.
“Mr. Ashley” said that he was selling the car because he had incurred expenses
in moving and he gave as his new abode an address in Wallasey that could
not have been far distant. No inquiry was made whether “Mr. Ashley” was

A moving to that address. So convincing was "Mr. Ashley", that he persuaded Mr. Clarke to buy the car for £200 and when Mr. Clarke wrote a crossed cheque for that amount "Mr. Ashley" further persuaded him to make it an open cheque. So "Mr. Ashley", a complete stranger, left a car which did not belong to him and soon after went on his way the richer by £200 in cash.

B If Mr. Clarke had not been deceived, just as Mr. Rolls was, it may be that "Mr. Ashley" or "Cullis" might not have wished much longer to retain the car; he might have feared that a look-out for it might be kept. I doubt whether either Mr. Rolls or Mr. Clarke ought to be judged too harshly because they were equally deceived by a man who seemed distinguished. But, for the reasons that I have given, it seems to me that a decision in this case does not depend on the question whether Mr. Rolls was careless in parting with the car and the book, but
C depends rather on the result and effect of his so acting.

The argument that the plaintiffs must lose their property because they were careless depends on a line of reasoning which was rejected in *Farquharson Brothers & Co. v. King & Co.* (3) ([1902] A.C. 325). In his speech in that case, LORD MACNAGHTEN said (*ibid.*, at p. 335):

D "The real defence is a singular one. It comes to this: The defendants say to the plaintiffs, 'You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune common to you and to us is all your fault. By your foolish confidence in Capon, and by the written authority you gave him, you "enabled" him to commit this fraud upon us. And so ASHHURST, J.'s famous dictum comes in and you must sustain the loss'."

LORD MACNAGHTEN proceeded to say that the defence had "no foundation in principle or authority". The "famous dictum" was, of course, that of ASHHURST, J., in *Lickbarrow v. Mason* (10) ((1787), 2 Term Rep. 63 at p. 70):

F "... that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

LORD LINDLEY in *Farquharson's* case (3) ([1902] A.C. at p. 342) described this as being "far too wide". The third parties, through Mr. Clarke, purported to buy because the man they saw said that he was Mr. Ashley and because he had a car and a registration book referable to Mr. Ashley. The plaintiffs had dealt with
G "Cullis" and, believing that he would hire a car that had belonged to a Mr. Ashley, they gave him advance possession of the car and book in the belief that the transaction would go through. The plaintiffs never expected that Cullis would ever say that he was Ashley and never authorised him to do so or to make any representation or to sell. But by giving Cullis the car and book they did
H in fact facilitate the perpetration of fraud by Cullis on the third parties. This resulted, however, merely from their permitting Cullis to have possession of the book and car. The question is, therefore, whether by giving Cullis possession they have clothed him with apparent authority to sell. It is clear that Cullis in fact possessed no authority to sell. The question is whether by entrusting him with the car and the book they have in effect made a representation which they
I are precluded from denying that the possessor of the car and book was vested with authority to sell.

If Cullis had had the car alone, it is not suggested that authority to sell could be assumed. If the owner of a car gives mere possession of it to another (not being a mercantile agent or a purchaser) he does not hold out or represent that other person as being entitled to sell. Is the position any different if the registration book is also handed over? This raises the question as to the nature of such a book. It is necessary for mechanically propelled vehicles to have an excise licence before they are used on public roads. These licences are issued by county

councils (or county borough councils). When a licence is issued or renewed, duties of excise are payable. When a licence is first issued, it is the duty of the county council (or county borough council) to register the vehicle and to assign a registration mark (see Vehicles (Excise) Act, 1949, s. 16). Registration books are issued "in respect of the registration" (see s. 16 (2) (c)). The licence which is issued must be fixed to and exhibited on the vehicle in manner prescribed by regulations (see s. 9 (3)). A registration book must be produced by the "owner" for inspection on the request of a police officer or local taxation officer. Under the regulations (Road Vehicles (Registration and Licensing) Regulations, 1955 (S.I. 1955 No. 1664)), "owner" means the person by whom the vehicle is kept and used, and the expression "ownership" is to be construed accordingly. It is the "owner" who obtains a licence and pays the duty and is issued with a registration book.

It is clear that the person who is registered with the council as the "owner" of a car is not necessarily the legal owner—though he may be. The "owner" is the person by whom the vehicle is kept and used. Accordingly the register which is kept by councils does not purport to be a register which records the names of the legal owners of cars: the councils will not know who are the legal owners. In conformity with all this, a notice in clear print appears on registration books as follows:

"Important. The person in whose name a vehicle is registered may or may not be the legal owner of the vehicle."

Regulations provide (see S.I. 1955 No. 1664, reg. 9) for what is to happen on a transfer of the vehicle. The registration book must be handed to "the transferee or other new owner". The old "owner" must at once notify the appropriate council giving certain prescribed particulars. The new "owner" or transferee must at once notify the council giving certain prescribed particulars and if he intends to use the vehicle on roads repairable at the public expense he must before using it insert his name and address in the registration book and deliver it to the council. He may have had the licence transferred to him but otherwise must obtain one. If a current licence is transferred and then expires, the transferee or new "owner", if he intends to renew the licence, must apply. There are special provisions if these can be used by a transferee under a trade licence.

The result, as it seems to me, is that it cannot be assumed that the person in possession of a car and its registration book is the owner of the car. The absence of a registration book when a car is being sold will naturally give rise to much inquiry. The existence of one in the hands of a seller does not remove all occasion for inquiry and does not prove legal ownership. When the plaintiffs reposed confidence in Cullis and gave him possession of their car with its book, they did not make a representation to those who had any dealings with Cullis that Cullis owned the car.

When the man calling himself Mr. Ashley presented himself to the third parties in Birkenhead, those who dealt with him were deluded into believing that he was Mr. Ashley. The man, for all they knew, might have been Mr. Ashley or he might not. Though the car was not on hire-purchase, Mr. Ashley, the registered person, might not have been the legal owner at all. The man who went to the garage might have been someone who had been given possession of the car and book without being entitled to part with them. The man might have been merely a thief of the car and book.

In my judgment the Birkenhead purchasers, the third parties, who acted with a measure of speed that was doubtless brought about by their induced belief in the respectability of the man they saw cannot acquire more than that man was able to pass to them. They may have acted as others might have done in the circumstances, but they took a risk. Because they were deceived by a confidence trickster, they did not think that they were taking a risk. If the plaintiffs had merely given Cullis the car, it is not suggested that there would have been a

A representation to all the world that the possessor of the car was its legal owner; nor can such a representation be established because possession was also given of a book which does not prove legal ownership and which proclaims a clear warning and intimation that it does not.

B For these reasons I do not consider that the plaintiffs were estopped from proving their ownership and in my judgment they were entitled to succeed against the defendants. That being so, the parties have agreed that the liability should be in damages which have been agreed at £240.

I would allow the appeal.

Appeal allowed.

C Solicitors: *Leader, Henderson & Leader*, agents for *Gardner, Leader & Co.*, Newbury (for the plaintiffs); *Hamblins, Grammer & Hamlin*, agents for *F. S. Moore & Price*, Birkenhead (for the third parties).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

D FAIRCLOUGH DODD & JONES, LTD. v. J. H. VANTOL, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Goddard, Lord Morton of Henryton, Lord Tucker and Lord Somervell of Harrow), October 31, November 1, December 5, 1956.]

E *Sale of Goods—C.i.f. contract for sale of Egyptian cottonseed oil—London Oil and Tallow Trades Association form of contract—Force majeure clause—Time of shipment to be extended by two months “should the shipment be delayed by . . . prohibition of export”—Construction.*

F *Arbitration—Procedure by arbitration—Whether appropriate for the decision of questions of law or construction of documents.*

G In November, 1950, the sellers sold to the buyers one hundred tons of Egyptian cottonseed oil, c.i.f. Rotterdam, to be shipped during the months of December, 1950 and January, 1951. The contract was in a form issued by the London Oil and Tallow Trades Association and cl. 11 thereof, which was a force majeure clause, provided, so far as is relevant, as follows: “A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled . . . B. Should the shipment be delayed by . . . prohibition of export . . . or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months . . .” The shippers had arranged to ship the oil on a ship which was due to load on Dec. 20, 1950, but on Dec. 12, 1950, the Egyptian government imposed a ban on the export of cottonseed oil. On Jan. 3, 1951, the ban was lifted, and between Jan. 4 and Jan. 31 oil of the contract description and quantity was available for shipment. On Feb. 17, 1951, before any shipment of oil for the purposes of this contract was made, the ban on export was re-imposed and continued in force until after April, 1951. By a letter dated Mar. 2, 1951, the buyers repudiated the contract on the ground of non-delivery by Jan. 31, 1951. The sellers relied on cl. 11B as extending the time for shipment by two months.

H **Held:** the shipment had been “delayed” within the meaning of cl. 11B, the use of the word “delayed” in that clause in contrast to the word “preventing” in cl. 11A being decisive in excluding the view that delay within cl. 11B meant a delay which continued to or beyond the last date allowed by the contract for shipment; and, accordingly, the buyers had wrongfully repudiated the contract.

Observations on recourse to arbitration as a method of deciding questions of law or of construction of documents (see letter F, *infra*, and p. 927, letters B to E, post).

Decision of the COURT OF APPEAL (sub nom. *J. H. Vantol, Ltd. v. Fairclough Dodd & Jones, Ltd.*) ([1955] 3 All E.R. 750) reversed.

[As to shipment of goods sold under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.]

Appeal.

Appeal by the sellers, Fairclough Dodd & Jones, Ltd., from an order of the Court of Appeal, dated Nov. 24, 1955, and reported sub nom. *J. H. Vantol, Ltd. v. Fairclough Dodd & Jones, Ltd.*, [1955] 3 All E.R. 750, reversing an order of McNAIR, J., dated May 5, 1955, and reported [1955] 2 All E.R. 516, on a Special Case stated under the Arbitration Act, 1950, s. 21 (1), by the Board of Appeal of the London Oil and Tallow Trades Association. McNAIR, J., gave judgment in favour of the sellers. The dispute arose out of a contract, dated Nov. 27, 1950, whereby the buyers, J. H. Vantol, Ltd., purchased a quantity of Egyptian cottonseed oil from the sellers. The facts appear in the opinion of LORD TUCKER, pp. 924, 925, post.

T. G. Roche, Q.C., and *A. J. Bateson* for the sellers.

A. A. Mocatta, Q.C., and *J. F. Donaldson* for the buyers.

The House took time for consideration.

Dec. 5. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the privilege of reading the opinion which my noble and learned friend, LORD TUCKER, is about to deliver, and agree so fully with his reasoning and conclusions that I do not find it necessary to add to it. I would, however, express in particular my concurrence in his final observations. Where the substantial issue between the parties raises a question of law of general importance such as the construction of a commercial instrument in common use, which must to the knowledge of the parties ultimately be determined by a court of law, it is difficult to see what advantage is to be gained by pursuing the tortuous and expensive course of arbitration and then a statement of a Special Case. The comments of the learned judge who tried the case will, I hope, receive the attention that they deserve. In accordance with the opinion of my noble and learned friend, I would allow the appeal with costs here and below.

LORD GODDARD: My Lords, the facts relating to this appeal are set out in the opinion about to be read by my noble and learned friend, LORD TUCKER, and I need not recapitulate them. The question that falls for decision depends, in my opinion, entirely on the true construction of the opening sentence of cl. 11B of the contract under consideration. While this is a matter on which opinions may well differ, I prefer the construction placed on it by McNAIR, J., to that which the Court of Appeal adopted. It is, I think, most material that cl. 11A, which deals with the event of war, uses the words "preventing shipment", while cl. 11B enumerates events which may delay the shipment. Effect must be given to this difference, and cl. 11B should be regarded as dealing with matters which it is contemplated will cause a temporary hindrance but are unlikely to frustrate the contract. In my opinion, the true construction of the clause is that, on one of the enumerated events happening during the period prescribed for shipment, that period is automatically extended by two months and the shipper can avail himself of that extension or as much of it as he requires. Like McNAIR, J., I see nothing unreasonable in this. The association which provides this form of contract for common use in the trade presumably knows the time that would, or at least might, be required to make alternative arrangements once the shipment is delayed by one of the enumerated causes. Commercial men

A may well prefer that the contract should provide for a definite period of extension, rather than leave it to be decided in each case as it occurs what extension should be allowed. I would allow the appeal. I am glad that the learned judge pointed out that the lengthy period it has taken to reach a final decision in this matter is in no way the fault of the courts.

B LORD MORTON OF HENRYTON: My Lords, the facts of this case are fully stated in the speech which is about to be delivered by my noble and learned friend, LORD TUCKER. I agree with that speech, but, out of respect for the Court of Appeal, I shall state briefly, in my own words, why I differ from the conclusion reached by that court. I have not found it at all easy to construe cl. 11B of the contract of Nov. 27, 1950, but I have formed the view that, in the
C present case, the shipment was "delayed" within the meaning of that clause. Accordingly, the time of shipment was extended for two months and the sellers (the appellants) were never in default.

As I read the Special Case, and especially para. 44 (6), the sellers satisfied the Board of Appeal that the goods would have been shipped on board the s.s. Mentor on or about Dec. 20, 1950, if the export of cottonseed oil had not been prohibited by the Egyptian government on Dec. 12. The goods could not be so
D shipped by reason of the prohibition, and the vessel sailed without them. Thus, the shipment was undoubtedly "delayed" in one sense, because this specific arrangement for shipping the goods had to be abandoned. Counsel for the buyers, however, contended that "the shipment" is not "delayed" within the meaning of the first sentence of cl. 11B, unless the cause of delay continues to operate up to the end of the contract period, that is, in the present case, up to Jan. 31, 1951. My Lords, I fully realise that there is weight in this argument,
E which is, to some extent, supported by the immediately succeeding sentences of cl. 11B, but I have come to the conclusion that the argument fails. It involves, to my mind, the insertion by implication of some such words as "within the contract period" after the word "shipment"; but if these words were inserted, the word "delayed" would be quite inappropriate. The appropriate word
F would be "prevented". There is, however, a marked contrast between the use of the words "in the event of war, hostilities or blockade *preventing* shipment" in cl. 11A, and the words "should the shipment be *delayed* by . . . prohibition of export" in cl. 11B. The former clause, as I read it, applies to a case where shipment remains impossible up to the end of the contract period, while the latter clause applies to a case in which shipment is delayed for a period, whether
G or not the cause of delay persists throughout the contract period. The submission of counsel for the buyers would give the same effect to two strongly contrasted phrases. I think that the prohibition imposed on Dec. 12, 1950, did "delay the shipment", in the ordinary meaning of these words, and the considerations which I have just mentioned outweigh, to my mind, the arguments put
H forward by counsel for the buyers.

It was pointed out by counsel for the buyers that a decision in favour of the sellers would lead to the result that, if (for instance) the sellers had arranged to ship the goods in the first week of December and the prohibition of export had operated for that week and had then been lifted, the sellers would be entitled to an extension of two months. This, they submitted, was a wholly unreasonable result. It would certainly appear to be more logical to give only an extension
I equal in length to the period of delay, but it must be borne in mind that cl. 11B is a printed clause forming part of Form 5a issued by the London Oil and Tallow Trades Association, which might be used for a large number of transactions differing widely in the length of the contract period. I would say, in the words of McNAIR, J. ([1955] 2 All E.R. at p. 519):

"I am by no means satisfied that such a result would be unreasonable as I can well imagine that the parties familiar with the trade who drew up this

contract—which, it is to be remembered, is to provide for a period of shipment extending over many months—may have taken the view that such an extension would afford a reasonable time to make alternative arrangements.”

My Lords, SINGLETON, L.J., said ([1955] 3 All E.R. at p. 753) that he arrived at his conclusion after considerable hesitation. I can say the same.

I would allow the appeal and restore the order of McNAIR, J.

LORD TUCKER: My Lords, the only question in the present appeal is the meaning of the words

“Should the shipment be delayed by . . . prohibition of export . . . the time of shipment shall be extended by two months”

appearing in a c.i.f. contract for sale of Egyptian washed cottonseed oil.

The contract in question was dated Nov. 27, 1950, and made between the appellants (hereinafter called “the sellers”) and the respondents (hereinafter called “the buyers”) for the sale of one hundred tons washed cottonseed oil to be shipped during the months of December, 1950/January, 1951, from Alexandria at £146 10s. per ton of 2,240 lb. c.i.f. to Rotterdam. The contract was in the standard form of the London Oil and Tallow Trades Association for oriental oils c.i.f. terms continental. This form has been in use for a number of years during which time the courts do not appear to have been called on to pronounce on the meaning of the words now in question. The contract contained the following clauses which must be set out in full:

“2. Particulars of shipment, with date of bill or bills of lading, marks and numbers of drums (if any) to be duly declared by the original seller in writing with due despatch but not later than forty-two days from the date of the bill of lading.

“11A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled. If required sellers must produce proof to justify cancellation.

“11B. Should the shipment be delayed by fire, strikes, lock-outs, prohibition of export, riots or revolution, or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible, but should the shipment not be possible within eight months from the date of shipment originally stipulated, contract to be void. The option to be declared as soon as shippers announce their inability to ship within the extended period of two months, a reasonable time being allowed for passing on such announcements. Should buyers fail to exercise their option in due time, contract to be void. If required sellers must produce proof to justify their claim for cancellation or extension.”

The facts so far as now material are set out in the award in the form of a Special Case of the Appeal Committee of the London Oil and Tallow Trades Association and are as follows. On Sept. 27, 1950, the Egyptian Salt & Soda Co., Ltd. (hereinafter called “the suppliers”) obtained a licence from the Egyptian authorities to export at least two hundred tons of cottonseed oil. The licence was valid until Dec. 26, 1950, subject to withdrawal at any time. On Nov. 10, 1950, the sellers purchased two hundred tons of cottonseed oil from the suppliers. This contract provided for one hundred tons to be shipped during December and one hundred tons during December/January. The terms were for shipment f.o.b. Alexandria freight to be provided by the buyers for shipment to Rotterdam. On the same day, the sellers sold, or agreed to sell, one hundred tons to the Irish Oil & Cake Mills, Ltd. c.i.f. Rotterdam, to be ready for shipment the first half of December, and to be shipped by the first

- A available steamer. On Nov. 27 the sellers entered into the contract now in question. On Dec. 12 the Egyptian government imposed a ban on export of cottonseed oil which extended to include holders of existing licences. On Dec. 14 the suppliers informed the sellers of their present inability to ship. The suppliers had previously arranged to ship these two hundred tons by the s.s. Mentor due to load on Dec. 20. On Jan. 3, 1951, the suppliers succeeded in getting their licence renewed for a period of three months. The suppliers intended shipping the first one hundred tons by the end of January and the balance during February, and, on Jan. 30, they shipped one hundred tons under their contract with the sellers, and the sellers appropriated that one hundred tons to their contract with the Irish Oil & Cake Mills, Ltd. On Feb. 17 the ban on export was re-imposed and remained in force until the end of April. The award
- C further found that goods of the contract description and quantity were available for shipment between Jan. 4 and 31, 1951. By letter dated Mar. 2, 1951, the buyers repudiated the contract on the ground of non-delivery by Jan. 31, 1951.

- The position, therefore, was that the ban was in force from Dec. 12 to Jan. 3, during which period the shipment intended to be made by the s.s. Mentor was not possible, and, accordingly, the sellers contended that the shipment had been
- D delayed with the result that they were entitled to the two months' extension provided by cl. 11B, and the buyers had wrongfully repudiated before the expiration of the extended period. The buyers, on the other hand, contended that the extension clause only applies if, for one of the specified causes, the sellers were unable to ship until a date later than Jan. 31, 1951. They say that, in the absence of a finding that in consequence of the ban on export of Dec. 12, 1950,
- E shipment was impossible thereafter up to Jan. 31, 1951, the extension clause will not avail the sellers.

The umpire in the arbitration and the appeal committee (subject to the Case Stated) decided in favour of the sellers. Their decision was upheld by McNAIR, J., in the commercial court, but reversed on appeal by the Court of Appeal.

- McNAIR, J. ([1955] 2 All E.R. at p. 519), in dealing with the contention that the construction relied on by the sellers would lead to a wholly unreasonable result in that a week's delay in shipment early in December would result in two months' extension even if shipment was easily procurable for the remainder of the period, said he was by no means satisfied that such a result would be unreasonable, adding that he could well imagine the parties familiar with the trade who had drawn up this form of contract might have taken the view that such
- G an extension would afford reasonable time to make alternative arrangements. Dealing with the argument (*ibid.*) that the words "should the delay exceed two months" point to the conclusion that the clause contemplates a delay which initially continues throughout the remaining part of the contract period, he expressed the view that, on either construction, effect cannot be given to these words according to their literal and grammatical meaning, but that they should
- H be regarded as equivalent to

"If the cause of delay continues to operate during the two months by which the period of shipment has been extended."

He held there was no justification for reading into the first sentence of the paragraph the words

- I "during . . . that part of the contract period which remains after the cause of delay has come into force".

So to do would, in his view, be, in effect, to read the word "delayed" as if it were "prevented", and thus disregard the marked contrast between the words "preventing shipment" in cl. 11A and "shipment being delayed" in cl. 11B. He, accordingly, upheld the award of the appeal committee.

The Court of Appeal accepted the buyers' construction. SINGLETON, L.J., said ([1955] 3 All E.R. at p. 753) he had arrived at his decision after considerable

hesitation, but was satisfied the word "the" in front of the word "shipment" in cl. 11B meant that the clause was intended to apply if delay were caused beyond the end of the contract period. "Delayed" in the first line of the clause meant, he thought, delayed as between buyers and sellers in relation to this contract. A

JENKINS, L.J., considered (*ibid.*, at p. 755) that, in a clause such as cl. 11B, references to delay should be related to the time set by the contract for its performance. He thought the proper time at which to decide whether there has been delay due to one of the specified causes was the last day for shipment allowed by the contract. If the sellers could, in fact, have shipped by that date but chose not to do so, then the only relevant delay was due to their own choice and not to any of the specified causes. He considered this construction accorded better with the words "the delay" in the second sentence, and with the remainder of the clause which pointed to a delay from one of the named causes by reason of which it proved impossible to effect shipment by the date originally stipulated. B C

PARKER, L.J., in reaching the same conclusion, was influenced by the fact that the clause is a "force majeure" clause. He said (*ibid.*, at p. 756):

"Whether viewed as a clause which extends the time for shipment or as an exception clause, it is a clause which operates to prevent what otherwise might be a breach from being a breach. Such a clause would normally, at any rate, not be construed as being operative, unless in its absence the party protected would have been in breach." D

He thought "the shipment" which had to be delayed was "shipment in accordance with the contract", i.e., by Jan. 31. E

My Lords, faced with these differing views, both judicial and commercial, as to the meaning of five ordinary English words, I confess I am much influenced by the context in which they appear. It seems to me quite natural that merchants should for their convenience make provision for what is to happen in the event of difficulties arising in the performance of their contracts, even if such difficulties are not such as to render performance impossible. Sellers, who for one of the specified causes, are unable to make use of the vessel on which they intended to ship the goods, may have difficulty in making other arrangements, and have to plan some way ahead. It seems to be altogether reasonable to provide in such circumstances for a fixed and definite period of extension which will facilitate commerce rather than to think only in terms of escape from breach or of impossibility of performance. F G

In my opinion, the first sentence of cl. 11B is designed and worded to meet such a situation. The use of the word "delay" in contrast to "prevent" seems to me decisive in favour of the sellers, and I can see no justification for construing "shipment be delayed" as "shipment by the contract date be prevented". The words "the delay" in the second sentence contemplate that the delay previously referred to has persisted up to and beyond the contract date, and that sentence provides what is to happen in such a case, but does not, in my opinion, justify the view that there can be no delay under the first sentence unless it or its consequences have persisted up to the last date for shipment. It seems to me that the first part of cl. 11B is designed to keep the contract alive, whereas the remainder provides for what is to happen when these attempts have failed and performance has eventually become impossible. H I

"Force majeure" clauses are of different kinds. In the case of an exception clause, it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of the time for performance, or for a substituted mode of performance on the occurrence of a "force majeure" event, whether or not such event would have prevented performance. It, therefore, seems to me that the words "force majeure" in the clause and their

A presence in the margin on the printed contract form as well as the nature of the specified events afford little assistance in the interpretation of the words in question, more especially when cl. 11B is contrasted with cl. 11A.

B For these reasons I respectfully prefer the construction adopted by McNAIR, J., and the Arbitration Appeal Committee to that of the Court of Appeal, and, in so doing, I am at any rate fortified by the fact that the construction which I favour does not appear to have been considered unreasonable by business men with experience in this trade. My Lords, at the end of his judgment McNAIR, J., said:

C "I cannot, however, part with this case without making one comment. This matter arose out of events which took place in the months of December, 1950, and January/February, 1951, and it has taken until May, 1955, to reach this court. I have little doubt that if the parties had been minded to make use of the machinery of this court in January or February, 1951, the whole matter could have been disposed of in two or three months, and, indeed, it would have been quite possible and it seems to me business-like, there being this dispute between the parties as to the effect of that contract, to ask this court for a declaratory judgment, which could have been given with possibly a delay of a week or so even while the contract was still running."

D The case eventually reached your Lordships' House in October, 1956. The time that has elapsed since January/February, 1951, has not been due to the "delays of the law" but to the failure of the parties to avail themselves of the facilities provided for the speedy hearing of commercial suits involving questions of law. I desire to associate myself with the observations of the learned judge.

E I would allow the appeal and restore the award.

F LORD SOMERVELL OF HARROW: My Lords, the facts and the rival submissions have already been stated. There are arguments of force in favour of either construction. That adopted by McNAIR, J., commends itself to me. The change from the word "preventing" in cl. 11A to the word "delayed" in cl. 11B is, I think, of great weight. If it had been intended to provide for an extension, if, and only if, strikes, fires, etc., prevented shipment in the contract period, I find it difficult to explain the avoidance of the word "prevention". The fact that, if shipment was "prevented" for the contract period, there was to be a further two months does not explain the change of language.

G On the sellers' construction it was necessary for the sellers to establish that some specific arrangement made by them for effecting shipment had to be postponed or abandoned through one of the mentioned causes. It was said, on the other side, that no shipment is a shipment under the contract until it has been effected and declared under cl. 2. This would, I think, lead to the conclusion that the shipment cannot be "delayed" and, therefore, the expression "the shipment" must have some other meaning than a shipment declared under cl. 2. The words in their context are, in my view, apt to cover an intended shipment which has to be postponed or abandoned, although the operating cause and its effects may not last for the whole of the contract period. The cause which may, on this construction, not render shipment impossible will have limited the time available and rendered it necessary for the sellers to make fresh arrangements. There is certainly no absurdity in a provision which, in such an event, makes an extension for a definite period.

I The second sentence in the paragraph, it is said, assists the buyers' argument. The "two months" are clearly intended to be the two months' extension, and the excess over two months would involve the "delay" operating at the end of the original contract period. Therefore, it is said, the delay covered by the first sentence must necessarily be a "delay" which continues to operate till the end of the original contract period. This is, I think, a non sequitur. The fact

that the second sentence deals with a case where the delay operates up to the end of the original contract period and beyond does not mean that the first sentence may not come into operation when the delay does not operate up to the end of the original contract period. The wording is, in any event, inapt on the buyers' construction. The "delay" might operate for more than two months, for example, from Jan. 1 to Mar. 2, leaving the sellers with the rest of March to fulfil the extended contract. Again, one would expect the latter part of the clause to operate if the cause of the delay continued into February, then ceased, but came on again towards the end of March, the sellers not having shipped in the meantime. The "delay" might well, in such a case, have not exceeded two months. There is, therefore, in my mind, no sufficient implication from the second sentence to negative or modify the natural meaning of the first. A B

PARKER, L.J., said ([1955] 3 All E.R. at p. 756) that a force majeure clause is one which operates to prevent what otherwise might be a breach from being a breach. This is the effect of cl. 11A and, indeed, may be the effect of cl. 11B. It is, I think, applying an over-nice standard of drafting to assume that extension as a result of force majeure which only cuts down the time available to the shipper could not be provided for, *inter alia*, in a clause with the sidenote force majeure. C D

It was further suggested by the buyers that, if the sellers' construction was right, there would have been a provision for notification to the buyers of the sellers' claim that the contract time had been extended. Whichever construction is right, it would be convenient for the buyers to know whenever one of the enumerated causes began to operate with the possibility of extension. The absence of any such provision may be due to the fact that the recited causes, if they occurred, would become known to all interested. E

McNAIR, J., at the beginning of his judgment, said this ([1955] 2 All E.R. at p. 519):

"Generally, a seller cannot claim the protection of the clause which provides that the contract shall be cancelled if shipment is prevented by certain specific causes unless he proves both (a) that he was himself so prevented from shipping, and (b) that it was impossible for him to fulfil the contract by buying goods afloat which had been shipped during the contract period." F

It was submitted by the sellers that (b) went beyond any decided case. The buyers, in their case, sought to rely on a failure to prove that goods afloat could be purchased. Whatever may be the position under some exception clauses, it became clear in the course of the argument that this point could not arise in this case. If the sellers' construction is right, the delay or postponement of an intended shipment is sufficient. If the buyers' construction is right, the sellers admit they were in breach. G

I would allow the appeal.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.* (for the sellers); *Stephenson, Harwood & Tatham* (for the buyers).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

WATSON v. BURTON.

[CHANCERY DIVISION (Wynn-Parry, J.), November 16, 19, 20, 1956.]

Specific Performance—Sale of land—Innocent misrepresentation as to size of site—Contract incorporating Law Society's Conditions of Sale, 1953, condition 35—Area of property substantially smaller than that stated in particulars of sale—Purchaser prejudiced by reason of difference—Contract rescinded.

B

Sale of Land—Contract—Condition—Misdescription.

C

On Sept. 14, 1954, an industrial property was offered for sale by auction. Owing to an innocent mistake on the vendor's part, the particulars of sale prepared by the auctioneer stated that the area of the property was approximately 3,920 square yards, whereas it was approximately 2,360 square yards. The purchaser, having obtained a copy of the particulars of sale, inspected the property before the auction and decided to bid up to £4,500 for it, in the belief that its area was as stated in the particulars. At the auction the property was sold to him for £4,500. He signed the contract and paid £40 in cash as part of a deposit of £450 payable on signing the contract. Condition 35 of the Law Society's Conditions of Sale, 1953, which was incorporated in the contract, provided: "... the property . . . shall be taken as correctly described as to quantity and otherwise, and any error . . . or misstatement found in the contract (whether or not it materially affects the description of the property) shall not annul the sale, nor entitle the purchaser to be discharged from his purchase, nor shall the vendor, nor any purchaser, claim or be allowed any compensation in respect thereof: Provided that nothing in this condition shall entitle the vendor to compel the purchaser to accept, or the purchaser to compel the vendor to convey, property which differs substantially from the property agreed to be sold and purchased, whether in quantity . . . or otherwise, if the purchaser or the vendor respectively would be prejudiced by reason of such difference."

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The purchaser's object in buying the property was to sell it, if possible, at a profit, and, if that was not practicable, to put it into a proper state of repair and then to let it. After the sale he was given a key of the premises and, while showing prospective purchasers or tenants over the property, he discovered that its area was smaller than that stated in the particulars. He informed the auctioneers of this fact towards the end of October, 1954, and, while waiting for the vendor to check the measurements, he wrote to her asking for certain repairs to be done, and he also had a leaking roof repaired by his own men. At that time he was still willing to complete the purchase, provided that he obtained suitable compensation for the difference between the stated and the actual area. On or about Nov. 26 he paid the balance of the deposit to the stakeholders at their request. On Nov. 30, 1954, a meeting took place between the vendor and the purchaser, but they were unable to come to any agreement on the question of compensation. On Dec. 31, 1954, the purchaser's solicitors wrote to the vendor rescinding the contract. In an action by the vendor against the purchaser for specific performance of the contract, the purchaser, by way of counterclaim, asked for a declaration that he was entitled to rescind the contract. At the hearing of the action the vendor was willing to waive the condition in the contract excluding compensation, but the purchaser was no longer willing to accept compensation.

Held: specific performance must be refused and the purchaser was entitled to rescind the contract for the following reasons—

(i) the statement of the site area was a term of the contract and could not be rejected under the maxim *falsa demonstratio non nocet* (dictum of SIR RICHARD MALINS, V.-C., in *Whittemore v. Whittemore* (1869), L.R. 8 Eq. at p. 605, followed).

(ii) the purchaser could not be given what he had bargained for, since the difference between the area stated and the actual area was substantial; moreover as the purchaser was also prejudiced thereby the case was within the proviso to condition 35 of the Law Society's Conditions of Sale, 1953, so that that condition did not preclude the purchaser from rescinding the contract (*Flight v. Booth* (1834), 1 Bing. N.C. 370, *Jacobs v. Revell*, [1900] 2 Ch. 858, and *Re Puckett & Smith's Contract*, [1902] 2 Ch. 258, applied).

(iii) the purchaser had not waived his right to rescind the contract by completing payment of the deposit and asking for repairs to be done after he became aware of the misstatement, since his conduct was consistent with his intention to try, in the first instance, to obtain an abatement of the purchase price.

(iv) the plaintiff could not by her unilateral action in offering to waive condition 35 of the Law Society's Conditions of Sale, which excluded compensation, entitle herself to a decree of specific performance if the purchaser were unwilling (as he was) to accept compensation.

Dictum of VISCOUNT HALDANE delivering the judgment of the Privy Council in *Rutherford v. Acton-Adams* ([1915] A.C. at p. 869) considered.

Shepherd v. Croft ([1911] 1 Ch. 521) distinguished.

[As to a condition in a contract disallowing compensation in respect of a misstatement, see 29 HALSBURY'S LAWS (2nd Edn.) 295, para. 389; and for cases on the subject, see 40 DIGEST 104, 105, 816-821.

As to waiver of right to rescind contract on ground of misrepresentation, see 23 HALSBURY'S LAWS (2nd Edn.) 110, para. 155.]

Cases referred to:

- (1) *Whittemore v. Whittemore*, (1869), L.R. 8 Eq. 603; 40 Digest 104, 818.
- (2) *Flight v. Booth*, (1834), 1 Bing. N.C. 370; 4 L.J.C.P. 66; 131 E.R. 1160; 40 Digest 252, 2199.
- (3) *Jones v. Edney*, (1812), 3 Camp. 285; 170 E.R. 1384; 40 Digest 237, 2063.
- (4) *Jacobs v. Revell*, [1900] 2 Ch. 858; 69 L.J.Ch. 879; 83 L.T. 629; 40 Digest 251, 2189.
- (5) *Portman v. Mill*, (1826), 2 Russ. 570; 38 E.R. 449; 40 Digest 107, 848.
- (6) *Re Terry & White's Contract*, (1886), 32 Ch.D. 14; 55 L.J.Ch. 345; 54 L.T. 353; 40 Digest 100, 770.
- (7) *Re Fawcett & Holmes' Contract*, (1889), 42 Ch.D. 150; 58 L.J.Ch. 763; 61 L.T. 105; 40 Digest 103, 814.
- (8) *Shepherd v. Croft*, [1911] 1 Ch. 521; 80 L.J.Ch. 170; 103 L.T. 874; 40 Digest 45, 282.
- (9) *Re Puckett & Smith's Contract*, [1902] 2 Ch. 258; 71 L.J.Ch. 666; 87 L.T. 189; 40 Digest 45, 286.
- (10) *Rutherford v. Acton-Adams*, [1915] A.C. 866; 84 L.J.P.C. 238; 113 L.T. 931; 42 Digest 572, 1366.

Action.

The plaintiff, Beatrice Ethel Fearn Watson, claimed (i) specific performance of an agreement in writing dated Sept. 14, 1954, whereby the defendant, Harold Burton, agreed to purchase from the plaintiff at the price of £4,500 the freehold premises known as the Britannia Works, Yates Street, Hanley, Stoke-on-Trent; (ii) further, or alternatively, damages for breach of contract; and (iii) in the further alternative, a declaration that the plaintiff was entitled to give a good discharge to Messrs. Huntbach & Son for the deposit of £450 paid to them as stakeholders pursuant to the agreement.

By his defence the defendant alleged that the total area of the property amounted to approximately 2,275 square yards, whereas it was described in the particulars of sale as amounting to approximately 3,920 square yards; that he was prejudiced by reason of the difference; and that, therefore, under the proviso to condition 35 of the Law Society's Conditions of Sale, 1953, which was

A incorporated into the contract, the plaintiff was not entitled to any part of the relief sought. By way of counterclaim the defendant claimed (a) a declaration that he was entitled to rescind the agreement, and (b) a declaration that he was entitled to give a good discharge to the stakeholders for the deposit paid to them pursuant to the agreement.

The facts appear in the judgment and are summarised in the headnote.

B *H. E. Francis* for the plaintiff.
G. T. Hesketh for the defendant.

WYNN-PARRY, J.: The plaintiff in this action is the owner in fee simple of certain lands and premises known as the Britannia Works, Yates Street, Hanley. In the autumn of 1954 she was minded to sell this property by auction. The necessary particulars were prepared by the auctioneers, Messrs. Louis Taylor & Sons, who are well-known auctioneers in Hanley. The particulars so far as material read as follows:

C “Hanley. The valuable freehold and central commercial and industrial premises, the Britannia Works, Yates Street (formerly William Street), Hanley. An extensive property, very near the centre of the town and yet in a quiet street which facilitates the loading and off-loading of vehicles. The whole with vacant possession on completion.”

D Then comes a statement who the auctioneers are, and where and when, namely, on Sept. 14, 1954, the property was proposed to be offered by auction, and there follow the name and address of the vendor's solicitors. The next page is headed “Particulars of the Britannia Works, Yates Street (formerly William Street), Hanley”, and then follows what I may describe, with no disrespect, as typical auctioneers’ “puff”:

E “This valuable and extensive premises is situated just off Broad Street, in a first-class position near the centre of Hanley. For many years it has been occupied as a foundry, but in addition is very suitable for development for general commercial or industrial purposes in which space is of paramount importance. The premises are located in a quiet street thereby facilitating the loading and off-loading of vehicles.”

F There follow, under the heading “Accommodation”, particulars of the various buildings, including in each case their measurements. Then there is the statement: “In addition there is a three-storey warehouse block at the rear”, and the particulars end with this very important statement which has given rise to this litigation: “The total site area amounts to approximately 3,920 square yards.”

G The statement as to the extent of the site area was inaccurate, because instead of amounting to 3,920 square yards, it has been proved by subsequent measurement—and this is common ground between the parties—to amount to 2,360 square yards, a difference, as counsel for the defendant pointed out, of nearly forty per cent. It is, I think, due to Mr. Watson, the plaintiff's son, who gave evidence before me, to say how this mistake arose, because there is not and cannot be any suggestion that the misstatement in the particulars is other than an entirely innocent mistake. Previous to the proposed auction, Mr. Watson, acting on behalf of the plaintiff, was negotiating for the sale of the premises privately, and in the course of the negotiations it became desirable or necessary to be able to furnish the prospective purchaser with a statement as to the extent of the site. Mr. Watson went to the surveyor's office of the local authority and asked them to let him know what the area was. He came armed with an ordnance map and a measurement, calculations were made in the surveyor's office, and he was given the figure of 3,920 square yards. In all good faith he passed that on to the auctioneers, and when later it became necessary to prepare the particulars, not unnaturally the auctioneers used this information. That is how this erroneous figure found its way into the particulars of sale.

In due course the defendant became possessed of a copy of the particulars. He was interested and made two inspections of the premises, on two succeeding days, before the auction. The defendant, in his evidence, told me that he read the statement as to the total site area being 3,920 square yards in the particulars, and that he relied on that statement in coming to a conclusion as to the figure up to which he would be prepared to go in bidding at the auction. He placed a figure of £1 per square yard as being the right figure for the land, and added £500 for the buildings, arriving at a figure of £4,500. The defendant went to the auction, and in the event his bid of £4,500 was the highest bid, and the property was knocked down to him at that figure. He signed the contract, but was unable to pay the whole of the deposit, because he was without his cheque book, but the auctioneers, knowing him, were satisfied to accept on account the sum of £40, which he had on him in cash. Subsequently, he paid the balance of the deposit in circumstances to which I shall have to refer later*. Almost immediately after the sale he was given a key of the premises.

The defendant told me that his primary objects in buying the property were, first, to be able, if possible, to sell it at a profit, and secondly, if that did not prove practicable, to spend whatever money might be necessary to put the premises in a proper state of repair and then let them, either as a whole, or in lots. He also had in mind, though not as an immediate practical proposition, the hope of selling later on if, as he hoped, the land should rise substantially in value. In the course of carrying out the first two of his objects he advertised the premises and, as a result, a number of prospective purchasers or tenants visited the premises. One visitor raised a doubt whether the area in fact contained as much as 3,920 square yards, or whether it was substantially less. There is no suggestion that that person on that occasion had made a detailed or accurate measurement of the area, but he had taken sufficient steps to raise, in his own mind, a considerable doubt as to the extent of the area. The defendant said that he was surprised to hear the suggestion that the area was smaller than as described in the particulars, because he relied on Messrs. Louis Taylor & Sons, as well-known auctioneers, to include only what was accurate in the particulars prepared by them; but he went to see Mr. Steele, a partner in the firm of Messrs. Huntbach & Son, the solicitors who were then acting for both parties, and was sent by him to see the auctioneers. This was about the end of October, 1954.

Thereafter matters dragged on. The defendant tells me that he was waiting for the plaintiff's representatives to check the measurement of the site and to let him know whether or not they agreed with his measurement of 2,360 square yards, which was the result of his check-up, or whether they were going to contend that their figure of 3,920 square yards was correct. The defendant requested certain work to be done on the premises, and instructed work to be done in circumstances which I shall have to consider in more detail† when I come to consider the plaintiff's contention that the defendant has waived any right which he might have had to rescind the contract. What, however, is more important in deciding this case is that on Nov. 30, 1954, a meeting took place at the offices of Messrs. Huntbach & Son. The defendant went to that meeting, and there were also present the plaintiff, Mr. Watson and Mr. Beswick, a solicitor now acting for the plaintiff, because it had become apparent that for Messrs. Huntbach & Son to go on acting for both parties would necessarily cause them considerable embarrassment. The defendant had also consulted another firm of solicitors, but when he went to the meeting he was not accompanied by any representative from that firm.

The meeting seems to have opened on a somewhat acrimonious note, because, according to the defendant, the plaintiff's solicitor was uncompromising in his attitude, intimating that either the defendant must complete or he would issue a

* See p. 937, letter C, post.

† See p. 937, letter E, post.

A writ. The defendant told me that, at that time, he would have been willing to complete if the plaintiff, recognising that there was a substantial misstatement as to the area, had been willing to abate the purchase price by a reasonable figure so as to compensate the defendant for the difference between the stated and the actual area. On the plaintiff's behalf consideration of compensation was, at any rate at first, refused, the reason being, no doubt, because there was incorporated into the contract condition 35 of the Law Society's Conditions of Sale, 1953, which provides:

" . . . the property or (as the case may be) each lot is believed to be and shall be taken as correctly described as to quantity and otherwise, and any error, omission, or misstatement found in the contract (whether or not it materially affects the description of the property) shall not annul the sale, nor entitle a purchaser to be discharged from his purchase, nor shall the vendor, nor any purchaser, claim or be allowed any compensation in respect thereof: Provided that nothing in this condition shall entitle the vendor to compel the purchaser to accept, or the purchaser to compel the vendor to convey, property which differs substantially from the property agreed to be sold and purchased, whether in quantity, quality, tenure or otherwise, if the purchaser or the vendor respectively would be prejudiced by reason of such difference."

The defendant, as he tells me, finding at first a wholly uncompromising attitude adopted on behalf of the plaintiff, intimated that it would be of no use for him to remain, and he made to leave the room, when better counsels prevailed, and a discussion started on the question whether there should be any, and if so what, abatement. In the course of the discussion, the defendant and the plaintiff left the room to have a private talk elsewhere with a view to seeing whether or not they could come to some accommodation. They failed to do so. It was, however, pointed out between them that they knew each other's addresses, and had or could find each other's telephone numbers, and, therefore, they could get into touch with each other later if either thought it desirable with a view to coming ultimately to some accommodation. Thus the whole matter, as I find, was left in a state of flux as a result of that which happened on Nov. 30, 1954. Matters dragged on further through the month of December, and on Dec. 31, the defendant, by a letter from his solicitors, terminated or purported to terminate the whole matter. In due course the writ in this action was issued, and it now comes before me.

The first point with which I have to deal is the point raised by counsel for the plaintiff: What is the property comprised in the contract? He contended that that was a question solely of construing the contract, and that when the contract was properly construed the correct view was that the statement "The total site area amounts to approximately 3,920 square yards" was no part of the contract and could be rejected under the doctrine *falsa demonstratio non nocet*. It is true that quite a number of statements in the particulars cannot be regarded as part of the contract. For instance, there are those passages which I described as "puff". One would not expect the dimensions of the various buildings to be included in the conveyance designed to complete the contract. It is not, however, to my mind, easy to reject the statement as regards the total site area as forming any part of the contract, because of all the statements in the particulars that is one which may be said to be the least inapt to be included in a conveyance. No doubt, the conveyance could take the form of defining the parcels by reference to a plan, but it would be by no means unusual conveyancing to define them, or help to define them, by including a reference to the total site area. I feel great difficulty in rejecting this statement as being nothing but a false description.

In *Whittemore v. Whittemore* (1) ((1869), L.R. 8 Eq. 603), there was a misstatement as to area, and it was a misstatement of some substance. In his judgment, SIR RICHARD MALINS, V.-C., said (*ibid.*, at p. 605):

"I am firmly persuaded that the purchaser would have given exactly the same price for the property if those words had been omitted; but as they have been put in I must treat them as part of the contract."

Whatever else may be said by way of criticism of the Vice-Chancellor's decision in that case, I cannot find that in any of the later cases that passage has been the subject of criticism, and as, apart from the circumstances and unaided by that statement, I should have been inclined to come to the conclusion here that the statement as to the total site area must be regarded as part of the contract, I feel that I must inevitably do so in view of that statement in the Vice-Chancellor's judgment. I, therefore, conclude that I must proceed on the basis that the parties have made this statement of the area part of the contract.

Then comes the question: What is the effect of this misstatement as to area having regard to condition 35 of the Law Society's Conditions of Sale, 1953? This condition excludes the right of a purchaser who finds a misstatement of area to compensation. The authorities establish that the court is less inclined, in the exercise of its jurisdiction, to decree specific performance where there has been a misstatement as to area and the purchaser is unable to claim compensation, than in cases where the condition is adopted which allows him to claim compensation.

Two main questions arise on this proviso: (i) Does the property which the plaintiff can convey differ materially from the property which has been agreed to be sold? (ii) Will the defendant be prejudiced by the existence of such a difference? The decided cases appear to show that the question whether or not the difference is substantial is one of fact for the court to decide in each case. In *Flight v. Booth* (2) ((1834), 1 Bing. N.C. 370), TINDAL, C.J., after considering a number of authorities which he found it difficult to reconcile, said (*ibid.*, at p. 377):

"In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney* (3) ((1812), 3 Camp. 285), where the subject-matter of the sale was described to be 'a free public house,' while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal."

Again, in *Jacobs v. Revell* (4) ([1900] 2 Ch. 858), BUCKLEY, J., had to consider a condition which read:

"The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise . . . and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof."

The property sold was described as containing five acres, no roods, twenty-six perches, and as bordering on a lake on Shortwood Common. In fact, the only part of the property to which a good title was shown contained four acres and three roods. The rest of the property was a strip bordering on a lake, and as to this the only title offered was what purported to be a title by possession for

A less than forty years. BUCKLEY, J., refused specific performance as to the area to which a good title was shown. In his judgment, having quoted from the judgment of LORD ELDON, L.C., in *Portman v. Mill* (5) ((1826), 2 Russ. 570 at p. 574) he said ([1900] 2 Ch. at p. 865):

B “Here I touch upon the question as to how far a trivial or substantial error makes a difference. The condition is not confined to trivial errors; nevertheless, if you get to a point such as that in *Flight v. Booth* (2), that the purchaser cannot get what he contracted to buy, the vendor cannot enforce specific performance.”

C Then, having referred to *Whittemore v. Whittemore* (1), BUCKLEY, J., quoted a passage from the judgment of LINDLEY, L.J., in *Re Terry & White's Contract* (6) ((1886), 32 Ch.D. 14), where the lord justice said (*ibid.*, at p. 28):

D “For example, it was contended that such conditions as the third condition in this case only applied to comparatively trivial and unimportant errors, misstatements and misdescriptions, and several cases were referred to in support of that proposition. But when those cases are carefully looked at they will not be found to warrant so general a statement. The proposition is only true in certain classes of cases.”

BUCKLEY, J., then said ([1900] 2 Ch. at p. 867):

“The classes of cases to which his Lordship there refers are those in which a vendor is seeking to force upon a purchaser what he did not contract to buy. He was dealing with the equitable grounds for refusing specific performance.”

E Towards the end of his judgment, BUCKLEY, J., referred to the judgment of LORD ESHER, M.R., in *Re Fawcett & Holmes' Contract* (7) ((1889), 42 Ch.D. 150), in which there was a clause allowing compensation. BUCKLEY, J., said ([1900] 2 Ch. at p. 868):

F “LORD ESHER says (42 Ch.D. at p. 156): ‘It is contended on the one side that the condition applies, however great the error may be; it is contended on the other side that the condition only applies where the error is trifling. I think that neither view is right.’ In one class of cases the error may be immaterial; but if the vendor comes to enforce specific performance, he cannot succeed if what he offers to convey is substantially different from what he offered to sell.”

G It is true that that was a case providing for an allowance of compensation, but the comment of BUCKLEY, J., on what LORD ESHER said is, I think, intended to be of general application and to apply also to cases where provision for payment of compensation is excluded.

H On that review of the authorities I conclude, as I have said, that the question whether or not the difference is substantial is a matter which is left to the court to decide in each case. On this aspect of the matter I feel difficulty in accepting what SIR RICHARD MALINS, V.-C., said in *Whittemore v. Whittemore* (1) (L.R. 8 Eq. at p. 606), namely, that conditions of this kind must be construed as intended to cover merely unintentional errors and inaccuracies. The Vice-Chancellor there was dealing with a case which provided that there should be no compensation, and, finding that the error was substantial, he, in effect, disregarded the provision that there should be no compensation and himself awarded compensation.

I Counsel for the plaintiff relied on the judgment of PARKER, J., in *Shepherd v. Croft* (8) ([1911] 1 Ch. 521), but that was a very different case. The misstatement there was not as to area; the misstatement was really negative, because neither the particulars of the contract nor inspection disclosed the existence of a natural underground watercourse which ran through the grounds of the property agreed to be sold. PARKER, J., found that the purpose of the plaintiff in entering into the contract was to acquire a residential property, and that in the circumstances she got substantially what she had contracted for.

I should have thought that a much nearer case to the present was that of *Re Puckett & Smith's Contract* (9) ([1902] 2 Ch. 258). There the plaintiff bought the land for building purposes, and this was known to the vendors. The misstatement was that there was no restriction as to the class of houses to be erected, but before the purchase was completed it was discovered that there was an underground culvert for water running across the land which would seriously interfere with the erection of houses, and as I understand the facts, it would have been necessary to divert the culvert before properly developing the land for building. The case came before the Court of Appeal, and the court came to the conclusion that in those circumstances the purchaser could not be said to have got substantially that for which he contracted. Giving the best consideration that I can to the misstatement in the present case, bearing in mind that it is a misstatement as to area which overstates the area by nearly forty per cent., and also bearing in mind that the defendant relied on that statement, I think that, for the purposes of considering condition 35 of the Law Society's Conditions of Sale, 1953, it must be regarded as a substantial misstatement, with the result that I find that the first condition set out in the proviso to condition 35 is proved by the defendant to exist.

Then comes the question: Was the defendant as the purchaser prejudiced? The defendant, as I have said, told me that he relied on that statement. He valued the land at £1 a yard, and the buildings at £500, thus producing approximately the sum of £4,500, which was the highest bid at the auction. I was asked to reject this evidence on the basis that it was most unlikely that the defendant's mind ever worked that way. It is true that an expert who was called on behalf of the plaintiff gave evidence that he would consider it very unlikely, having regard to the nature of the property, and the fact that between the eastern and western borders there is a slope down of ten feet, that any person would pay more than 12s. 6d. per square yard. Although the defendant has had a certain number of property deals, on examination they do not appear to have been very extensive, and he cannot, and indeed, does not put himself forward as an expert. Contrary to the contention of counsel for the plaintiff, it seems to me to be a most natural step for a man to take who is considering going to an auction to bid for property, to think the matter out with a view to coming to a conclusion, however ill-advised, as to the maximum which he will bid at the auction. It is true that, when he got to the auction, enthusiasm might run away with him, and he might exceed the limit which he had set on himself; but that a man should think the matter out and put a limit on his bidding in advance seems to me not merely natural but good sound business sense, and I accept the defendant's evidence on that aspect of the matter.

The defendant also told me that, had he known the actual area of the property, he would not have bid £4,000, or anything like that figure. Indeed, he told me that he would have stopped bidding at about £3,000. I observe that in the statement of facts in *Whittemore v. Whittemore* (1) (L.R. 8 Eq. at p. 604) it is stated:

"The purchaser in his affidavit stated that he would not have purchased at that sum [the purchase price of £1,000] if he had known the actual area of the ground . . ."

It seems to me that that is a circumstance to which I should give serious consideration. In the present case the defendant contracted for an area of 3,920 square yards, and on that basis bid up to £4,000. In those circumstances I come to the conclusion that the defendant has proved the second condition in the proviso to condition 35 of the Law Society's Conditions of Sale, 1953, namely, that he has been prejudiced by the misstatement.

I must now consider the point raised by the reply and defence to the counterclaim, namely, that the defendant by his conduct has waived any right which he might have had to rescind the contract. The matters relied on in this regard

A are set out in the particulars to the reply. Put shortly, they amount to this. The defendant first complained of the error in the particulars about Oct. 27, but, nevertheless, he continued to show various persons over the property with a view to letting or otherwise disposing of it to such persons. It is quite true that in the early part of the material period, that immediately following the signing of the contract, the defendant was busying himself in attracting possible purchasers or lessees, and showing them around, but, according to his evidence, after he complained, at any rate after the meeting of Nov. 30, 1954, he neither showed round, nor allowed persons to go round the property who had not previously shown interest in it.

The next point made is that the defendant as late as Nov. 26, 1954, in response to a request from Messrs. Huntbach & Son, paid the balance of the deposit, namely, £410, although the request was contained in the same letter as fixed the intended meeting for Nov. 30, 1954. It is quite true that at first sight it may be said against the defendant: Why, if he was complaining about the discrepancy in the area and did not intend to go on with the matter, should he pay the balance of the deposit? The defendant explains that by saying that the extent of the area had not yet been agreed and he was still of a mind to go forward with the matter provided that he could obtain a reasonable rebate. That seems to me to be a perfectly reasonable reply to the criticism that he paid the balance of the deposit on Nov. 26, 1954.

The next points taken in the particulars are (a) that on Oct. 29, 1954, the defendant wrote to Mr. Watson and asked that certain work should be done in what had been part of the premises from which machinery had been removed, and that certain repairs should be done to the electric wiring and the plumbing; and (b) that the defendant demanded that certain damage which had been caused to the roof of the factory by the removal of a cupola should be repaired, and that, at his own suggestion, he employed two of his men to repair a roof which was leaking. Those acts, looked at against the background which I have painted, are to my mind equivocal at least; they are not so unequivocal as to indicate necessarily that the defendant was waiving his right to rescind. They are quite consistent with his story that his mind was still in a state of flux. He wanted to know what was said on behalf of the plaintiff as to the actual extent of the area involved, and he was not unwilling to go on, provided that an arrangement could be come to under which he would get proper compensation.

Counsel for the plaintiff invited me to take the view that the proper approach to this question of waiver is to be found in 23 HALSBURY'S LAWS OF ENGLAND (2nd Edn.) 110, para. 155, where it is said:

“The acts and conduct relied upon as evincing the representee's affirmation must be such as are more consistent, on a reasonable view of them, with that than with any other theory.”

H I will accept that, but unless I am wholly to reject the defendant's evidence—and I am not willing to do that—I must come to the conclusion that the conduct of the defendant in the respects referred to in the particulars is quite consistent with his intention to try to negotiate a way out of the difficulty which had arisen and is not really consistent with a fixed intention to affirm the contract and forgo that claim for compensation which quite clearly he put forward at the meeting on Nov. 30, 1954, and which was left open between him and the plaintiff in the hope that a figure could be arrived at. I come to the conclusion, therefore, on this issue that the defendant cannot be said to have waived his right to rescind.

I One last point remains to be dealt with. Counsel for the plaintiff said that if all other weapons failed him he would desire to waive that part of condition 35 of the Law Society's Conditions of Sale, 1953, which excluded the allowance of any compensation. The question which I have to decide is whether, by the unilateral act of the plaintiff in expressing her willingness to allow compensation,

the defendant purchaser can be compelled on that basis to complete the contract. A
Counsel for the plaintiff relied on *Shepherd v. Croft* (8), which was a case where
the contract excluded compensation. In his judgment PARKER, J., said ([1911]
1 Ch. at p. 529):

"In an ordinary case this would, in my opinion, give rise to a claim for
compensation on the part of the purchaser; but in the present case the
eleventh condition of sale appears to preclude the purchaser from asking B
for compensation, and might possibly have been relied on by the vendors as
a reason why specific performance should be granted without compensation.
I need not, however, consider the effect of this condition, because the parties,
in the course of the trial, have agreed that if I am of opinion—which I am—
that compensation would be payable in an ordinary case were there no con- C
ditions, then for the purposes of this action I am to treat condition 11 as
struck out of the conditions of sale. That being the case, it appears to me
that the proper order to make is a decree for specific performance with a
reduction of the purchase-money, which, having considered the evidence,
I fix at £600."

That case, in my opinion, does not assist the submission of counsel for the plaintiff, D
because PARKER, J., proceeded to make the order solely on the basis that the
parties had agreed to vary their bargain by the introduction, in effect, of a term
providing for compensation.

Counsel for the defendant referred me to *Rutherford v. Acton-Adams* (10)
([1915] A.C. 866), which was an appeal in the Privy Council from the Court of
Appeal in New Zealand. I need not refer to the facts of that case, but only to a E
short passage in the judgment, which was delivered by VISCOUNT HALDANE.
Having referred to an examination of the relevant cases which the Committee
had made, he said (*ibid.*, at p. 869):

"The result of this examination is to satisfy them that the principle which
applies ought to be laid down as follows. In exercising its jurisdiction over
specific performance [a] court of equity looks at the substance and not
merely at the letter of the contract. If a vendor sues and is in a position to F
convey substantially what the purchaser has contracted to get, the court will
decree specific performance with compensation for any small and immaterial
deficiency, provided that the vendor has not, by misrepresentation or other-
wise, disentitled himself to his remedy. Another possible case arises where a
vendor claims specific performance and where the court refuses it unless the
purchaser is willing to consent to a decree on terms that the vendor will make G
compensation to the purchaser, who agrees to such a decree on condition that
he is compensated."

As I read that passage it is essential, if the course which counsel for the plaintiff
in the last resort suggests should be followed, that the purchaser should be
agreeable to accept some compensation. In the present case the purchaser is not H
now agreeable to accept any compensation. Therefore, this last point fails. In the
result I must dismiss the action with costs, and allow the counterclaim, and make
the declarations there asked for and order the plaintiff to pay the costs of the
counterclaim.

Judgment for the defendant.

Solicitors: *Peacock & Goddard*, agents for *R. W. Beswick*, Hanley, Stoke-on-
Trent (for the plaintiff); *Doyle, Devonshire & Co.*, agents for *Moxons*, Hanley,
Stoke-on-Trent (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A

VINE v. NATIONAL DOCK LABOUR BOARD.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), October 9, 10, 11, 15, December 5, 1956.]

B *Employment—Regulation—Registration of workers—Dismissal of worker pursuant to decision of statutory tribunal—Action for declaration of invalidity of dismissal and damages—Whether damages sufficient remedy—Dock Labour Board—Delegation of quasi-judicial disciplinary powers—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O. 1947 No. 1189), cl. 16 (2) (c).*

C *Declaration—Discretionary remedy—Damages not an adequate remedy—Dock worker's irregular dismissal.*

The plaintiff was a registered dock worker employed in the reserve pool by the National Dock Labour Board under the scheme set up under the Dock Workers (Regulation of Employment) Order, 1947. By cl. 3 (3) of the scheme, the National Board had the duty of delegating as many as possible of their functions to local boards. By cl. 16 (2) (c), the local boards were given power to give seven days' notice of termination of employment to any registered dock worker who failed to comply with any provision of the scheme. In 1948 the National Board approved the delegation of, inter alia, powers to disciplinary committees set up by the local board. In October, 1952, the plaintiff failed to obey a valid order to report for work with a company of stevedores, and the local board instructed their disciplinary committee to hear the case. That committee, having heard the case, and purporting to act under cl. 16 (2) (c), gave seven days' notice in writing to the plaintiff terminating his employment, and their decision was upheld by the appeal tribunal. The plaintiff ceased to work for the National Board in November, 1952. The plaintiff claimed damages for wrongful dismissal and a declaration that his purported dismissal was illegal, ultra vires and invalid. The plaintiff having been granted damages and the declaration, the National Board appealed to the Court of Appeal who struck out the declaration. The plaintiff appealed to the House of Lords against the striking out of the declaration and the National Board cross-appealed against the finding that the dismissal was invalid and the award of damages.

G **Held:** (i) the plaintiff's purported dismissal was a nullity since the local board had no power to delegate its disciplinary functions.

Barnard v. National Dock Labour Board ([1953] 1 All E.R. 1113) approved.

(ii) the granting of a declaration was discretionary and, as damages in the present case would not be an adequate remedy, the declaration granted by the trial judge was properly made (see p. 943, letter H, to p. 944, letter C, p. 946, letters B to D, p. 948, letter C, p. 951, letter G, post).

(iii) there was no such error of principle in assessing the damages as to justify an appellate tribunal interfering with the assessment.

I Per LORD SOMERVELL OF HARROW (VISCOUNT KILMUIR, L.C., and LORD KEITH OF AVONHOLM concurring): judicial authority normally cannot . . . be delegated . . . There are . . . many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would, normally, have no authority to delegate . . . I am . . . clear that the disciplinary powers, whether "judicial" or not, cannot be delegated (see p. 951, letter B, post).

Decision of the COURT OF APPEAL ([1956] 1 All E.R. 1) reversed in part.

[As to the control of statutory tribunals and the delegation of judicial functions, see 9 HALSBURY'S LAWS (3rd Edn.) 580, 581, para. 1352. A

As to the discretionary power to make declaratory judgments, see 19 HALSBURY'S LAWS (2nd Edn.) 215, para. 512; and for cases on the subject, see 30 DIGEST (Repl.) 169, 208 et seq.

For a summary of the Dock Workers (Regulation of Employment) Order, 1947, see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 142.] B

Cases referred to:

- (1) *Cooper v. Wilson*, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; Digest Supp.
- (2) *R. v. Metropolitan Police Comr., Ex p. Parker*, [1953] 2 All E.R. 717; 117 J.P. 440; 3rd Digest Supp.
- (3) *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438; 90 L.J.K.B. 1089; 126 L.T. 35; 30 Digest (Repl.) 170, 212.
- (4) *Barnard v. National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18; 3rd Digest Supp.
- (5) *Andrews v. Mitchell*, [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537; 25 Digest 325, 266.
- (6) *Coplans v. King*, [1947] 2 All E.R. 393; 31 Digest (Repl.) 710, 7968.
- (7) *Spackman v. Plumstead Board of Works*, (1885), 10 App. Cas. 229; 54 L.J.M.C. 81; 53 L.T. 157; 49 J.P. 420; 26 Digest 505, 2113.
- (8) *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.
- (9) *R. v. Local Government Board, Ex p. Arlidge*, [1914] 1 K.B. 160; *reversd.* H.L. sub nom. *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 18 Digest 169, 1223.
- (10) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.
- (11) *Osgood v. Nelson*, (1872), L.R. 5 H.L. 636; 41 L.J.Q.B. 329; 13 Digest 317, 507. D E F

Appeal.

Appeal by special leave by Walter Charles Vine, a registered dock worker, from an order of the Court of Appeal, dated Nov. 30, 1955, and reported [1956] 1 All E.R. 1, in so far as it set aside a declaration granted by ORMEROD, J., on July 28, 1955, at Winchester Assizes, that the purported dismissal by the National Dock Labour Board of Mr. Vine was illegal, ultra vires and invalid. Cross-appeal by the National Dock Labour Board from the same order in so far as it affirmed the award by ORMEROD, J., on July 28, 1955, at Winchester Assizes of £250 damages to the said Walter Charles Vine for wrongful dismissal by the National Dock Labour Board. The facts appear in the opinion of Viscount KILMUIR, L.C., p. 941, letter B, to p. 942, letter I, post. G H

Dingle Foot, Q.C., and *T. O. Kellock* for the plaintiff in the action, Walter Charles Vine.

Harold Brown, Q.C., and *G. W. Willett* for the National Dock Labour Board.

The House took time for consideration. I

Dec. 5. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, the appeal and cross-appeal in this matter are brought by leave of your Lordships' House from a judgment of the Court of Appeal dismissing an appeal from, but varying the judgment of, ORMEROD, J. The learned judge had granted a declaration that the purported dismissal by the National Dock Labour Board (whom I shall call "the National

A Board ") of Mr. Vine (whom I shall call " the plaintiff ") was illegal, ultra vires and invalid, and had awarded him £250 damages. The Court of Appeal, by a majority, struck out the declaration. As a result of the appeal and cross-appeal, your Lordships have now to decide whether that purported dismissal was invalid, whether the majority of the Court of Appeal were right in striking out the declaration, and whether the award of £250 damages should stand.

B The plaintiff was, at the material time, a dock labourer in the Port of Southampton and had been so employed for many years and was, in fact, a " registered dock worker available for work " and " in the reserve pool " within the scheme which I shall describe. He was, therefore, deemed to be in the employment of the National Board. All dock workers are employed and controlled under a scheme embodied in the schedule to the Dock Workers (Regulation of Employment) Order, 1947, which was made under s. 2 of the Dock Workers (Regulation of Employment) Act, 1946. The relevant portions of the scheme would appear to be:—(A) Cl. 1, which sets out its objects of ensuring regularity of employment and availability of workers. (B) Cl. 3, which establishes the National Board and sets out its functions, including keeping the register or records of dock workers. (C) Cl. 3 (3), by which it is the duty of the National Board to delegate as many as possible of their functions to local boards. (D) Cl. 5 (2), which deals with the composition of local boards and imports the principle of equal numbers of employers and workers. (E) Cl. 6, which, inter alia, includes within the matters for which the local board is responsible to the National Board removal from the register of the name of any dock worker, in accordance with the provisions of the scheme. (F) Cl. 8, by which a registered dock worker available for work is required to carry out the directions of the local board. (G) Cl. 14, which contains the conditions of payment under the scheme for unemployment or under-employment. (H) Cl. 15, which provides for disentitlement to such payment and also for a procedure which has a special relevance. Paragraph (4) provides:

F " The local board shall consider any written report received under para. (2) or para. (3) hereof, and if, after investigating the matter, the board notifies the registered dock worker that it is satisfied that there has been such a failure or behaviour as aforesaid, the registered dock worker shall not be entitled to any payment, or to such part of any payment as the board thinks fit, under cl. 14 hereof in respect of the pay week in which such failure or behaviour occurred or continues."

G (I) Cl. 16 (2), which provides:

H " Where a registered dock worker available for work fails to comply with any of the provisions of the scheme, then without prejudice to and in addition to the powers conferred by cl. 15 hereof, the local board may take any of the following steps as regards that dock worker—it may (a) determine that for such period as it thinks proper he shall not be entitled to any payment under cl. 14 hereof; (b) suspend him without pay for a period not exceeding seven days; (c) give him seven days' notice of termination of employment; (d) dismiss him summarily."

I (J) Cl. 17, which provides:

" (1) The employment of a registered dock worker in the reserve pool who is available for work shall not be terminated except . . . (b) by the giving of seven days' notice in writing . . .

" (2) A registered dock worker in the reserve pool who is available for work shall not leave his employment with the National Board except by giving seven days' notice in writing to the local board or so as to be employed in accordance with the provisions of the scheme.

"(3) Where the employment of a registered dock worker by the National Board has been terminated under para. (1) (a) or (b), or under para. (2) hereof after notice given by him, his name shall forthwith be removed from the register or record."

(K) Cl. 18, which contains the provisions for certain appeals to an appeal tribunal appointed by the local board.

On Nov. 6, 1947, the South Coast Local Dock Labour Board adopted standing orders under which the local board: (a) should be responsible for administering the scheme and such matters as were assigned to the local board by the scheme or by the National Board, subject only to such limitations as might be imposed from time to time by the National Board; (b) might delegate to a committee such of its functions and powers as it might deem appropriate, provided such delegated committee conformed to the regulations and restrictions imposed by the National Board, or the local board; and (c) determined its own quorum, to consist of seven persons. The local board set up disciplinary committees, consisting of two members (one from the employers and one from the dock workers); such duties were to be undertaken by the members of the local board in turn.

On Feb. 3, 1948, the National Board, in accordance with cl. 3 (3) of the scheme, approved the delegation of functions to committees of the local board, including the delegation of powers to disciplinary committees in the manner previously resolved by the local board. On Oct. 29, 1952, the plaintiff was detailed for work with a company of stevedores, J. Rose & Co., Ltd. (who were, in fact, registered employers within the scheme), and was required to start shift work at 8 p.m. on that day. The plaintiff did not attend for the work and was reported to the local manager of the National Board by the stevedores by letter dated Oct. 30, 1952. On the same day one E. W. Chapman, the local manager, on behalf of the National Board, reported this complaint to the plaintiff and invited his explanation. By letter dated Nov. 1, 1952, the plaintiff gave the following explanation in writing: "Had requested to Port Officer to be given work so that I could finish at 5 o'clock and was refused."

By letter dated Nov. 6, 1952, Mr. Chapman, on behalf of the National Board, gave notice to the plaintiff that a disciplinary committee would consider his case on Nov. 13, and requested him to be in attendance. On Nov. 13 a disciplinary committee (consisting of two members of the local board, one representing the employers and one representing the dock workers) was convened in accordance with the rules and standing orders of the local board, to which I have already referred, and heard the complaint made against the plaintiff and his explanation. The minutes of the meeting of the disciplinary committee show that, after a careful consideration of all the facts and circumstances of the case, including the plaintiff's previous record, the committee agreed that he should be given seven days' notice to terminate his employment with the National Board on grounds which they stated as follows:

"Failure to report for work at 8 p.m. on Oct. 29, 1952, after being allocated at 12.45 p.m. call that day, in addition to failure from time to time to comply with terms of local agreements."

In accordance with the decision of the committee, notice in writing was on the next day given to the plaintiff to terminate his employment with the National Board on Saturday, Nov. 22. By letter dated Nov. 16, 1952, the plaintiff gave notice of appeal against this decision, and was given a statement of the case against him. On Nov. 20, 1952, the plaintiff's appeal was heard and disallowed without variation. He was consequently informed that the notice terminating his services remained operative, and he ceased to work for the National Board from Nov. 22, 1952.

On these facts and provisions of the scheme, counsel for the National Board submitted that the National Board had an independent power, under cl. 17 of

A the scheme, which they could, and did, exercise through the disciplinary committee, who acted on their behalf. I do not think that it is necessary to decide whether they could exercise a power independent of that of the local board under cl. 16, because I am quite certain that they did no such thing. The happenings that I have set out above occurred as the result of the procedure laid down by cl. 15 (4) and cl. 16 (2) being put into operation by the disciplinary committee on behalf of the local board. Counsel's first submission is as unreal as it is ingenious and, therefore, fails.

I now turn to the contention that the local board could delegate its functions to the disciplinary committee. I have had the advantage of seeing in print the opinion which my noble and learned friend, LORD SOMERVELL OF HARROW, is about to express and, on this part of the case, I find myself in complete agreement with it. It was urged that the very idea was negatived by the fact that this was a quasi-judicial act. I am not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word "quasi" means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed (see *Cooper v. Wilson* (1), [1937] 2 All E.R. 726 at p. 740, per SCOTT, L.J.). As so much has been said on this point I think it is right to say that there is a judicial element here in the sense discussed by DONOVAN, J., in *R. v. Metropolitan Police Comr., Ex p. Parker* (2) ([1953] 2 All E.R. 717). Nevertheless, that is not the end of the matter. It is necessary to consider the importance of the duty which is delegated, and the people who delegate. In this case, the duty is to consider whether a man will be outlawed from the occupation of a lifetime. The scheme will not work unless discipline is maintained by the wise use of that power. I do not make any reflection on the ability or sense of justice of the pairs of gentlemen who from time to time form the committee. I notice that the pair would always consist of one representative of the employers and one of the workers, but my view is that this duty in this scheme is too important to delegate unless there is an express power.

I reach the same conclusion when I consider this from the aspect of who may delegate. The duty is placed on the local board. It is obviously possible that cases may occur in which not only the man but his trade union and employers may want a decision of the whole board. Again, I think that they are entitled to have it unless the scheme says otherwise. Further, as was mentioned in the argument, if one allows the principle of delegation, it would then be possible, although neither probable nor practicable, for the board to delegate its functions to a committee which was not a microcosm of itself but a body on which employers and employed were no longer equally represented. For all these reasons, I do not think that delegation was possible. The decision of the disciplinary committee was, therefore, a nullity which, it is conceded, cannot be cured by appeal.

I now turn to the striking out of the declaration made by ORMEROD, J. The granting of a declaration is a matter of discretion, and, in view of the opinions expressed by the majority of the Court of Appeal, I have considered what was said on this subject in your Lordships' House in *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.* (3) ([1921] 2 A.C. 438). In that case, VISCOUNT FINLAY said, in the course of his dissenting opinion (*ibid.*, at p. 445):

"The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by Mr. Hogg."

VISCOUNT FINLAY then cited (*ibid.*) the expressions used in those earlier cases: "sparingly", "with great care and jealousy", "with extreme caution". I agree that the discretion should not be exercised save for good reason. On the

other hand, I find helpful the Scottish tests set out in that case by LORD DUNEDIN A who said (*ibid.*, at p. 448):

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

It seems to me that however "cautiously" or "sparingly" the discretion is to be exercised, this is a case in which the learned judge was right to grant a declaration. B

I should, on this point, be content to leave the matter as stated by JENKINS, L.J. ([1956] 1 All E.R. at p. 9), with whose judgment I am in entire agreement, but, as I am differing from the majority of the Court of Appeal, I think it right to summarise my reasons. First, it follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register, and he continued in the employ of the National Board. This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the court should declare his rights. Secondly, it was said that the grant of a declaration would lead to further litigation. I cannot believe that the National Board would do other than comply with the declaration, and, in that case, I do not see why there should be further litigation. Thirdly, for the reasons given by JENKINS, L.J. (*ibid.*, at p. 10), I find it difficult to see that damages would be an adequate remedy. Nor can I see that the conduct of the plaintiff as a result of the National Board's action, or the form of his pleadings, should be a bar to his obtaining the remedy he asks for. C D E

Although doubts have been expressed on the quantum of the damages, I cannot see such an error of principle as calls for the interference of your Lordships' House. F

I would, therefore, allow the plaintiff's appeal and dismiss the cross-appeal.

LORD MORTON OF HENRYTON: My Lords, as there is a cross-appeal in this case, I find it convenient to refer to Mr. Vine as "the plaintiff", and to the respondents as "the National Board". Three questions arise for determination—(i) Was the purported dismissal of the plaintiff, as from Nov. 22, 1952, effective or invalid? (ii) If it was invalid, was the Court of Appeal right in reversing, by a majority, the decision of ORMEROD, J., to make a declaration to that effect? (iii) Should the learned judge's award of £250 damages to the plaintiff be altered? G H

As to the first question, counsel for the National Board submitted that the dismissal was an act of that board under cl. 17 (1) (b) of the Dock Workers (Regulation of Employment) Scheme, 1947. That clause and the other relevant clauses have already been read, and I need not repeat them. Counsel submits that this sub-paragraph conferred a power on the National Board which was quite independent of the power conferred on the local board by cl. 16 (2) of the scheme, and that the giving of notice to the plaintiff was an administrative act rightly carried out on behalf of the National Board by its delegate, the disciplinary committee. Alternatively, he submits that, if the act of dismissal could be carried out only by the local board, it was, in fact, carried out by the local board. I

My Lords, I am prepared to assume, without expressing any opinion on the point, that cl. 17 (1) (b) of the scheme confers an independent power on the National Board, but, in my view, it is plain from the course of events, as set

A out in the judgment of ORMEROD, J., that the whole matter was dealt with by the disciplinary committee, purporting to act as the delegate of the local board and following the procedure laid down in cl. 15 (4) and cl. 16 (2) of the scheme. Neither the local board nor the National Board at any time considered the written report given by Messrs. J. Rose & Co., Ltd. or investigated the matter; nor did either of them at any time arrive at any decision on the penalty which
 B should be imposed on the plaintiff. I, therefore, reject counsel's first two submissions.

Next he submits that the giving of notice to the plaintiff was an administrative act which could be delegated, and was properly delegated, by the local board. I do not find it surprising, my Lords, that the local board thought they could delegate their duties under cl. 15 (4) and cl. 16 (2) of the scheme to a disciplinary
 C committee, especially as they were careful to provide that the committee was to consist of "one member representing the dock workers and one member representing the employers". The question whether these duties could, or could not, be delegated has been argued at length in this House, and I have found it difficult to arrive at a conclusion on it. I add that, if delegation was permissible at all, the selected delegate, the disciplinary committee, appears to me to have
 D acted with perfect propriety throughout; but if delegation was not permissible, the dismissal of the plaintiff was a nullity, and this House must so hold, however unfortunate may be the result to the National Board in the discharge of its heavy and important duties. The learned judge and the Court of Appeal, following *Barnard v. National Dock Labour Board* (4) ([1953] 1 All E.R. 1113), unanimously took the view that the duties and powers assigned to the local
 E board by cl. 15 (4) and cl. 16 (2) of the scheme could not be delegated, and I have arrived at the conclusion that they were right.

Action under these clauses arises when a written report is made to the local board that a worker has been guilty of the conduct described in para. (2) or para. (3) of cl. 15 of the scheme. The sequence of events is, then, as follows, under cl. 15 (4):—First, "the local board shall consider" the written report.
 F Then it must investigate the matter and form an opinion whether the worker has committed the offence alleged in the employer's report. If the local board is "satisfied" that he has, it must then consider (a) whether the worker has any valid excuse for his conduct, and (b) which, if any, of the penalties mentioned in cl. 16 (2) of the scheme should be imposed on him. These duties, viewed as a
 G whole, are, in my opinion, duties of a judicial character, and the decision of the local board may be of vital importance to the worker, as it may involve dismissal. If, in an ordinary contract of service, a man is dismissed by his employer, it is open to him to seek and obtain employment in the same or another line of work with another employer; but the result of dismissal from employment under this scheme is wholly to remove the man from employment as a dock worker. Further,
 H it must be borne in mind that, if the local board could delegate these duties at all, they could be delegated to any person or body of persons. In my opinion, the true meaning and intent of the scheme is that these duties shall only be carried out by the carefully balanced body to which they are directly entrusted under the scheme, the local board. I do not doubt that many of the numerous duties imposed on the local board by the scheme can be delegated, and an express power
 I of delegating certain duties to a registration committee is given by cl. 5 (7) (a); but the duties imposed by cl. 15 (4) and cl. 16 (2) are on a special footing, for the reasons I have given. I add that much of the argument centred round cl. 17 and cl. 18 of the scheme, and I think that it is by no means clear what is the precise relationship between cl. 17 and cl. 16, and what exactly are the rights of appeal conferred by cl. 18. I have not found it necessary to form an opinion on these matters, but I think that these clauses might well be reconsidered and clarified by amendment.

Next, counsel for the National Board submitted that, if the act of dismissal was wrongful, the plaintiff elected to accept the act of the National Board as a repudiation of the contract, so that an award of damages was the only relief open to him. On this point, I need only say that, in agreement with ORMEROD, J., and the Court of Appeal, I cannot find any such election by the plaintiff, either in his conduct after Nov. 22, 1952, when the notice of dismissal took effect, or in the statement of claim delivered on Jan. 12, 1954, or in any subsequent pleading. A B

My Lords, I now come to the question whether the Court of Appeal was right in reversing, by a majority, the decision of the learned judge to make a declaration that the purported dismissal was invalid. Counsel for the National Board submitted that the only remedy open to the plaintiff was an award of damages and, alternatively, that, if the court had power to grant a declaration, no declaration should have been made in the circumstances of the present case. My Lords, I hope I shall not be thought wanting in respect to the judgments of the majority of the Court of Appeal, with which I have so far agreed, if I say that, on this point, I find myself entirely in agreement with the judgment of JENKINS, L.J. I am content to adopt, without qualification, everything that he said on the point, and I would only add this. If your Lordships agree with the views which I have stated, the result is that the purported dismissal of the plaintiff is a nullity. To give him an award of money, as the learned judge did, for the damage he suffered up to the date of the judgment, is only to give him part of the relief which he ought to have. The declaration granted by the learned judge was properly made, in my view, so as to make it clear to all the world what was the plaintiff's position in the eyes of the law. C D E

Lastly comes the question whether the learned judge's award of £250 damages should be altered. It is, I think, clear that the learned judge assessed damages only up to the date of his judgment, and I do not see any sufficient ground for interfering with his award.

For these reasons, I would allow the plaintiff's appeal and dismiss the cross-appeal of the National Board. F

LORD COHEN: My Lords, I need not repeat the citations your Lordships have made from the scheme scheduled to the Dock Workers (Regulation of Employment) Order, 1947. The proper construction of that scheme is a matter of considerable difficulty. Thus it is far from clear whether the provisions of cl. 17 (1) are intended to confer a power of terminating the contract established between the National Dock Labour Board and a registered dock worker in the reserve pool by cl. 8 (2) of the scheme and to prescribe how, and in what cases, that power is to be exercised, or whether, at any rate, so far as sub-para. (a) and sub-para. (b) are concerned, they are intended merely to qualify the exercise of powers conferred on the local board by cl. 16 (2) (c) and (d). I do not find it necessary to reach a conclusion on this point since it is, I think, reasonably clear from the terms of the notice given to Mr. Vine (hereinafter called "the plaintiff") that, in dismissing him, the local board, acting by its disciplinary committee, purported to act under the powers conferred on the local board by cl. 16 (2) in any case where a registered dock worker fails to comply with a provision of the scheme. G H

Counsel for the National Dock Labour Board (hereinafter called "the National Board") submitted that the dismissal was merely an administrative act taken in pursuance of the power which, he said, the National Board, like any other employer, had to dismiss a workman on seven days' notice. I do not think that the National Board are in the position of an ordinary employer. The objects of the scheme are stated in cl. 1 (2) as being to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. The scheme contains elaborate provisions for its operation, and it seems to me clear that it I

- A would defeat the object of the scheme if the National Board could remove a dock worker from the register except for reasons recognised expressly or impliedly as valid by the scheme. The language of cl. 18, which confers a right of appeal to an appeal tribunal constituted under the scheme on a registered dock worker aggrieved by action taken under certain paragraphs of cl. 15, cl. 16 and cl. 17, is, I think, inconsistent with the existence of any such wide power as that for which
- B counsel contends. He also submitted that cl. 18 did not confer any right of appeal on a workman aggrieved by the termination of his contract under cl. 16 (2) (c). It would be strange indeed if this argument were well founded. I think, however, the answer to it is that the right of appeal arises either because the effect of the termination is to disentitle the worker to payment under cl. 14 and, therefore, cl. 18 (1) (a) applies, or because, the notice of determination having been
- C given in writing, the case falls within cl. 18 (1) (e). It is not, I think, material to decide under which of these paragraphs the case falls.

These matters are merely subsidiary to the real issue, which is whether the decision to determine the contract, having been taken not by the local board but by a disciplinary committee appointed pursuant to the resolution of the local board passed on Oct. 2, 1947, was valid or was, as ORMEROD, J., declared, illegal, ultra vires and invalid.

- D Counsel for the National Board says that it was an administrative act and, like any other such act, could be delegated by the National Board. I doubt whether the mere fact that it was an administrative act would be conclusive of the matter, but I need not go further into this, since I am satisfied that, in exercising their powers under cl. 16 (2), the local board were acting in a judicial capacity. I reach this conclusion from the language of cl. 15, cl. 16, cl. 17 and
- E cl. 18 read together. The significant language is, I think, as follows:—(a) In cl. 15 (1) and (2) the words “without adequate cause”. The determination of whether there is adequate cause seems essentially a proper matter for decision judicially. (b) A worker who “without adequate cause” fails to comply with certain provisions of the scheme is to be reported in writing to the local board (see cl. 15 (2)). (c) Similarly, a worker whose engagement is terminated by an
- F employer and who is returned to the reserve pool is also to be reported in writing to the local board (see cl. 15 (3)). (d) Under cl. 15 (4), the local board are to consider any such written report and to investigate the matter and are empowered, if they are satisfied that the worker is at fault in the respect alleged, to disentitle him, in whole or in part, to payment under cl. 14 for the week in which the fault
- G was committed. (e) Clause 16 (2) enables action to be taken “without prejudice to and in addition to the powers conferred by cl. 15” in case of failure to comply with any of the provisions of the scheme. The reference to cl. 15 satisfies me that the local board, if it acts under cl. 16, must investigate the matter and be satisfied that the default is proved in the same way as it must under cl. 15. (f) The provisions of cl. 18 requiring, as I think, that, if there is an appeal, the
- H local board must state the grounds on which they acted, reinforces my view that, in all the decisions taken under cl. 15, cl. 16 and cl. 17 (1), the local board must act in a judicial manner. If this be so, it was not, I think, disputed that the local board, as such, must exercise the power and cannot delegate it to a committee.

- I would add that the constitution of the local board which was so devised as to secure equal representation for employer and employed seems to support the view that the power conferred by cl. 16 cannot be delegated. For, if delegation were permissible, there is nothing to control the selection of the persons to whom the power is to be delegated.

For these reasons, I agree with the unanimous decision of the Court of Appeal and with your Lordships that the delegation to the disciplinary committee of the power to terminate the employment of a registered dock worker was invalid. In reaching this conclusion, I am assisted by the decision of the Court of Appeal in *Barnard v. National Dock Labour Board* (4) ([1953] 1 All E.R. 1113). The

correctness of that decision was challenged by counsel for the National Board, A
but, in my opinion, his criticism is not valid. |

The question next arises whether the majority of the Court of Appeal were
right in refusing to the plaintiff the declaration that had been made by the order
of ORMEROD, J. The plaintiff's right to this declaration was challenged on two
grounds. First, it was said that he had elected to treat himself as wrongfully
dismissed and to sue for damages and was thus debarred from claiming to be B
still in the employment of the National Board. Secondly, it was said that the
power to make such a declaration should be sparingly used, and that this was not
an appropriate case for its exercise. I am unable to accept either of these
arguments. I cannot attach importance to the fact that the plaintiff sought
other employment. As ORMEROD, J., said, he was prevented from following
his employment by the act of the National Board, and was left with no alternative
but to try to find other employment in order to earn a living, at least until the
dispute between the parties could be decided one way or the other. Counsel
relied also on the form of the original statement of claim in this action. On this
point I agree with JENKINS, L.J. ([1956] 1 All E.R. at p. 10), that on no fair
reading of the pleading could it be read as an election not to ask for reinstatement. C

I also agree with ORMEROD, J., and JENKINS, L.J., that this is not a case in
which damages would be an adequate remedy, and I cannot usefully add anything
to the reasons given by them and by your Lordships for reaching this conclusion. D

Finally, counsel for the National Board, by way of cross-appeal, urged that,
if a declaration were made, the damages awarded were excessive. My Lords, I
am unable to see that the trial judge erred in principle in assessing the damage,
nor can I say that the amount he awarded is so excessive that an appellate
tribunal would be justified in interfering with his assessment. E

For these reasons, I would allow the appeal and restore the judgment of the
trial judge, and would dismiss the cross-appeal.

LORD KEITH OF AVONHOLM: My Lords, agreeing as I do with the
conclusions reached by your Lordships, I have little to add to what has been said. F

This is not a straightforward relationship of master and servant. Normally,
and apart from the intervention of statute, there would never be a nullity in
terminating an ordinary contract of master and servant. Dismissal might be in
breach of contract and so unlawful but could only sound in damages.

Here we are concerned with a statutory scheme of employment. One of its
objects was to do away with the evils of casual employment at the docks. Another
was to secure a regular supply of labour for the shipping and unshipping of
merchandise. These objects are concisely stated in the scheme, echoing the
words of the statute, to be G

"to ensure greater regularity of employment for dock workers, and to
secure that an adequate number of dock workers is available for the efficient
performance of dock work." H

No employer can engage labour at the docks unless he is registered under the
scheme, and no dock worker can be employed at the docks unless he also is
registered under the scheme. To be registered as a dock worker is, therefore,
the first step to getting employment. Further, having been registered the worker
comes on to the pay roll of the National Dock Labour Board, unless he is in the
employ of a registered dock employer on a contract by the week or longer, I
whether there is work for him or not. He is in what the scheme calls the reserve
pool and, while in the reserve pool, is in the employment of the National Dock
Labour Board. While in the reserve pool, a man has to be at call unless he is
excused for illness or otherwise. When allocated for work at the docks, he
comes for the time being into the employment of the particular registered
employer requiring his services, and when this employment is finished he falls
back again into the reserve pool. The worker employed by a registered employer

A on a week's notice or longer does not properly come within the scheme, apart from the fact that he must be registered. He is paid by his particular employer, and is subject to his orders and control. But if he were dismissed by his employer, it would seem that, as a registered dock worker, he would fall into the reserve pool and be in the employment of the National Dock Labour Board and subject to the directions of the local board. It is impossible, in my opinion, to equate
B the position of a registered dock worker in relation to the National Dock Labour Board with that of an employee under an ordinary contract of service. It is being in the scheme, with all the advantages that pertain thereto, that is important to the dock worker, and it is significant that the scheme places the dock worker and the employer on the same plane in this matter. Clause 11 provides:

C “ (1) The scheme shall cease to apply to a registered dock worker when his name has been removed from the register or record in accordance with the provisions of the scheme. (2) The scheme shall cease to apply to a registered employer when his name has been removed from the employers' register in accordance with the provisions of the scheme.”

D The scheme gives the dock worker a status. Unless registered, he is deprived of the opportunity of carrying on what may have been his lifelong employment as a dock worker, and he has a right and interest to challenge any unlawful act that interferes with this status. If the actings here complained of were a nullity, Mr. Vine (hereinafter called “ the plaintiff ”), in my opinion, has a clear right to have that fact declared by the court.

E I find it difficult to correlate the provisions of cl. 15, cl. 16, cl. 17, and cl. 18 and to be satisfied in my mind on how they are intended to interact as between one another. But that does not, in my view, affect the fundamental question with which this appeal is concerned. It is, in my opinion, plain that the disciplinary committee acted under cl. 16. I agree that such a committee had no authority to exercise the whole powers of disciplinary action conferred by that clause. The scheme committed these powers to the local board, and the local board at no
F stage took any part in investigating, or considering any report on, the conduct of the plaintiff, or in terminating his employment. It had no power to commit all its functions under cl. 16 to any committee of its own number, or to anyone else. I do not find it necessary to consider in what respects, or to what extent, the local board would have to act in a judicial manner or to pay regard to judicial models of procedure in operating the powers of this clause. In this matter, I
G would associate myself with the observations to be made by my noble and learned friend, LORD SOMERVELL OF HARROW, whose speech I have had the advantage of reading.

I agree that, in the circumstances of this case, the purported termination of the plaintiff's employment was a nullity.

H LORD SOMERVELL OF HARROW: My Lords, in *Barnard v. National Dock Labour Board* (4) ([1953] 1 All E.R. 1113), the plaintiffs claimed that notices of suspension given under cl. 16 of the scheme were invalid, in that they had not been given by the local board, and that the local board had no power to delegate as it had purported to do. The plaintiffs claimed a declaration. The board submitted, as a preliminary point, that the claim for a declaration was incompetent; that the only remedy was by certiorari. The Court of Appeal held it
I was a proper case for a declaration, relying on a decision of its own in *Cooper v. Wilson* (1) ([1937] 2 All E.R. 726), and referring to a decision of this House in *Andrews v. Mitchell* (5) ([1905] A.C. 78).

The principle laid down in *Cooper v. Wilson* (1) is, I think, accurately stated in the headnote: “ Where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null and void.”

In *Andrews v. Mitchell* (5), the remedy sought was not a declaration but a writ of prohibition. It concerned a dispute between a member and a friendly society. Under the Friendly Societies Act, 1896, such disputes were to be determined in a manner directed by the rules of the society, and such decisions were to be final. The EARL OF HALSBURY, L.C., referred to the inconvenience of having such disputes reinvestigated in a court of law ([1905] A.C. at p. 80). The courts, he said, would not insist on a "too minute observance of the regularity of forms" but "there are some principles of justice which it is impossible to disregard". In that case, the man expelled had never received a charge as provided by the rules. This went, as LORD DAVEY expressed it (*ibid.*, at p. 83), "to the root of the jurisdiction".

The Court of Appeal held, I think rightly, that action taken by a delegated authority when there was no power to delegate went to the root of the jurisdiction, and the circumstances entitled the court, in its discretion, to grant a declaration. I agree, for the reasons that have been given by my noble and learned friend, LORD MORTON OF HENRYTON, that the disciplinary committee in the present case were purporting to act as the delegate of the local board under cl. 15 and cl. 16 of the scheme.

In *Barnard's* case (4), as in the present case, the functions of a local board under these provisions have been said to be judicial or quasi-judicial, and this has been regarded as conclusive on the question whether the functions could be delegated. I would like, in the first place, to associate myself with the critical observations made by LORD GREENE, M.R., on the expression "quasi-judicial" in *Coplans v. King* (6) ([1947] 2 All E.R. 393). It is not to be found in the statements made in this House and normally cited on this topic. I will not set them out, but I have in mind the EARL OF SELBORNE, L.C.'s opinion in *Spackman v. Plumstead Board of Works* (7) (1885), 10 App. Cas. 229 at p. 240, LORD LOREBURN, L.C.'s opinion in *Board of Education v. Rice* (8) ([1911] A.C. 179 at p. 182), and that of VISCOUNT HALDANE, L.C., in *Local Government Board v. Arlidge* (9) ([1915] A.C. 120 at p. 132). The phrase "quasi-judicial" suggests that there is a well-marked category of activities to which certain judicial requirements attach. An examination of the cases shows, I think, that this is not so. The court has to consider whether a minister, tribunal or board has to act "judicially" in some respect and has failed to do so. The respect in which he has to observe judicial procedure will depend on the statutory or other provisions under which the matter arises. In *Rice's* case (8), the question was whether the board had determined "questions" which, on the decision, it was their duty to determine. In *Arlidge's* case (9), one question was whether the board was entitled to withhold from the appellant the report made by its inspector after the local inquiry. Although the case was one in which it was the duty of the board to act judicially—in some respects—the proceedings were not vitiated by the fact that the official who decided saw and considered a report which was not available to the appellant. In *Errington v. Minister of Health* (10) ([1935] 1 K.B. 249), the subject-matter was a clearance order made by a local authority. The owners had objected, and the Minister had to hold a public inquiry and confirm or not confirm the order. This was done, and the order was confirmed. The officials of the Minister had, after the inquiry, received statements from, and viewed the property with, representatives of the local authority in the absence of, and without communicating with, the owners. This vitiated the proceedings and the order was quashed.

As LORD GREENE, M.R., pointed out in the passage to which I have referred, the administrative and quasi-judicial functions are closely intermingled. The last two examples I have given show that, in one case, a document may properly be withheld from the "other side", while in another, withholding a document, or conversation, or its purport, may vitiate the whole proceedings. The expression is "sadly lacking in precision", as HAMILTON, L.J., said of the expression

A "natural justice" (*R. v. Local Government Board, Ex p. Arlidge* (9), [1914] 1 K.B. 160 at p. 199).

The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a "person" has power to delegate, one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated, though no one doubted in *Arlidge's* case (9) that the local government board, which consisted of the President, the Lord President of the Council, the Secretaries of State, the Lord Privy Seal and the Chancellor of the Exchequer (Local Government Board Act, 1871), could act by officials duly deputed for the purpose, whether or not the act to be done had judicial ingredients. There are, on the other hand, many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would, normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute, authorise someone else to make the appointment without further reference to him. I do not, therefore, find it necessary to consider what judicial requirements might be held implicit in the local board's proceedings under cl. 16. I am, however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated. The non-entitlement to pay, the suspension, the notice or the dismissal, must be a step taken by the local board and not by a delegate. The penalties, in some cases, may be slight but, in some cases, very great. A man who has worked all his life in the docks may find himself precluded altogether from doing so. Today it may be easy for him to get other work, but that has not always been so. The constitution of the local board also supports the conclusion. It is clearly constituted so as to inspire confidence and weigh fairly the interests of employers and employed. The purported delegation in the present case was to a representative of each side, but it is impossible to imply a limited right of delegation. *Osgood v. Nelson* (11) ((1872), L.R. 5 H.L. 636) decides that, in somewhat similar circumstances, the appointment of a committee to take evidence and report is not in itself a delegation of authority. If there are administrative difficulties, this may be an answer to them.

On the questions whether the plaintiff had elected, whether the majority of the Court of Appeal were right in refusing a declaration, and whether the damages should be interfered with, I have nothing I wish to add to the opinion just delivered by my noble and learned friend, LORD MORTON OF HENRYTON.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *White & Leonard*, agents for *Woodford & Ackroyd*, Southampton (for the plaintiff in the action, Walter Charles Vine); *Bell, Brodrick & Gray* (for the National Dock Labour Board).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

PURTON *v.* PURTON AND GEORGE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 9, November 20, 1956.]

Divorce—Discretionary bar—Delay—Culpable delay—Discretion exercised—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (i).

The parties were married in 1927 and there were four children of the marriage born in 1928, 1930, 1939 and 1944. In May, 1946, the wife left the matrimonial home, taking with her the two youngest children, and went to live with the co-respondent as his wife. The husband continued to provide a home for and look after the two eldest children. He hoped that the wife would return to him but by 1951 he had given up this hope. In 1955 the husband became desirous of marrying someone who was free to marry him and in December, 1955, he presented a petition for divorce on the grounds of the wife's desertion and adultery. Towards the end of 1955 the woman whom the husband now wished to marry became his housekeeper and from about Christmas, 1955, they had lived together as man and wife; and the husband asked the court to exercise its discretion in respect of his adultery. It was conceded that the husband had been guilty of unreasonable delay amounting to culpable delay. On the question whether the court should exercise in the husband's favour its discretion under proviso (i) to s. 4 (2) of the Matrimonial Causes Act, 1950*,

Held: although the husband had been guilty of culpable delay he had not been guilty of acquiescence in the wife's adultery (*Lowe v. Lowe*, [1952] 2 All E.R. 671 distinguished) and (applying the principles laid down by VISCOUNT SIMON, L.C., in *Blunt v. Blunt*, [1943] 2 All E.R. at p. 78) a decree nisi should be granted for the following reasons—

(i) it was in the interest of the youngest child that the wife should be free to marry the co-respondent.

(ii) there was no real prospect of reconciliation between the husband and wife, and his interest and those of the woman named in the husband's discretion statement were identical, viz., that their position should be regularised by their being allowed to marry.

[As to unreasonable delay in presenting a petition for divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 308, para. 615, note (t); and for cases on the subject, see 27 DIGEST (Repl.) 414, 3440, 3441 and 3rd DIGEST Supp.]

For the Matrimonial Causes Act, 1950, s. 4 (2), proviso (i), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *Key v. Key & Staples*, post, p. 955.

(2) *Lowe v. Lowe*, [1952] 2 All E.R. 671; [1952] P. 376; 3rd Digest Supp.

(3) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, 3589.

Petition.

The husband petitioned for divorce on the grounds of the wife's desertion and adultery.

The parties were married in 1927 and there were four children of the marriage, a son born in November, 1928, and three daughters born respectively in March, 1930, January, 1939, and August, 1944. The wife left the matrimonial home on May 9, 1946, taking with her the two youngest children, and ever since that date she had lived with the co-respondent. In the summer of 1955

* By the Matrimonial Causes Act, 1950, s. 4 (2), proviso (i), the court is not bound to pronounce a decree of divorce if, in the opinion of the court, the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition.

A the husband met a woman whom he became desirous of marrying and who was free to marry him. On Dec. 2, 1955, the husband presented a petition for divorce dated Nov. 25, 1955, on the grounds of the wife's desertion and adultery. The husband filed a discretion statement in which he stated that on Dec. 18, 1955, the woman whom he wished to marry came to act as his housekeeper, that from Christmas, 1955, they had lived together as man and wife, and that
B they intended to marry if the court exercised its discretion and granted him a decree. The suit was undefended and came before KARMINSKI, J., on May 9, 1956, when His LORDSHIP adjourned it for argument by the Queen's Proctor on the question of delay. On the same date KARMINSKI, J., heard the undefended suit of *Key v. Key & Staples* (1) (post, p. 955) in which the same question arose and which His LORDSHIP also adjourned for argument by the
C Queen's Proctor*. The husband now appeared by different counsel.

A. F. Waley for the husband.

Colin Duncan for the Queen's Proctor.

KARMINSKI, J.: The husband and the wife were married in June, 1927; four children were born of this marriage and, as far as I am able to judge, the
D marriage was at least reasonably happy until the early part of 1946 when the wife first fell in love with, and then went off to live with, the co-respondent. At that time the parties had been married for the best part of twenty years. The wife took with her the two youngest children of the marriage; the two eldest children, who were nearly grown-up, remained with their father, the husband. The children saw each other and their parents quite regularly, and that state
E of affairs seems to have continued for a very long time.

For the first five years of this separation the husband says that he had hopes that the wife would return to him. I saw the husband on the previous hearing and today, and I say at once that I regard him as an honest man and I think that he is telling me the truth both in that regard and in other matters. I find that he entertained a hope, firm at first but later less strong, that the wife would
F give up the co-respondent and return to him at the matrimonial home. In fact she did not, and she and the co-respondent have continued to live as man and wife until the present time. She has voluntarily given evidence today, which I accept. She has told me that she and the co-respondent earnestly desire to be married. By 1951 the husband had quite given up hope that the wife would return to him, and for the next five years he did nothing until the
G petition was in fact presented on Dec. 2, 1955. By that time the husband had met, and had clearly formed an attachment for, the woman named in his discretion statement. He had formed the view, which this woman had accepted, that marriage between them would, if possible, be desirable. At the end of 1955 this woman came to live in the husband's house as his housekeeper, but after
H a very short interval the relationship between them developed and she in fact has lived with him as man and wife since about Christmas, 1955. They are still desirous of marrying each other.

I have not the slightest doubt that unless the husband had formed an affection for another woman this particular petition would never have been presented. He was not unsatisfied with the state of affairs which had gone on for very nearly
I ten years; and although he had not, as I find, acquiesced in it in any way and certainly had not encouraged this association or the adultery, I have no doubt that nothing at all would have happened but for the fact, perhaps the chance fact, that he met the other woman and they formed an affection for each other. In those circumstances I thought it right to adjourn the present case, together with another case with somewhat similar difficulties [*Key v. Key & Staples* (1) (post, p. 955)] so that the matter could be argued by the Queen's Proctor.

* See letter I, *supra*.

On the facts as they stand, I regard the present case as one of grave difficulty, but not so hopeless as it originally appeared when it was first brought to my notice. Counsel, who has admirably argued the case for the husband, frankly, and I think rightly, conceded that there was in the present case unreasonable delay, which he agreed amounted to culpable delay. However, he said that the present case is one of the comparatively small body of cases where in spite of culpable delay being found the court can, and here should, exercise its discretion in favour of the husband. Counsel for the husband rightly emphasised that the delay became culpable only during the last five of the ten years and then only because the husband had given up all hope of reconciliation. Counsel for the Queen's Proctor admitted that the mere fact that the husband had been stung into action at last by his desire to marry another woman was not by itself a reason for refusing to exercise discretion.

In matters of discretion it is essential to try to form a general view of the whole case. Here was a man who was left by his wife through no fault of his own, with two children of seventeen and a half and sixteen to look after. They were in fact both at work, but he provided a home for them; not only, I am sure, in the sense of providing a roof and food, but looking after them as well as he could. At that stage, therefore, his mind was not at all on divorce; further he hoped that his wife would come back to him. The children grew up and one of them indeed is now married; but he had formed a way of life where the question of marriage or divorce was of small interest to him. The husband is a perfectly intelligent man, but he is not perhaps the kind of man who seeks legal advice unless he is driven to it. Undoubtedly the difficulties in the present case might well have been solved if within a few years of his wife leaving him he had consulted a solicitor or at any rate taken advice from one of the many voluntary bodies who give legal advice; but, unfortunately, he did nothing of the kind and continued to exist as he was. In the present case, however, unlike the petitioner in *Lowe v. Lowe* (2) ([1952] 2 All E.R. 671), he was not guilty in any way of acquiescence. In *Lowe v. Lowe* (2) the husband went on being quite friendly with his wife and meeting her from time to time, and indeed took no proceedings until after the death of the man with whom she had been living. In *Lowe v. Lowe* (2) also the husband had consoled himself for a period of five years with another woman. Those disquieting aspects are happily absent from the present case. I agree with both counsel that there was culpable delay in the present case; but I have to consider, in the light of all the circumstances, and dealing with a man of the husband's particular background, whether or not I should exercise the court's discretion.

I believe the basis on which the court's discretion is exercised to be that laid down by VISCOUNT SIMON, L.C., in *Blunt v. Blunt* (3) ([1943] 2 All E.R. 76), and it seems to me that all, except perhaps one, of the five categories enumerated by the Lord Chancellor fall to be considered here. The first category is the position and interest of the children, and that is the one least applicable to the present case. I think that the youngest child, who is a little over twelve, has to be considered because she has been living with her mother and under the same roof as her mother's lover for most of her life. I cannot help thinking that it would certainly be of some advantage to her if her mother and the co-respondent, whom she probably regards as her stepfather, could be married. The second category is more important. I have to pay regard to the woman named in the discretion statement; she is free to marry and her position would be regularised by being allowed to marry the husband. So far as reconciliation is concerned, it is quite obvious here that after all these years there is no real prospect of reconciliation. The husband has admittedly formed an association with another woman, and the wife appears to have been living perfectly happily with the co-respondent, whom she desires to marry. The interests of the husband are identical with those of the woman named in his discretion statement. He wants

A to be able to marry her and to live respectably. Lastly I have to regard the interests of the community as a whole and maintain the delicate balance between the need for the binding sanctity of marriage and those considerations which make it contrary to public policy to insist on the maintenance of a marriage which has in fact, though not in law, ceased to exist.

B I have considered all these matters, and I have considered them in the light of the admitted long delay by the husband. On the whole, and with some hesitation, I have come to the conclusion that the present is a case where I ought to exercise the judicial discretion of the court, notwithstanding his culpable delay, in favour of the petitioner. I also exercise my discretion in his favour notwithstanding his adultery as disclosed. In the result, therefore, there will be a decree nisi.

C

Decree nisi.

Solicitors: *Maurice Hudgell*, Woolwich (for the husband); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

D

NOTE.

KEY v. KEY AND STAPLES.

E

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 9, November 20, 1956.]

Divorce—Discretionary bar—Delay—Delay caused by petitioner's desire to save up for costs of proceedings—Delay not culpable—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (i).

F

The parties were married in 1932 and there were no children of the marriage. In 1946 the wife left the matrimonial home and went to live with the co-respondent. The husband, who was a motor coach driver, made inquiries but was unable to find out where the wife had gone; he hoped, however, that she would return to him. In about 1949 or 1950 the husband came to the conclusion that the wife would not return to him and in August, 1950, the husband began to commit adultery with a woman whom he now wished to marry and who was free to marry him. They had thereafter lived together as man and wife. The husband did not institute proceedings as he wished first to save sufficient money to cover the costs of the proceedings. By the beginning of 1956 the husband had saved £100 and on Feb. 10, 1956, he presented a petition for divorce on the ground of the wife's desertion and adultery and prayed for the exercise of the court's discretion in respect of his adultery. The petition was undefended.

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Held: the husband's delay in presenting his petition was not culpable (*Hooper v. Hooper*, The Times, Oct. 15, 1953, p. 2, and *Lowe v. Lowe*, [1952] 2 All E.R. 671, considered); and the court would exercise its discretion in his favour in respect of his adultery and grant him a decree.

I

[As to unreasonable delay in presenting a petition for divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 308, para. 615, note (t); and for cases on the subject, see 27 DIGEST (Repl.) 414, 3440, 3441 and 3rd DIGEST Supp.]

For the Matrimonial Causes Act, 1950, s. 4 (2), proviso (i), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *Hooper v. Hooper*, (1953), The Times, Oct. 15, p. 2.

(2) *Lowe v. Lowe*, [1952] 2 All E.R. 671; [1952] P. 376; 3rd Digest Supp.

Petition.

The husband petitioned for divorce on the grounds of the wife's desertion and adultery.

The facts appear in the headnote.

The suit came undefended before KARMINSKI, J., on May 9, 1956, when His LORDSHIP adjourned it for argument by the Queen's Proctor on the question of delay by the husband in presenting the petition. The husband, who now appeared by different counsel, was recalled at the adjourned hearing.

R. J. A. Batt for the husband.

Colin Duncan for the Queen's Proctor.

KARMINSKI, J., stated the facts and after referring to *Hooper v. Hooper* (1) ((Oct. 15, 1953), *The Times*), where the Court of Appeal had pointed out that for a man in the position of the husband to save money to cover the cost of divorce proceedings was something not to be criticised but to be commended, and to *Lowe v. Lowe* (2) ([1952] 2 All E.R. 671), continued: I think that the present case, as it now emerges, is quite different from *Lowe v. Lowe* (2). The husband, who is not a man with very much educational advantage, did his best according to his own lights to remedy the wrong which was done to him. He tried his best for some years to find his wife and then he tried with great trouble and inconvenience to save up enough money to start proceedings. I have come to the conclusion that, although there is undoubtedly a ten years' delay here, there is no culpable delay as envisaged by the statute* and, that being so, I think that this is a proper case where the delay is sufficiently explained. I think also that on the facts it is a case where, notwithstanding the husband's adultery, I can properly exercise my discretion in the husband's favour, and accordingly I pronounce a decree nisi.

I would add that in this sort of case it may be of very great assistance to the court if, before the evidence is called, the attention of the court is called to the salient facts and dates and some explanation given to the court for the delay. That course at least has the merit of directing the attention of the court to the inherent difficulties of a case of this kind, but I am satisfied now that the present is a case where the delay is not culpable.

Decree nisi.

Solicitors: *Elliott & Macvie* (for the husband); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

* Matrimonial Causes Act, 1950, s. 4 (2), proviso (i).

A

G. H. RENTON & CO., LTD. v. PALMYRA TRADING CORPORATION OF PANAMA.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow), October 2, 3, 4, 8, December 5, 1956.]

B

Shipping—Carriage by sea—Bill of lading incorporating Hague Rules—Clause for discharge of cargo in the event of strike—Strike at port of delivery—Delivery at port other than that named in bill of lading—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5 c. 22), Schedule, art. III, r. 2, r. 8, art. IV, r. 4—Water Carriage of Goods Act, 1936 (R.S.C. 1952 c. 291), Schedule, art. III, r. 2, r. 8, art. IV, r. 4.

C

The appellants were the indorsees of four bills of lading in similar form issued by the respondents as shipowners, and providing for the shipment of timber from ports in British Columbia to London, and, in one case, to Hull, in England. By condition 2 of the bills of lading the Hague Rules* were applied to the contracts of carriage, though in the case of one bill of lading the rules did not apply since the goods covered were carried on deck. By condition 3, cl. 14, of the bills of lading, it was provided: “(c) Should it appear that . . . labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore . . . would prevent the vessel from . . . reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port”, and “(f) The discharge of any cargo under . . . this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods”. The ship was due to arrive at London on Oct. 14, 1954, but, while she was still at sea, a strike broke out among dock workers in the Port of London. The respondents instructed the master to proceed to Hamburg where the cargo originally destined for London was discharged. While the ship was at Hamburg, the dock strike spread to Hull and the cargo originally destined for Hull was, therefore, also discharged at Hamburg. The cargo was fully discharged on Nov. 1, 1954, on which day work was resumed at all the United Kingdom ports affected by the strike. The respondents took no steps to forward or tranship any part of the cargo discharged at Hamburg to the United Kingdom, nor did they pay for storage costs incurred at Hamburg, but insisted on receiving payment of the freight in full before releasing the goods to the appellants at Hamburg. The appellants claimed damages for breach of contract by reason of the respondents’ failure to deliver the cargo at London and Hull. The appellants contended (i) that the discharge of the goods at Hamburg by the respondents constituted a breach of the contract on the true construction of cl. 14 (c) and (f) of the bills of lading, and (ii) that, in relation to the three bills of lading to which the Hague Rules applied, cl. 14 (c) and (f), on which the respondents relied as excusing them from liability for the final discharge of the goods at Hamburg, were rendered null and void by art. III, r. 8† of the Hague Rules, as being provisions that relieved the carrier from a liability for “loss or damage to or in con-

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* The terms of art. III, r. 8, are printed at p. 962, letter H, post.

† The Hague Rules thus incorporated in the bills of lading were those enacted in the country of shipment, i.e., those enacted in the Water Carriage of Goods Act, 1936 (R.S.C. 1952 c. 291) of Canada. They are similar in terms to the Hague Rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924. The terms of art. III, rr. 2 and 8, and art. IV, r. 4, are set out at p. 962, letter G, post.

nection with goods " arising from failure in the obligations imposed by art. III, or that lessened a liability provided by the Hague Rules.

Held: the respondents did not commit a breach of contract by discharging the goods at Hamburg since cl. 14 (c) and (f) provided a substituted method of performing the contract, which the respondents had fulfilled, and were valid for the following reasons—

(i) clause 14 (c) and (f) were not repugnant to the main objects of the contract, viz., carriage to London and Hull, because there was no repugnancy where an obligation, stated first in unqualified terms, was subsequently qualified by a proviso modifying the obligation if certain events, which were outside the control of either party to the contract, should happen (see p. 964, letter I, to p. 965, letter A, post).

Distinction stated by JENKINS, L.J. ([1956] 1 All E.R. at p. 223, letter C) adopted (see p. 962, letters A to C, p. 967, letters E to H, p. 968, letter G, post).

(ii) although the loss or damage in the present case was loss or damage " in connection with goods " within art. III, r. 8, of the Hague Rules, which rule accordingly was applicable, yet cl. 14 (c) and (f) were not rendered null and void by that rule, because the obligation imposed by art. III, r. 2, that the carrier must " properly . . . carry " the goods was directed solely to the manner in which whatever carrying was in fact done should be carried out (dictum of DEVLIN, J., in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. at p. 163, approved) and was not directed to the goods being carried to a particular destination.

(iii) (LORD TUCKER expressing no opinion on this point), even if a clause in a contract permitting a deviation not envisaged by art. IV, r. 4, were rendered void by art. III, r. 8, yet cl. 14 (c) and (f) of the contract in the present case did not permit a " deviation " within art. IV, r. 4.

Decision of the Court of Appeal ([1956] 1 All E.R. 209) affirmed.

[As to the effect of the Carriage of Goods by Sea Act, 1924, on the common law rights and liabilities of shipowners, see 30 HALSBURY'S LAWS (2nd Edn.) 607, para. 767; and for the obligation of a carrier under art. III, r. 2, of the Schedule to the Act in relation to properly discharging the goods, see 30 HALSBURY'S LAWS (2nd Edn.) 612, para. 771, note (b).]

For the Carriage of Goods by Sea Act, 1924, Schedule, art. III and art. IV, see 23 HALSBURY'S STATUTES (2nd Edn.) 887-892.]

Cases referred to:

- (1) *Leduc & Co. v. Ward*, (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 41 Digest 485, 3172.
- (2) *Margetson v. Glynn*, [1892] 1 Q.B. 337; 61 L.J.Q.B. 186; 66 L.T. 142; *affd.* H.L. sub nom. *Glynn v. Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 41 Digest 311, 1715.
- (3) *Frenkel v. MacAndrews & Co., Ltd.*, [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33; Digest Supp.
- (4) *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.*, (1934), 49 Lloyd's Rep. 183.
- (5) *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.*, (1920), 2 Lloyd's Rep. 639; 149 L.T. 302; 41 Digest 519, 3485.
- (6) *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1927] 2 K.B. 432; *revsd.* C.A., [1928] 1 K.B. 717; 97 L.J.K.B. 193; 138 L.T. 421; *revsd.* H.L., [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; Digest Supp.
- (7) *Angliss (W.) & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 41 Digest 474, 3054.
- (8) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158; [1954] 2 Q.B. 402; 3rd Digest Supp.

- A (9) *Atkins, Kroll & Co. v. Silver Line, Ltd.*, 1954 A.M.C. 177.
 (10) *Hirsch Lumber Co. v. Weyerhaeuser Steamship Co.*, 1956 A.M.C. 1294.

Appeal.

B Appeal by G. H. Renton & Co., Ltd., indorsees and holders of four bills of lading issued by the respondents, Palmyra Trading Corporation of Panama, as shipowners, from an order of the Court of Appeal, dated Dec. 20, 1955, and reported [1956] 1 All E.R. 209, reversing an order of McNAIR, J., dated Oct. 7, 1955, and reported [1955] 3 All E.R. 251. The facts are set out in the opinion of VISCOUNT KILMUIR, L.C.

C *A. A. Mocatta, Q.C.*, and *R. A. MacCrimdale* for the appellants.
Eustace Roskill, Q.C., *T. G. Roche, Q.C.*, and *A. J. Bateson* for the respondents.

The House took time for consideration.

Dec. 5. The following opinions were read.

D VISCOUNT KILMUIR, L.C.: My Lords, this appeal arises out of a claim by the appellants under four bills of lading in similar form issued by the respondents as shipowners, and providing for the carriage of timber in the vessel *Caspiana* from Canada to (in the case of three bills of lading) London and (in the case of the remaining bill of lading) Hull. The short question raised is whether the respondents can successfully rely on cl. 14 (c) and (f) of the bills of lading in finally discharging the timber at Hamburg against payment of freight appropriate for carriage to London and Hull; and thereafter failing to take any steps to have the goods forwarded to these ports. By reason of the final discharge of the goods at that port, the appellants suffered damage. McNAIR, J., held that, in these circumstances, the respondents were liable to the appellants. The Court of Appeal (SINGLETON, JENKINS and HODSON, L.J.J.) held that the respondents were freed from liability by the clause.

F As a fair example on all material points I take the first bill of lading, No. LN-4, the material terms of which are:—On p. 2:

G “Shipped at Vancouver B.C. in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, . . . on board the good vessel called the *Caspiana* for carriage to London, England or so near thereunto as the vessel may safely get always afloat, the following goods [certain quantities of Douglas fir lumber] . . . which are to be delivered in the like good order and condition at the aforesaid port unto order of shipper . . . or his or their assigns, he or they paying freight plus other charges incurred in accordance with the provisions contained in this bill of lading. Freight: collect at destination. In accepting this bill of lading the merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant.”

H Stamped across the front of each bill of lading was “Subject to Chamber of Shipping War Risks Clauses Nos. 1 and 2.” These clauses are:

I “(1) No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship is or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had

discharged at the port or ports of discharge to which she was originally ordered.

"(2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

On p. 1:

"I. Definition. Wherever the term 'merchant' is used in this bill of lading, it shall be deemed to include the shipper, the receiver, the consignee, the holder of the bill of lading and the owner of the cargo.

"II. Paramount Clause. The Hague Rules contained in the International Convention for the unification of certain rules relating to bills of lading, dated Brussels Aug. 25, 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply. With respect to goods loaded at a Canadian port, the Water Carriage of Goods Act, 1936, of the Dominion of Canada shall be effective . . .

"III. Jurisdiction. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply* . . .

"14. (c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port . . .

"(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods."

In the case of one bill of lading (No. LN-78), the Hague Rules did not apply, since the goods covered were carried on deck.

At the time of sailing from British Columbia, labour relations were tranquil at United Kingdom ports, but at the end of September, 1954, while the vessel was on passage, a strike broke out among dock workers in the Port of London. The vessel was due to arrive off Dungeness on Oct. 13, 1954, and to dock in London the following day. On Oct. 13, the strike continued to prevail in London, and at about 12.15 p.m. on that day the respondents cabled the master

* The carrier (i.e., the respondents) had their principal place of business in Panama, but it was agreed for the purposes of the case that there was no difference between English law and the law of the State of Panama.

A to proceed to Hamburg. The vessel arrived at Hamburg on Oct. 15, 1954, and began to discharge the cargo originally destined for London on Oct. 16, 1954. By Oct. 20, 1954, the strike had spread to certain other ports, and on that date the strike affected Hull. The respondents completed the discharge at Hamburg of the London cargo on Oct. 26, 1954. On that date, they also began to discharge at Hamburg the Hull cargo, and completed this on Nov. 1, 1954. On the same day, work was resumed at all United Kingdom ports affected by the strike, and, although a smaller strike again broke out that day in London, by Nov. 4, 1954, there was a full resumption of work. The respondents took no steps to forward or tranship any part of the cargo discharged at Hamburg to the United Kingdom, nor did they pay for storage costs incurred at Hamburg. They insisted, before releasing the goods to the appellants at Hamburg, C that the full bill of lading freight should be paid; this was done under protest.

The appellants' submissions fell under two main heads. They contended that the respondents' action in finally discharging the goods at Hamburg constituted a breach of contract on the true construction of the bills of lading. This contention was independent of the operation of the Hague Rules. Secondly, they submitted that, in relation to the three bills of lading to which the Hague Rules D applied, the provisions on which the respondents relied as excusing them from liability for the final discharge at Hamburg were rendered null and void by the operation of the rules.

On the first contention, it was submitted that, in this case, the main object and intent of the contract is the carriage of the timber to London or Hull, and that cl. 14 (c) and (f) do not provide for alternative ports of discharge but seek E to exonerate the respondents from liability for failure to achieve this main object. Counsel for the appellants submitted that, while there might be nothing inconsistent with this object in a provision permitting discharge at Hamburg and subsequent forwarding to the named ports by the respondents, cl. 14 (f) purported to provide that delivery at Hamburg shall be deemed due fulfilment of the contract and thus the provisions of the clause are repugnant to the purpose F of the contract. In support, counsel for the appellants referred us to a number of cases on contracts generally and bills of lading in particular whose effect was, in his submission, that contractual provisions inconsistent with the main object of the contract should be disregarded. He placed reliance on the well known passage in the judgment of LORD ESHER, M.R., in *Leduc & Co. v. Ward* (1) ((1888), 20 Q.B.D. 475 at pp. 480, 481). We were also referred to various G passages in the judgments in *Glynn v. Margetson & Co.* (2) in the Court of Appeal ([1892] 1 Q.B. 337) and to the speeches in this House, especially to that of LORD HALSBURY, where he says ([1893] A.C. 351 at p. 357):

H "Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to deliver at another port a perishable cargo."

Counsel emphasised, as had McNAIR, J., that after what had been said by VISCOUNT SUMNER in *Frenkel v. MacAndrews & Co., Ltd.* (3) ([1929] A.C. 545 at pp. 562 and 564), BRANSON, J., felt constrained in *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.* (4) ((1934), 49 Lloyd's Rep. 183 at p. 188) to limit the operation I of a clause apparently based on LORD SUMNER's words. BRANSON, J., restricted the operation of the clause to such acts as would not frustrate (*ibid.*, at p. 191),

"the object of the voyage, that is to say the safe carriage of the cargo, subject to the exceptions which are provided by the bills of lading."

It is necessary, in considering the authorities on which counsel relies, to consider carefully the form of the deviation clauses in each case. They were

invariably in so extensive a form that, if they were fully and literally construed, the shipowners had a complete discretion to delay intolerably and so defeat the main object and intent of the contract if they so desired. The distinction between these cases and that before your Lordships' House has been so well stated by JENKINS, L.J., that I find it impossible to improve on his words which I quote ([1956] 1 All E.R. at p. 223):

"It seems to me that there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in cl. 14 (c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either, arising to prevent or impede the performance of the contract in accordance with its primary terms."

Counsel for the appellants argued that the obstacles must be of such a kind as to amount to frustration or, in other words, that they must prevent, and not merely impede, the performance of the contract. I cannot agree. This would be a most difficult and impractical pre-requisite. I cannot see why the parties cannot contract to meet emergencies arising from circumstances beyond the control of the shipowners, even if they may be something short of frustration. It seems much more reasonable to provide for such an emergency in advance than to leave it to prolonged post mortem speculation. It is a buttress to this approach to find that the validity of clauses comparable to those now under consideration was assumed some fifty years ago, has apparently not been since attacked, and was affirmed in an obiter dictum of GREER, J., in *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.* (5) ((1920), 2 Lloyd's Rep. 639 at p. 642).

Counsel accepted that the object and intent of the contract was made subject to the two war risks clauses set out above, which provide a substituted method of performance of the contract. This being so, I find all the more difficulty in rejecting the clauses in issue even although they are printed and the war risks clauses are introduced by a stamp.

I, therefore, reject the first contention of the appellants.

On the second contention, that cl. 14 (c) and (f) are struck at by art. III, r. 2 and r. 8 of the Hague Rules, the relevant provisions of the Hague Rules would appear to be:

"Article III, r. 2. Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

"Article III, r. 8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect . . .

"Article IV, r. 4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

I reject the respondents' submission that the damage in this case was not "loss or damage to or in connection with goods" within art. III, r. 8. So to hold would be to give no effect to the words "or in connection with".

- A The appellants argued that, under art. III, r. 2, the respondents were obliged, inter alia, properly to carry and discharge the goods carried. The appellants submitted that this involved discharging at a "proper" port, and that Hamburg was not such a port. The natural and ordinary meaning of "properly" in antithesis to "carefully" in the phrase "properly and carefully load, handle, stow, carry, keep, care for and discharge" is in accordance with a sound system.
- B It has not a geographical significance. We are asked to infer that it has, first from the important statement of the general function of the rules of WRIGHT, J., in *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.* (6) ([1927] 2 K.B. 432 at p. 434), and in *W. Angliss & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.* (7) ([1927] 2 K.B. 456 at pp. 460, 461). Secondly, the connotation is alleged to arise from the initial words of art. III, r. 2, "Subject to the provisions of art. IV" and from art. IV, r. 4. In support there was quoted note (c) at p. 502 of SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING (12th Edn.), whose senior editor was LORD PORTER. I have carefully considered these submissions, but they do not enable me to give a strained construction to a simple word.
- C

- D It was also argued that the word "carry" in art. III, r. 2, meant transport from one place to another and that, as the clause here in question permitted discharge at the port of loading, that clause must go. I cannot accept either that meaning of "carry" or the implication that it is impossible for the parties to provide for discharge in the port of loading in any circumstances.

- E Finally it was submitted that cl. 14 allows a deviation not permitted by art. IV, r. 4. I do not think that I need say more than that, in my opinion, this argument must fail.

For all these reasons, I would dismiss this appeal.

- LORD MORTON OF HENRYTON: My Lords, in this case I find myself in agreement with the Court of Appeal, but, as I am differing from the learned trial judge (McNAIR, J.), who is so experienced in these matters, I feel that I ought to state my reasons briefly in my own words.
- F

- The first question arising on this appeal is whether, apart from the question raised under the Hague Rules, cl. 14 (c) and (f) of the four bills of lading now in question are valid and effective so as to make discharge of the goods at Hamburg a performance of the respondents' contract. For the sake of simplicity I shall deal only with the contract contained in the bill of lading No. LN-4, since there is no difference between the four contracts for the purpose of the question now under consideration. The contract provides for carriage of the goods to London "or so near thereunto as the vessel may safely get always afloat"; but I do not find that the obligation to carry to London is "unqualified", and it is at this point that I part company with the learned judge. On the same page of the bill of lading there are typed the words "Subject to Chamber of Shipping War Risks Clauses Nos. 1 and 2". These clauses are as follows:
- G
- H

- I " (1) No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after the bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship is or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.

"(2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

To my mind, my Lords, by making the obligation to carry to London subject to the two clauses just quoted, the parties have inserted a proviso qualifying the obligation to carry the goods to London and providing a substituted method of performing the contract, and earning the freight, on the occurrence of the events specified in the war risks clauses. This must surely be the effect of the concluding words of each clause.

Lower down on the same page of the bill of lading are the words:

"In accepting this bill of lading the merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant."

On the other page of the bill of lading there are printed a number of stipulations, whereof I need only quote cl. 14 (c) and (f):

"(c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.

"(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods."

These two sub-clauses, read together, constitute a further proviso, again providing a substituted method of performing the contract and earning the freight on the occurrence of the events therein specified.

Counsel for the appellants contended that cl. 14 (c), read in conjunction with the first sentence of cl. 14 (f), was in conflict with the "main object and intention of the contract", namely, that the goods were to be carried to London, and must, accordingly, be modified or rejected, in accordance with the principles stated in this House and in the Court of Appeal in *Glynn v. Margetson & Co.* (2) ([1892] 1 Q.B. 337 and [1893] A.C. 351).

My Lords, I can see no conflict. The contract contained in the bill of lading must be read as a whole. So read, it provides, in effect, that the goods must be carried to London, unless there occurs an event specified in one or other of the provisos already mentioned; but, if such event happens, the goods may be discharged elsewhere, and such discharge is to be deemed to be due fulfilment of the contract. No conflict arises when an obligation in a contract, unqualified in its terms as it is first stated, is subsequently qualified by a proviso modifying

- A or altering the obligation if certain events happen which are outside the control of either party. The original obligation and the qualification of it both form part of the intention of the parties, and neither part is repugnant to the other. I add, in deference to one portion of counsel for the appellant's argument, that I can see no ground for distinguishing the incorporation of the war risks clauses from the incorporation of cl. 14 (c) and (f). It is true that, if there is
- B a conflict between general printed conditions and special written conditions bearing directly on the particular contract,

"... the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties."

- See per FRY, L.J., in *Margetson v. Glynn* (2) ([1892] 1 Q.B. at p. 344). In the present case, however, I reject the suggestion of a conflict, for the reasons
- C which I have already given.

- The second question arising on this appeal is whether the provisions of cl. 14 (c) and (f) are null and void by reason of art. III, r. 8, of the rules generally known as the Hague Rules, as scheduled to the Canadian Water Carriage of Goods Act, 1936*. These rules apply to three out of the four transactions which are the
- D subject of this appeal, by reason of a clause in the bills of lading. They do not apply to the fourth transaction as the goods were carried on deck and were stated in the bill of lading to be so carried. Article III, r. 8, of the rules is as follows:

- "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."
- E

- Counsel for the appellants contended—(i) that sub-cl. (c) and (f) of cl. 14 purport to relieve the carriers from "loss . . . in connection with goods", within the meaning of art. III, r. 8; (ii) that the liability from which the carriers are thus relieved is one which arises from "failure in the duties and obligations provided" in art. III, and, in particular, in the duty properly to "carry . . . and discharge the goods carried" laid on carriers by art. III, r. 2; (iii) that, accordingly, these sub-clauses are null and void and of no effect
- F by reason of art. III, r. 8.
- G

- As to point (i), counsel for the respondents submitted that the words "loss or damage to or in connection with goods" refer only to actual loss of the goods or physical damage to the goods. The Court of Appeal did not find it necessary to decide this point, but the contrary view is the first step in the argument of counsel for the appellants on this branch of the case, and I shall state my view on it shortly, although, as will appear, I find that his argument fails on other grounds.
- H

- My Lords, I find it quite impossible to limit the words in question in the manner suggested by counsel for the respondents. In effect, he is asking your Lordships to read the words as if they were "loss of or damage to goods", and to give no effect to the words "or in connection with". In my view, the phrase
- I covers four events—(a) Loss "to" goods (whatever that may mean); (b) damage to goods; (c) loss in connection with goods; (d) damage in connection with goods. Comparing the wording of art. III, r. 8, with other rules in which loss or damage are mentioned, it would seem clear that the words "or in connection with" were inserted in order to give a wider scope to the rule, and, in my opinion, they are wide enough to cover, for example, the loss or damage sustained by the appellants in having to bear the cost of transshipping

* See footnote on p. 957, ante.

the goods from Hamburg and of storage at that port. For these reasons I accept the first head of the argument of counsel for the appellants. A

In my view, however, counsel's second contention is ill-founded. I construe the words "shall properly and carefully . . . carry . . . and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and discharge imposed on him by the contract in a proper and careful manner. In *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (8) ([1954] 2 All E.R. 158 at p. 163), DEVLIN, J., said: B

"There is, however, a third interpretation to art. III, r. 2. The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in CARVER'S CARRIAGE OF GOODS BY SEA (9th Edn.) p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide." C

My Lords, I agree with this passage, save that, to my mind, not only is the construction approved by DEVLIN, J., more consistent with the object of the rules but it is also the more natural construction of the language used. D

Now sub-cll. (e) and (f) of cl. 14 do not seek to relieve the carrier from any liability arising from failure in the duties and obligations imposed by art. III, r. 2, as so construed. Disregarding for the moment the provision that, in certain circumstances, the master may discharge the cargo at the port of loading, the sub-clauses merely substitute for London, in the events specified, "any other safe and convenient port". Counsel for the appellants, however, relies particularly on the fact that sub-cl. (e) gives the master power to discharge the cargo at the port of loading, and sub-cl. (f) provides that such a discharge "shall be deemed due fulfilment of the contract". He submits that "carry" means "transport from one place to another"; that art. III, r. 2, imposes a positive obligation on the carrier to carry the goods, and that the goods are not carried at all if they are loaded on the vessel and then discharged at the port of loading. Consequently, sub-cll. (e) and (f), in providing that the goods need not be carried at all, relieve the carrier from an obligation provided in art. III, r. 2, and are null and void under art. III, r. 8. E

My Lords, even if "carry" has the meaning suggested by counsel, art. III, r. 2, as I construe it, does not place any obligation on the carrier to transport the goods at all, unless the contract says he is to transport them; so that, if the contract says he need not carry them in a certain event, there is no conflict with art. III, r. 2. This is a sufficient answer to counsel's argument, but I incline to the view that a ship does "carry" goods, within the meaning of art. III, r. 2, from the moment when they are loaded on board; and I think that this view is supported by the definition of "carriage of goods" in art. I (e): F

"'Carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." G

A The result is that counsel for the appellants has failed to establish his second point.

He sought, also, to rely on art. IV, r. 4, which is as follows:

B “Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

C Counsel submits that a contract cannot validly permit deviations which are not covered by that rule. In my opinion, even if this submission is correct, as to which I express no opinion, the provisions of cl. 14 (c) and (f) are not provisions which permit deviations. As I have already said, they provide substituted ways of performing the contract in certain events. Consequently, if the master performs the contract in any of these ways, he is not deviating. See the American cases of *Atkins, Kroll & Co. v. Silver Line, Ltd.* (9) (1954 A.M.C. 177) and *Hirsch Lumber Co. v. Weyerhaeuser Steamship Co.* (10) (1956 A.M.C. 1294). Counsel for the appellants also submitted that art. IV, r. 4, supports the construction of art. III, r. 2, for which he contends. I have carefully considered this argument, D but I shall not detain your Lordships further by stating it fully and dealing with it in detail. In my opinion, art. IV, r. 4, throws no light on the construction of art. III, r. 2.

The result is that the attack on cl. 14 (c) and (f) which is based on art. III, r. 8, must fail.

I would dismiss the appeal.

E LORD TUCKER: My Lords, I am in complete agreement with the decision of the Court of Appeal to the effect that, at common law, cl. 14 (c) and (f) of the bill of lading in this case read together are not so inconsistent with, and repugnant to, the primary and unqualified promise to deliver at London or Hull that they must be rejected. In the course of his judgment, JENKINS, L.J. ([1956] 1 All E.R. at p. 223) said:

F “It seems to me that there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in cl. 14 (c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given G to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either, arising to prevent or impede the performance of the contract in accordance with its primary terms.”

H I would respectfully adopt this distinction, and I arrive at the conclusion that the power in the present case is undoubtedly within the latter class, and does not bring the case within the authorities relied on by the appellants.

I Once the contract is so interpreted, it seems to me that, in the circumstances of this case, the Hague Rules will not avail the appellants. Whether, on its true construction, the object of art. III, r. 2, is to define not the scope of the contract service but the terms on which that service is to be performed, it is only by reference to the terms of the contract that it is possible to ascertain the proper port to which the goods are to be carried and at which they are to be discharged. Once it is determined that, in the existing circumstances, Hamburg was such a port, no question of improper carriage or discharge in a geographical sense can arise. It would, therefore, seem to me that a decision, with, perhaps, far-reaching consequences, on the extent and nature of the obligations imposed by the rule in relation to the various operations referred to is not called for.

There remains, however, the question whether cl. 14 (c) is void in toto because it provides for discharge at the port of loading in the circumstances there referred to, with the result, it is said, that, by reason of sub-cl. (f), such discharge is deemed to be due fulfilment of the contract without any carriage having been performed. In my opinion, carriage begins the moment the goods are loaded and before the ship has moved. This is, I think, the natural meaning of the word in this context, and it is supported by the language of art. I (e), which reads: A

“ ‘Carriage of goods’ covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.” B

Consequently, sub-cl. (c) and (f) of cl. 14 are not rendered void by art. III, r. 2 and r. 8.

My Lords, I cannot think that this construction of the Hague Rules is in any way contrary to the intentions of the framers of the rules. Article IV, r. 2 (j), expressly exempts the carrier and ship from liability for loss or damage resulting from strikes. It is difficult to see on what principle the parties should not be at liberty to provide what is to happen in the event of a strike without waiting for the loss to occur, or the contract to become frustrated. It would seem to be in the interests of carrier and holder of the bill of lading so to do, and, in the absence of clear language prohibiting any such an agreement, I should be slow to arrive at the conclusion that the rules have this effect. C

It only remains to say that, for the reasons which have been stated by your Lordships, I agree that the words “loss or damage to or in connection with goods” in art. III, r. 8, are not confined to physical damage. D

I would, accordingly, dismiss the appeal. E

LORD COHEN: My Lords, I had written an opinion in this matter, but since doing so I have had the opportunity of reading in print the speech which has just been delivered by my noble and learned friend, LORD MORTON OF HENRYTON. I find myself in such complete agreement with him that I do not desire to add any reasons of my own for agreeing that the appeal should be dismissed. F

LORD SOMERVELL OF HARROW: My Lords, in my opinion, the appellants fail, for the reasons given by the Court of Appeal. The first question is whether the printed provisions as to strikes in cl. 14 (c) and (f) defeat, or are repugnant to, the typewritten words, which describe the voyage as one to a named destination. Under cl. 14 the master has, in my opinion, to act reasonably and, in particular, in deciding what is a convenient port, he must have regard to the consignee's convenience as well as the ship's. So construed, I think it is in no way repugnant to the typewritten words. I would adopt the distinction between the clauses which have in whole or in part come within the principle applied in *Glynn v. Margetson & Co.* (2) ([1893] A.C. 351), and the present clause drawn by JENKINS, L.J., in the passage which has already been cited by my noble and learned friend, the Lord Chancellor. G

The general ambit of the Hague Rules is to be found in art. III, r. 2, which has already been cited. It is, in my opinion, directed and directed only to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by DEVLIN, J., in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (8) ([1954] 2 All E.R. 158 at p. 163), in relation to the words “shall properly and carefully load”. I agree with his statement, which has already been cited. Prima facie, therefore, the rules leave the parties free to contract in the terms in question here. They do not prohibit Hamburg as a destination in the events which happened, but they apply on that voyage as they would have done on the voyage to, and discharge at, London if there had been no strike. H

- A** The appellants submitted that, even if they had to accept this view as the prima facie ambit of the rules, the strike clause in these bills of lading was invalidated because it provided for the possibility of the port of loading being the safe and convenient port for discharge. In such an event, it was argued, there was no carriage, and a provision under which the ship need not carry at all must be bad. I accept neither the premise nor the conclusion. Once goods
- B** have been loaded there is, I think, "carriage" in the sense in which the word is used in these rules. This is re-enforced by the definition in art. I (e). Even if it could be said that a discharge at the port of loading as a result of war, ice, strikes, etc., prevented there being any carriage, I would not regard a provision to this effect as thereby invalidated by art. III, r. 2. Such a provision is outside its scope.
- C** An argument was also based on the wording of art. IV, r. 4. It was submitted that the words there used assume that a deviation would be a breach of the rules. Therefore, it is said, the rules are concerned with the course of the voyage; therefore, they prohibit the provision for a substituted safe and convenient port as this amounts to a deviation. This final step in the argument is, I think, plainly wrong if, as I have held, the appellants fail on the "repugnancy" point.
- D** The voyage to Hamburg was not a deviation. It was, in the circumstances which arose, the contractual voyage. I agree that the words of the rule assume that a deviation would, or might be, a breach of the rules. Deviation is a breach of the shipowners' undertaking, implied if not expressed, to proceed by a usual and reasonable route. Assuming the contractual voyage is from A to B, the undertaking, as set out, certainly could be, and I think would be, treated as a
- E** "term" on which the service—that is the voyage from A to B—was to be performed. A deviation would, therefore, be a failure properly and carefully to carry. If this were only a possible view, it would be sufficient to explain the presence of the words in the rule.
- The respondents submitted that the words in art. III, r. 8, "loss or damage to or in connection with goods" covered physical damage only; that the damage
- F** here was not physical, as the goods were undamaged though in the wrong place; and that, therefore, the rules did not apply. The Court of Appeal did not decide this point. In one sense, it is not necessary to do so. On the other hand, if right, it is a complete and short answer to the claim. It is unnecessary to decide whether there are heads of damage which might be outside the words, but I am myself clear that the appellants' loss or damage in the present case was "to or in
- G** connection with goods".

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *William A. Crump & Son* (for the appellants); *Richards, Butler & Co.* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

HORNAL v. NEUBERGER PRODUCTS, LTD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 10, 11, 12, November 20, 1956.]

Fraud—Standard of proof—Balance of probabilities.

Burden of Proof—Civil action—Alternative causes of action in contract or for fraud—Whether standard of proof different for the alternative causes of action—Degrees of probability within a standard of proof, whether civil or criminal.

The plaintiff acquired a capstan lathe from the defendants under a hire-purchase arrangement with a finance company. The lathe proved defective, and the plaintiff brought an action for damages against the defendants, alleging that it had been represented to him on their behalf that the lathe was "Soag re-conditioned". The action was based alternatively on contractual warranty or fraudulent misrepresentation. At the trial it was found that there was no contractual warranty because the misrepresentation, if made, was not intended to be contractual, but that, if the representation were proved to have been made, fraud would be established. On the question of fact whether the misrepresentation was made it was found that, if the question were determined on the civil standard of proof (i.e., on the balance of probabilities), the representation was proved, but that, if the question were determined on the criminal standard of proof (i.e., on the basis of proof beyond reasonable doubt), the representation was not proved. The judge decided that the misrepresentation was proved but no damage was suffered.

Held: in determining the question of fact, viz., whether the representation had been made, the same standard of proof should be applied whether the cause of action was contractual warranty or fraud, and, the standard of proof applicable was the civil standard of a preponderance of probability, which, however, was not an absolute standard, since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved; in the present case the judge had not misdirected himself on the question of proof, but, as some damage flowed from the fraudulent misrepresentation, the plaintiff was entitled to judgment.

Observations of DENNING, L.J., in *Bater v. Bater* ([1950] 2 All E.R. at p. 459) on the degrees of proof within the legal standards of proof, whether civil or criminal, adopted (see p. 976, letter I, to p. 977, letter C, and p. 978, letter H, post).

Appeal allowed on the question of damage.

[**Editorial Note.** The measure of proof in civil or criminal cases is not an absolute standard; within each standard there are degrees of probability (see particularly p. 976, letter I, to p. 977, letter B, post). HODSON, L.J., after expressing his complete concurrence with the passage from the judgment of DENNING, L.J., in *Bater v. Bater* ([1950] 2 All E.R. at p. 459), says: "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others" (see p. 977, letter D, post).

As to the standard of proof required in legal proceedings, see 15 HALSBURY'S LAWS (3rd Edn.) 272, para. 496.]

Cases referred to:

- (1) *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 35 Digest 54, 486.
- (2) *Bater v. Bater*, [1950] 2 All E.R. 458; [1951] P. 35; 114 J.P. 416; 2nd Digest Supp.
- (3) *Thurtell v. Beaumont*, (1824), 8 Moore C.P. 612; *previous proceedings*, (1823), 1 Bing. 339; 29 Digest 322, 2643.
- (4) *Issaïas v. Marine Insurance Co.*, (1922), 15 Lloyd's Rep. 186; 28 Com. Cas. 95; 29 Digest 207, 1662.

- A (5) *Lek v. Matthews*, (1927), 29 Lloyd's Rep. 141.
 (6) *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372; [1948] L.J.R. 203; 177 L.T. 536; 2nd Digest Supp.
 (7) *Routledge v. McKay*, [1954] 1 All E.R. 855; 3rd Digest Supp.
 (8) *Oscar Chess, Ltd. v. Williams*, (Nov. 13, 1956), not reported.
 (9) *Boyce v. Chapman*, (1835), 2 Bing. N.C. 222; 5 L.J.C.P. 74; 132 E.R. 87; 8 Digest (Repl.) 57, 372.
- B (10) *Vaughton v. London & North Western Ry. Co.*, (1874), L.R. 9 Exch. 93; 43 L.J.Ex. 75; 30 L.T. 119; 8 Digest (Repl.) 57, 376.
 (11) *Cooper v. Slade*, (1858), 6 H.L. Cas. 746; 27 L.J.Q.B. 449; 31 L.T.O.S. 334; 22 J.P. 511; 10 E.R. 1488; 20 Digest 66, 464.
 (12) *R. v. Stoddart*, (1909), 73 J.P. 348; 2 Cr. App. Rep. 217; 14 Digest (Repl.) 149, 1118.
- C (13) *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R. 124; [1951] A.C. 391; 2nd Digest Supp.
 (14) *R. v. Hepworth*, *R. v. Fearnley*, [1955] 2 All E.R. 918; [1955] 2 Q.B. 600; 119 J.P. 516; 3rd Digest Supp.

Appeal.

- D The plaintiff brought an action for damages against the defendants alleging that they had fraudulently misrepresented that a machine which he had acquired from them in a hire-purchase transaction had been "Soag re-conditioned", that he had relied on such misrepresentation and had suffered damage. On June 6, 1956, His Honour JUDGE LEON in Willesden County Court decided that, if he applied the standard of proof applicable in civil cases to the allegation of fraud,
- E on a balance of probabilities he would find that the misrepresentation was made, but that, if he applied the standard of proof applicable in criminal cases, proof beyond reasonable doubt, he would not so find. He held that the standard of proof required was that applicable in civil cases and that the misrepresentation was proved, but that the plaintiff had suffered no damage as the machine was worth what the plaintiff paid for it. He dismissed the action and the plaintiff
- F appealed. The defendants cross-appealed on a question of costs.

R. B. Gibson for the plaintiff.

S. A. Stamler for the defendants.

Cur. adv. vult

Nov. 20. The following judgments were read.

- DENNING, L.J.: The question in this case is whether Mr. Neuberger orally represented to Mr. Hornal, the plaintiff, that a certain capstan lathe had been "Soag re-conditioned". I should have thought it was a simple question of fact for the judge to decide on the evidence, but it has become so mixed up with questions of law that the case took many days in the court below and over two days before us.

- The capstan lathe was made by Alfred Herbert, Ltd., in January, 1935,
- H for the continental market. It was shipped to Germany in May, 1935. It was used in Germany for many years until in 1951 Mr. Neuberger, on behalf of Neuberger Products, Ltd., the defendants, bought it in Germany from its German owner for about £700. The German owner told him that it had been factory re-conditioned at their works in Germany, and Mr. Neuberger believed him. Nevertheless, when Mr. Neuberger imported the machine into England he
- I said, in order to obtain it free of duty, that it had not been re-conditioned. He made a declaration that:

"We hereby declare these goods free of duty as British returned goods, which have not undergone any process of renovation, repair, manufacture, alteration or addition whilst abroad."

Mr. Neuberger made that declaration regardless of the truth, but, as it suited him to make it, he did so. In 1952 the machine was imported free of duty. The transport arrangements were made by the well known toolmakers Soag Machine

Tools, Ltd., and it appears that when it was in their hands they put a metal plate with their name "Soag Machine Tools" on it. They did it as an advertisement but not meaning to indicate that they had done any work on it. The defendants paid some £700 for the machine and took delivery. Mr. Neuberger soon found out that it had not been re-conditioned at all. He was very angry about it and he managed to persuade the German seller to refund him £300. He then himself did the work necessary to put the machine in good and sound working order. He had a new bar feed put in and the gears put right; but it did not cost him nearly as much as £300. A

After keeping the machine for two years, Mr. Neuberger wanted to sell it. It so happened that at that time the plaintiff wanted to buy a capstan lathe because of contracts that he had to fulfil. He went along with his man Lynch to see this machine which the defendants had for sale. They inspected it and agreed to take it. Both parties were under the impression that it was fit for immediate use, though it was not expressly said that the machine was so fit. The plaintiff signed a purchase order dated Oct. 13, 1954, but the transaction was eventually completed on hire-purchase terms. The defendants sold the machine to United Dominion Trust, Ltd., for £415, who let it on hire-purchase to the plaintiff. B

After the plaintiff had taken delivery of the machine, he discovered that a part of it called the turret was defective, and in order to remedy it he got another turret fitted by Alfred Herbert, Ltd., at a cost of £50 14s. 3d. This took some seven weeks during which he was unable to use the lathe and suffered damage in consequence. C

The plaintiff now brings this action against the defendants claiming damages for the defective turret. He bases his claim on what Mr. Neuberger said to him when he inspected the machine. He relied at the trial on several representations, but they were all rejected by the judge except this one representation said to have been made by Mr. Neuberger: "The machine has been Soag re-conditioned." The plaintiff alleged that this was a contractual warranty or, alternatively, a fraudulent misrepresentation. D

The judge seems to have found it difficult to make up his mind whether Mr. Neuberger made that representation or not. The judge said that his decision depended on the standard of proof which was to apply. If he was to apply the standard in civil cases—the balance of probability—he would hold that the representation was made by Mr. Neuberger; but if he was to apply the standard in criminal cases—proof beyond reasonable doubt—he would hold that the representation was not made. E

Such being the judge's state of mind, he considered first whether there was a contractual warranty. On that issue the civil standard of proof clearly applied. He found on the balance of probabilities that Mr. Neuberger did say that the machine had been Soag re-conditioned, that Mr. Neuberger made it in order to persuade the plaintiff to enter into the transaction, and that the plaintiff relied on it; but he found that it was not a contractual warranty because it was not so intended. I do not think we can disturb that finding. The judge clearly had in mind the speech of LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* (1) ([1913] A.C. 30 at p. 45) and directed himself by it. It was said that the judge made a mistake in that he tried to look into the minds of the parties to see if in their inmost thoughts they intended a warranty; whereas he ought only to have looked at their external behaviour to see whether it bore the reasonable inference of a warranty. Now I quite agree that, if the judge did try to look into their inmost thoughts, it would be a mistake. In seeing whether there is a contract or not, the law can only look to outward appearances. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice even though neither party in fact had it in mind. This is such trite law that I do not think for a moment the judge fell into error about it. It is true that in F

A one passage he used words which seem to suggest that he was looking into the minds of the parties; but in another passage he approached the matter in the correct way. He said that one of the matters that impressed him most was the plaintiff's complete failure to refer in any document to this machine being Soag re-conditioned. That is a factor always considered in these cases.

B Thus having disposed of the warranty, the judge turned to consider whether Mr. Neuberger was guilty of fraud. If Mr. Neuberger did in fact represent that the machine had been Soag re-conditioned, he was clearly guilty of fraudulent misrepresentation; because he knew it was not true. He had got £300 from his German supplier because it had not been re-conditioned. So the only question was whether Mr. Neuberger made the representation or not. It was there that the judge ran into difficulty—about the standard of proof. He said:

C "If I have to be satisfied beyond all reasonable doubt, I should not be so satisfied in regard to the statement that it was Soag re-conditioned. I have come to the conclusion on the preponderance of probability that the statement was made, but in my view no jury would dream of convicting a defendant of a fraud based on that statement, and if I had to consider whether, sitting as a magistrate trying a case of false pretences, I should convict Mr. Neuberger of making this statement, I have no hesitation in saying I should not dream of doing so."

D In setting himself this problem the judge showed an uncommon nicety of approach. I must say that, if I was sitting as a judge alone, and I was satisfied that the statement was made, that would be enough for me, whether the claim was put in warranty or on fraud. I think it would bring the law into contempt if a judge were to say that on the issue of warranty he finds the statement was made, and that on the issue of fraud he finds it was not made.

E Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law. Take this very case. F If Mr. Neuberger did represent that the machine was Soag re-conditioned, he did very wrong because he knew it was untrue. His moral guilt is just as great whatever the form of the action, no matter whether in warranty or in fraud. He should be judged by the same standard in either case.

G I have already expressed my views on this subject in *Bater v. Bater* (2) ([1950] 2 All E.R. 458 at p. 459), and I need not repeat them here. I would only mention the insurance cases on which counsel for the defendants especially relied, in which the insured person tried to defraud the insurance company by burning down his house or scuttling his ship. In some of those cases, particularly *Thurtell v. Beaumont* (3) ((1823), 1 Bing. 339), and *Issaias v. Marine Insurance Co.* (4) H ((1922), 15 Lloyd's Rep. 186) the judges have said that the offence of arson or malicious damage must be as fully proved as a criminal charge: but the latest case in the House of Lords, *Lek v. Matthews* (5) ((1927), 29 Lloyd's Rep. 141) shows that that is putting too high a burden on the insurance company. LORD SUMNER said (*ibid.*, at p. 164) that

I "On a civil issue I do not think more is required than a correct appreciation of the incidence and the shifting of the onus of proof and a reasonable estimate of the correct pro and con of the various parts of the evidence . . . I am just as reluctant to make the underwriters pay Mr. Lek many thousands of pounds if he has been guilty of making a false claim as to find him guilty of it if he has not. The whole question is whether it has been proved; and I think it has."

It is apparent that LORD SUMNER considered that proof was only necessary according to the civil standard.

It is unnecessary to discuss here the difference between the criminal standard and the civil standard. I tried to define it in *Miller v. Minister of Pensions* (6) ([1947] 2 All E.R. 372 at pp. 373-375). Suffice it to say that the judge, applying the civil standard, found that Mr. Neuberger represented that the machine had been Soag re-conditioned, and I do not think that this finding should be disturbed. It can readily be reconciled with his finding that there was no contractual warranty. Suppose that Mr. Neuberger used some such words as these: "It has, I believe, been Soag re-conditioned. At least when I bought it I was told it had been". There would then be no contractual warranty because Mr. Neuberger was only passing on what he was told, as happened in *Routledge v. McKay* (7) ([1954] 1 All E.R. 855), and the recent decision of *Oscar Chess, Ltd. v. Williams* (8) (unreported); but there would be a fraudulent misrepresentation because the statement conveyed the false impression that it had been Soag re-conditioned, whereas Mr. Neuberger knew it had not.

There remains, however, one more question. Despite his findings that the representation was made, the judge dismissed the plaintiff's claim for fraud, because he said he had suffered no damage. He said that the machine was worth quite as much as the £400 the plaintiff paid for it, and very likely more, and that therefore the plaintiff could not recover. I do not agree. The judge had already found that the representation was made in order to persuade the plaintiff to buy the machine, and that the plaintiff did to some extent rely on it. It influenced his mind. I ask myself: How did it influence him? We do not know exactly, but we do know that he got the impression that the machine was fit for immediate use. The representation that it had been Soag re-conditioned would certainly have helped to produce that impression. He took the machine in the belief that it was fit for immediate use, whereas it was not: and he was put to seven weeks' delay in getting it put right. That is, I think, a head of damage which can properly be said to flow from this fraudulent misrepresentation. The judge put it at some £20 to £30.

Another way of approaching the case is to ask: What would have been the position if the statement had not been made? We do not know. The plaintiff might have offered less, and got the machine for less than it was worth; or he might not have gone on with the transaction at all, but bought another machine elsewhere, and thus saved himself the seven weeks' delay in getting this one put right. In either case he would have suffered damage. I confess I do not look kindly on a defendant who, having got the plaintiff to buy a machine by knowingly telling him an untruth, afterwards says he suffered no damage. Why say it except to induce him to buy or to pay a higher price than he otherwise would? In either case he suffers damage. The damage may be difficult to assess. It may only be £20 to £30. But that there was some damage sufficient to support the action, I do not doubt.

This means that Mr. Neuberger was guilty of fraud. The appeal should be allowed and judgment entered for damages to be assessed, but I do hope they can be agreed; and the cross-appeal should be dismissed.

HODSON, L.J.: The learned county court judge, having reached the conclusion, on the basis of a balance of probability, that a fraudulent statement had been made, found himself unable to find that fraud had been proved beyond all reasonable doubt. Thus he posed himself the question: "In a civil action are criminal standards of proof necessary in considering what is or may be a crime?" This question, after a review of the authorities, he answered in the negative.

The comparative dearth of express authority on this topic is not surprising. No responsible counsel undertakes to prove a serious accusation without admitting that cogent evidence is required, and judges approach serious accusations in the same way without necessarily considering in every case whether or not there is a criminal issue involved. For example, in the ordinary case arising

A from a collision between two motor cars involving charges of negligence, I have never heard of a judge applying the criminal standard of proof, on the ground that his judgment might involve the finding of one of the parties guilty of a criminal offence.

The learned judge took great pains to consider the cases in which the question that he posed had been considered. I do not propose to follow him in their
B review, agreeing as I do with his conclusion. I agree with him that in most civil cases, where the standard of proof in cases involving crime has been mentioned, there has been no argument, and the heavier burden of proof has been accepted by counsel or assumed as necessary by the judge. I also think that it is impossible to find a satisfactory explanation of all cases where divergent views have been taken. For example, it seems to have been taken for granted in what
C may be called the third-party cases that the crime of a person not concerned in the action may be established on a balance of probabilities. See, for example, *Boyce v. Chapman* (9) ((1835), 2 Bing. N.C. 222), and *Vaughton v. London & North Western Ry. Co.* (10) ((1874), L.R. 9 Exch. 93). If the criminal standard were required in civil cases for the reason suggested in TAYLOR ON EVIDENCE (12th Edn.), Vol. 1, at p. 106, namely, that every man has a right to his character
D and not to have the presumption of innocence rebutted unless the strict standard were adopted, the third-party cases would appear to be cases where the rule ought to be most strictly applied, since the third party may not even know of the charge which is being made against him in an action between two persons in whose dispute he is not interested, and even if he knows of it may have no opportunity of intervening in it.

E Notwithstanding the existence of some cases where the point appears to have been argued and decided in a contrary sense, I think that the true view and that most strongly supported by authority is that which the learned judge took, namely, that in a civil case the balance of probability standard is correct. I propose to refer only to a few of the authorities.

The first is *Cooper v. Slade* (11) ((1858), 6 H.L. Cas. 746). The action was for
F penalties for bribery under the Corrupt Practices Prevention Act, 1854, which declared the giving or promising of bribes to voters to be a misdemeanour. WILLES, J., one of the judges who was summoned to give his opinion to the House, in the course of his speech, said (*ibid.*, at p. 772):

“As a difference of opinion exists upon this question, I may be excused
G for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. BEST's very able and instructive treatise on the PRINCIPLES OF EVIDENCE (2nd Edn.), p. 114. So long since as the 14 Eliz., DYER, C.J., and a majority of the other justices of the Common Pleas laid down this distinction between pleadings and evidence, ‘that in a writ or declaration or other pleading certainty ought to
H be shown, for there the party must answer to it, and the court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereupon the court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know and the court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the
I inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence’.”

In more recent times there is the speech of LORD SUMNER in *Lek v. Matthews* (5) ((1927), 29 Lloyd's Rep. 141 at p. 164) where he says:

“With great respect to the lords justices it seems to me that what has really made both this forgery theory and this construction of the claim

attractive has been a strong reluctance to say that Mr. Lek has tried to cheat and has backed his effort by perjury. This has been supported by a canon, new to me in the form employed, to the effect that such a man as Mr. Lek cannot be convicted of this so long as any reasonable possibility remains of explaining his conduct otherwise. I am afraid I look at it differently and think that this is wholly without authority. When prisoners could not give evidence, such an appeal might have passed muster with a jury, but on a civil issue I do not think more is required than a correct appreciation of the incidence and the shifting of the onus of proof and a reasonable estimate of the weight pro and con of the various parts of the evidence. Mr. Lek's reputation and wealth are material only as ground for considering the probability of such misconduct. The consequences of a verdict against him are quite immaterial. I am just as reluctant to make the underwriters pay Mr. Lek many thousands of pounds, if he has been guilty of making a false claim, as to find him guilty of it if he has not. The whole question is whether it has been proved; and I think it has."

There is in truth no great gulf fixed between balance of probability and proof beyond reasonable doubt. Although when there is a criminal prosecution the latter standard is securely fixed in our law, yet the measure of probability is still involved in the question of proof beyond reasonable doubt.

Students are familiar with PROFESSOR KENNY'S OUTLINES OF CRIMINAL LAW, where the following passage appears (16th Edn.) (1952) at p. 416:

"A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a *preponderance* of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is a *reasonable doubt* as to the guilt of the accused. See *R. v. Stoddart* (12) ((1909), 2 Cr. App. Rep. 217 at p. 242). Even in civil proceedings, e.g. in actions of debt, a mere scintilla of evidence would not warrant the jury in finding a verdict for the plaintiff; for there must (as we have seen) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof. The progressive increase in the difficulty of proof, as the gravity of the accusation to be proved increases, is vividly illustrated in an extract from LORD BROUGHAM'S speech in defence of Queen Caroline: 'The evidence before us' he said 'is inadequate even to prove a debt—impotent to deprive of a civil right—ridiculous for convicting of the pettiest offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen'."

This passage appears in the earlier editions of this work for which the late PROFESSOR KENNY was responsible.

DENNING, L.J., referred both to criminal and to civil cases when he expressed the same idea in *Bater v. Bater* (2) ([1950] 2 All E.R. 458 at p. 459):

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees

A of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. B It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

This citation comes from a judgment given on appeal in a divorce case. The House of Lords held in *Preston-Jones v. Preston-Jones* (13) ([1951] 1 All E.R. 124), C that the words of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178*, as amended by the Matrimonial Causes Act, 1937, s. 4, produce the same result as the rule in criminal cases although divorce cases are civil actions. Nevertheless, on the general question of the standard of proof in criminal and civil cases, I would like to express my complete concurrence with the words D used by DENNING, L.J., in the passage which I have cited. Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.

On the other questions of law and fact raised on this appeal and on the issue as to damage, I agree with the judgment of DENNING, L.J., and also with the judgment which MORRIS, L.J., is about to deliver, which I have had the advantage E of reading. The appeal should be allowed to the extent stated, and the cross-appeal dismissed. I agree with the form of order proposed.

MORRIS, L.J.: After a very full hearing which extended over many days, the learned judge delivered a judgment in the course of which he examined and analysed all the evidence. The plaintiff had become aware that the defendants F possessed a Herbert No. 4 capstan lathe. The plaintiff, accompanied by his engineer, went to see it, and had an interview with Mr. Neuberger at which others were present. There was a discussion about the machine. There was bargaining about its price. The plaintiff was shown the gears. The power was turned on. The plaintiff thought that the machine was fit for immediate use and that it would avail him for some work of his that he had in mind. The G plaintiff as a result acquired the machine. The acquisition was not effected by direct purchase but with the assistance of a hire-purchase company. The plaintiff affirmed and Mr. Neuberger denied that in the course of the discussion Mr. Neuberger had said that the machine had been "Soag re-conditioned". The significance of the phrase in question was well understood by those concerned. It was first of all a question of fact whether Mr. Neuberger had made the alleged H statement. The learned judge held that he had. On that finding the question arose whether what Mr. Neuberger had said had contractual effect. Being an affirmation made during negotiations for a sale, it would not have been surprising if it had been held that the statement had contractual quality. But the learned judge made a correct approach in law when he considered the totality of the evidence so as to decide whether contractual intention existed. There was I much oral evidence to be considered; there was correspondence which, either by reason of what it contained or by reason of what it did not contain, had some evidential value. The learned judge had no hesitation in holding that the statement of Mr. Neuberger was not contractual. He held that neither the plaintiff nor Mr. Neuberger had thought it to be. "It was simply a matter of talking about the machine". Although wrong statements made when someone is about to buy ought not readily to be held to be beyond the frontiers of contract,

* See now Matrimonial Causes Act, 1950, s. 4; 29 HALSBURY'S STATUTES (2nd Edn.) 394.

it seems to me that the learned judge approached the issue with discrimination. He appears to have applied the correct tests, and, accordingly, I do not think that his conclusion should be displaced. A

It is not in dispute that if Mr. Neuberger made a representation that the machine was Soag re-conditioned he knew that the representation was false. Accordingly, if the representation was made then, although there was no warranty, there was an actionable misrepresentation. Here a question arises whether the learned judge misdirected himself when deciding the issue whether the two words "Soag re-conditioned" were or were not spoken. He has said that, if as to this he ought to be satisfied in the way in which a court or a jury would have to be satisfied before convicting in a criminal case, then in this case he was not so satisfied, but he was satisfied if he was entitled to decide the matter as issues in civil actions are decided, that is, according to the balance of probabilities. The precision of this revealed judicial heart-searching is impeccable from the point of view of its logical nicety. The question of fact which the learned judge had to decide was simply whether Mr. Neuberger spoke the two words in question. If he did, the words might have been a warranty or they might have been a representation, which in this case would be actionable because fraudulent. It would be strange if different standards of proof as to the speaking of the two words could be applicable according as to what civil legal rights followed. B C D

In a criminal case a jury must be directed that the onus is all the time on the prosecution and that before they convict they must feel sure of the accused's guilt. Authoritative guidance in regard to directing juries in criminal cases is to be found in the judgment of LORD GODDARD, C.J., in *R. v. Hepworth*, *R. v. Fearnley* (14) ([1955] 2 All E.R. 918) and in other cases. It has, however, been emphasised that what is vital is not the mere using of some particular formula of words but the effect of a summing-up in giving true guidance as to the right approach. E

It is, I think, clear from the authorities that a difference of approach in civil cases has been recognised. Many judicial utterances show this. The phrase "balance of probabilities" is often employed as a convenient phrase to express the basis on which civil issues are decided. It may well be that no clear-cut logical reconciliation can be formulated in regard to the authorities on these topics; but perhaps they illustrate that "the life of the law is not logic but experience". In some criminal cases liberty may be involved; in some it may not. In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty. "Good name in man or woman . . . is the immediate jewel of their souls". F G

In truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning. Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities. This view was denoted by DENNING, L.J., when in his judgment in *Bater v. Bater* (2) ([1950] 2 All E.R. 458 at p. 459) he spoke of a "degree of probability which is commensurate with the occasion" and of "a degree of probability which is proportionate to the subject-matter." H I

In English law the citizen is regarded as being a free man of good repute. Issues may be raised in a civil action which affect character and reputation, and these will not be forgotten by judges and juries when considering the probabilities in regard to whatever misconduct is alleged. There will be reluctance to rob any man of his good name: there will also be reluctance to make any man pay what is not due or to make any man liable who is not or not liable who is. A court will not be deterred from a conclusion because of regret at its consequences: a

A court must arrive at such conclusion as is directed by the weight and preponderance of the evidence.

In my judgment, the learned judge did not misdirect himself in approaching the case on the basis of the preponderance of probability in deciding that Mr. Neuberger had stated that the machine was Soag re-conditioned. It follows that there is liability if damage resulted and if damage was proved. I consider that

B there was resulting damage as indicated by my Lord, and I agree with the course proposed by my Lord.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Goodman, Monroe & Co.* (for the plaintiff); *C. Butcher & Simon Burns* (for the defendants).

C [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

D R. v. CARR.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), November 29, 1956.]

Court-Martial—Corruption—Ingredients of offence—Proper direction by judge-advocate—Prevention of Corruption Act, 1906 (6 Edw. 7 c. 34), s. 1 (1).

E *Criminal Law—Corruption—Ingredients of offence—Prevention of Corruption Act, 1906 (6 Edw. 7 c. 34), s. 1 (1).*

Application for leave to appeal against conviction.

The court dismissed the application of Major Charles Victor Carr, Royal Engineers, for leave to appeal against his conviction by general court-martial sitting at Aqaba, Jordan, on the charge of committing a civil offence, to wit, corruption against the provisions of the Prevention of Corruption Act, 1906,

F s. 1 (1).

Dennis Lloyd and J. M. E. Byng for the appellant.

E. Garth Moore for the Crown.

LORD GODDARD, C.J.: Leave to appeal will not be given in this case, but I must say one word for the guidance of prosecuting officers and judge-advocates. The officer was charged in this case with taking a bribe, an offence against the Prevention of Corruption Act, 1906. The judge-advocate told the officers of the court-martial that they must be satisfied not only that he received a bribe as an inducement to show favour but also that he did show favour. That is not so; the bribe was given to him as an inducement to show favour. It does not matter if he did show favour. If the person did what is called double-crossed, and did not do what he was bribed for, that is no reason why he should be acquitted of taking a bribe. If he takes a bribe and goes straight off and says "Here is the bribe he has given me", that may show in certain circumstances that he is not acting improperly. In this case the direction given was quite a wrong direction, but it was given in favour of the prisoner and not against him. I have said what I have said merely because if there is an idea that in such an offence it is necessary to show that the person did that which the bribe was given to him to do, it is an impression that should be corrected.

I

Application dismissed.

Solicitors: *Lomer & Wheeler* (for the appellant); *Director of Army Legal Services* (for the Crown).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

R. v. LINZEE.
R. v. O'DRISCOLL.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), November 29, 1956.]

Court-Martial—Evidence—Corroboration—Assault and conspiracy to pervert justice—Single witness—Corroborating witness implicated in assault—Medical evidence of nature of injury—Sufficiency of direction by judge-advocate.

Court-Martial—Judge-advocate—Position and duties of judge-advocate.

The appellants were convicted by a general court-martial of conspiring to pervert the course of public justice and also of assaulting a Cypriot subject who was in custody, but the confirming officer did not confirm the finding of assault against the second appellant. The evidence relied on by the Crown to prove the assault was that of the person assaulted, whose body bore bruises as if he had been assaulted, and a British private soldier who was said himself to have taken some part in the assault. The judge-advocate warned the court-martial that the evidence of the British private soldier was tainted evidence, and that it was desirable that there should be corroboration of it before they accepted it. On the charge of conspiracy the evidence was uncorroborated. It was contended that in his summing-up on the assault charge the judge-advocate did not give an adequate direction on corroboration and that on the conspiracy charge he did not put the matter to the court-martial as strongly as a judge would have put it to a jury.

Held: (i) the evidence of the person assaulted did not require to be corroborated in relation to the charge of assault; and in regard to the evidence of the private soldier the judge-advocate was right to warn the court-martial that that witness's evidence was tainted evidence but in fact the witness was corroborating the complainant.

(ii) the duty of the judge-advocate in relation to corroboration was to point out the necessity or desirability of corroboration and to point out what evidence could amount to corroboration, which duty he had performed in this case.

(iii) accordingly, and taking into consideration also the medical evidence as to the nature of the assaulted man's injuries, there was abundant evidence to support the court-martial's findings and the appeals must be dismissed.

Per CURIAM: a judge-advocate was not in the same position as a judge and he had not the authority over a court-martial that a judge had over a court over which he was presiding. The duty of the judge-advocate was to advise the court-martial on questions of law and to sum up the facts, but if there was no evidence to support a conviction he could say so (see p. 984, letters E and G, post).

Court-Martial—Procedure—Deliberation on findings in closed court—Communication while court closed—Whether proceedings invalidated—Whether position of members of court-martial analogous to that of jury or bench of magistrates.

After a general court-martial had retired to consider their findings in closed court the president sent for a staff officer of the convening authority and told him that the court proposed to adjourn and resume their deliberations two days later. On being informed that this procedure was improper and that the question of adjourning must be discussed in open court the president withdrew his proposal and the court continued their deliberations and reached a decision.

Held: (i) a court-martial was a peculiar court which was sui generis and was not analogous to a jury or a bench of magistrates; it was not a court in which the old common law rule of jury closure and jury retirement could be applied unless a statute so enacted, and, though a court-martial must

A consider their finding in private, yet, unlike a jury, if they separated, e.g., for lunch, that fact would not disqualify or nullify all their further proceedings (see p. 984, letter I, to p. 985, letter C, post).

(ii) in the present case the question was whether the court-martial should decide at once or adjourn over the week-end, and the court could not possibly say that what had happened justified the conviction being quashed.

B Appeals dismissed.

[As to charges requiring corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458, para. 843, and for the effect of absence of corroboration, see *ibid.*, 461, para. 848; and for cases on this subject, see 14 DIGEST (Repl.) 533-537, 5177-5217.

For the Perjury Act, 1911, s. 13, see 5 HALSBURY'S STATUTES (2nd Edn.) 969; and for the Children and Young Persons Act, 1933, s. 38, see 12 HALSBURY'S STATUTES (2nd Edn.) 1002.]

C Appeals against convictions by general court-martial.

The appellants, Captain Robert Alexander Craig Linzee, the Gordon Highlanders, and Captain Gerald O'Driscoll, the Intelligence Corps, appealed against their convictions by a general court-martial sitting at Nicosia, Cyprus. The first appellant was charged (1) with an assault occasioning actual bodily harm to one Koronides, a Cypriot suspect while he was in custody; (2) an assault on another suspect named Constantinou; (3) conspiring with the second appellant and others to pervert the course of public justice; and (4) assault occasioning actual bodily harm to another prisoner suspect. The second appellant was charged with the first three offences but not with the fourth. The court-martial found both appellants guilty on the second charge, assault on Constantinou, but the confirming officer did not confirm that finding against Captain O'Driscoll; and the court-martial found both appellants guilty of the conspiracy charge. On the other charges the court-martial returned a finding of not guilty. Both appellants were sentenced to be cashiered but the confirming officer reduced the sentences to dismissal from the army.

F *Dennis Lloyd and J. M. E. Byng* for Captain Linzee.

Peter Lewis for Captain O'Driscoll.

E. Garth Moore for the Crown.

LORD GODDARD, C.J.: This is an appeal by two officers, one Captain Linzee and the other Captain O'Driscoll, who were convicted before a general court-martial sitting on the island of Cyprus, of two offences. Captain Linzee was convicted of two offences and Captain O'Driscoll of one. Captain Linzee was convicted of assaulting a prisoner who was in custody and whom he was interrogating; Captain O'Driscoll was also convicted of assaulting that prisoner, but the confirming officer did not confirm the finding. They were also convicted of conspiring among themselves and with others to pervert the course of public justice.

Anybody who has read the papers in this case, and who has read the testimonials which were given to these two officers for their gallantry and the good service they have done in the suppression of terrorism in Cyprus, and the number of lives they probably have saved by their efforts, can approach this case only with a feeling that it is a most unhappy business. I say of this court, as I am sure one can say of the court-martial, that they would approach this case with every sympathy with the officers, who on account of the terrible stress to which they had been subject, may have temporarily lost their heads and ill-treated a prisoner, and then, realising what they had done, wanted to cover it up. I am sure, therefore, that the court-martial approached this case with every feeling of sympathy for two gallant officers, but I want to point out to the persons who are subject to courts-martial and who appeal to this court certain things that they do not altogether understand as to what are the functions of this court. We cannot try anybody; we do not try anybody. We sit merely as a court of

appeal, and as a court of appeal our duties are these. First of all, we have to see that the finding is one that is possible in law. Then we have to see that there was evidence before the court-martial which supported their finding. Then, if any question of law arose, we have to see whether or not the law has been correctly laid down by the judge-advocate, who nowadays is a qualified lawyer in every case before a general court-martial, I think, and in most cases before a district court-martial. We have to see that the summing-up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the facts for the prosecution and states fairly the nature and evidence of the defence. It is not necessary to go into every point which the defence has raised. It is not necessary to go into the evidence of every witness. The court has to be reminded of the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. It is not our function to re-try the case because we do not see the witnesses, and no court of appeal does re-try the case in the sense of substituting themselves either for a jury in a civil case or for a court-martial in the case of one of the services.

In this case there were the two charges (charges 2 and 3) on which there were convictions, but there were two other charges (charges 1 and 4), which were also charges of assault, on which the court-martial acquitted. That, of itself, considering the nature of the case and the general nature of the evidence that was given, the general surroundings of assaults on prisoners, and corroboration or lack of corroboration, seems to me to show that the court-martial applied their minds with care to the evidence put before them. It is fair to say that the corroboration or what was said to be corroboration and what was possibly corroboration in regard to charges 1 and 4 was not as strong as it was with regard to charge 2. Charge 3 stood on a different footing. The court-martial found that these two officers were guilty of assault on one man and not guilty of assault on another man. I say the "two officers" because the court-martial found the case proved against both, although in the case of Captain O'Driscoll the confirming officer did not confirm the finding.

We have had read to us various passages from the summing-up, a summing-up which we have all read with care ourselves, and the court cannot find misdirection of any sort or kind. We think that the judge-advocate gave a summing-up which is quite impeccable. In every judge's summing-up, or nearly every judge's summing-up, if one goes through it with a magnifying glass, some sentence can be found of which one can say that it is not quite accurate or that something else ought to have been said. The fact is that one should not look at the summings-up in that way. The summing-up must be taken as a whole and it must be seen that there is no misstatement of law; that is the first thing. Certainly there is no misstatement of law here. It must then be seen whether, in those cases where a long-standing practice has become established of requiring certain warnings or directions to be given, that the warnings or directions have been given.

One of the matters of challenge in this case is whether a sufficient direction on corroboration was given. The matter of corroboration of evidence is perfectly simple. There are certain, very few, cases in which the law requires corroborative evidence to be given by another witness and unless it is forthcoming there cannot be a conviction and it would be the duty of the judge or the court-martial to stop the case. The commonest case is the unsworn evidence of children. The unsworn evidence of a child may be taken on any matter, but there is the provision in the Children and Young Persons Act, 1933, s. 38, that that evidence must be corroborated by sworn testimony. It is a statutory rule that a charge of perjury cannot be sustained on the evidence of one witness (Perjury Act, 1911, s. 13). So also in most cases of high treason, and there are other cases in which

- A** there is some statutory provision as to corroboration*. There are other cases in which it is so desirable that there should be corroboration that for very many years judges have always warned juries, and judge-advocates, taking their cue from the judges, continue to warn courts-martial that it is most desirable that they should find corroboration. That is principally with regard to the evidence of accomplices.
- B** In this case it is said that there was not a warning with regard to corroboration though there was with regard to the charge of assault, but this was a curious case. This was not a case in which an accomplice was the principal witness for the prosecution. The person who was assaulted here was the man Constantinou. He gave his evidence and his evidence did not require to be corroborated; there was no requirement either as a rule of practice or of law. If a man comes before
- C** the court and says: "This man hit me in the face" or "stabbed me", there is no rule of law that his evidence should be corroborated. A private soldier, who is said to have been present and to have taken some part in the assault, was called, and the judge-advocate did warn the court-martial that that witness's evidence ought to be corroborated. That certainly was a direction which was being given in favour of the prisoners because what really the soldier was doing
- D** was corroborating the complainant's evidence. Speaking for myself, I do not feel at all sure that it was necessary that there should be this warning in this particular class of case. The ordinary case in which corroboration is required is where the accomplice comes forward and says that a man has committed an offence. The commonest case, which HILBERY, J., put, is the case of a man charged with receiving stolen goods. The prosecution call the thief, and he
- E** says: "I stole the goods and sold them to this man". It is desirable that his evidence should be corroborated because he might be accusing other people in order to secure an indulgence for himself.

- In the present case Constantinou said that these two officers assaulted him. Then the prosecution called a soldier who was there and who was alleged to have taken part in it. It was, therefore, quite right for the judge-advocate to warn
- F** the court-martial that that witness was to a great extent, if you like, a tainted witness and therefore they should not accept his evidence unless they were thoroughly satisfied with it, and that it would be desirable to find some corroboration; but in fact the man was corroborating the complainant. Assuming, therefore, that there was evidence which required to be corroborated, there was ample corroboration here if the court-martial chose to accept it. The duty of a
- G** judge-advocate is to point out the necessity or desirability, as the case may be, of corroboration, and, then having done that, to point out to the court what can be corroboration. It is not for him to say whether it does corroborate; that is for the court.

- In this case the judge-advocate pointed out to the court-martial that this man
- H** was found by two doctors, a Greek doctor and a doctor of the Royal Army Medical Corps, to have on him chain marks, and he said he had been assaulted by being beaten with a chain. There was a chain in the place where he was interrogated, and it was that chain he was beaten with, and there was evidence by the doctors that there were bruises on this man's body which appeared to have been caused by a chain. That corroborated his evidence if the court-martial accepted
- I** it. The court-martial had first to consider whether they could believe the evidence at all, because no kind of corroboration would turn a lie into truth, and in any court when considering corroboration the first question is whether the court are satisfied with the evidence given. The court ask themselves whether it is evidence on which they would act without its being corroborated. If the court consider that the evidence is untrue, no question of corroboration arises. Here, the court, having heard the evidence, came to the conclusion that there was an

* See 10 HALSBURY'S LAWS (3rd Edn.) 458, para. 843, note (k).

assault. We cannot say they were wrong. There was abundant evidence on which they could come to that decision. A

In the other charge, of conspiracy to pervert the course of public justice, the evidence was this: It was said that it leaked out that there had been this beating-up of the prisoner and the Special Investigation Branch of the army were making inquiries, and that thereupon these two officers went round and interviewed witnesses and tried to induce them to suppress the facts relating to this beating-up, and to leave them out of any statement the witnesses might give to the officers whose duty it was to collect the evidence together and, if necessary, lay it before the commanding officer for the purpose of considering whether a court-martial should be held. In other words it was said that the officers were trying to induce witnesses to give false evidence or to omit from their evidence these facts of the assault. The judge-advocate not once, but more than once, warned the court-martial of the danger that there might be in this case of acting on uncorroborated evidence, because the evidence was uncorroborated. Then evidence was given for the defence, and when the judge-advocate summed up, no one can say that he did not sum up fairly. It is complained that he did not put the matter as strongly to the court-martial as a judge might have done. I do not think it can be put higher than "might have done". The position of the judge-advocate is certainly not that of a judge. He has not the authority over a court-martial that a judge has over a court over which he is presiding. I should not expect a judge-advocate to address a court-martial in entirely the same way that a judge may at times address or direct a jury. B

The judge-advocate's duty is to advise the court-martial on questions of law; and we have heard that by an amendment* which will come into force in January he himself will rule on questions of law; but he will still have to sum up the facts. I have no doubt that from time to time there are cases in which a judge says to a jury: "Although I cannot say that there is no evidence in this case to be left to you as a jury, I tell you that you ought to acquit". If the judge once leaves a case to a jury, which he must do if he thinks there is any evidence to go to the jury, and the jury choose to convict, they have the right to do it. I remember one case in which the learned recorder of a great city in the North of England strongly urged the jury to acquit, but they convicted. I cannot imagine a judge-advocate directing a court-martial to acquit, but a judge can sometimes say to a jury: "I think you ought to acquit". A judge directs an acquittal if there is no evidence, and so would a judge-advocate. He would say: "There is no evidence on which you can convict". Assuming, however, that there is evidence, he can do no more than tender advice to the court-martial. It is said that he did not advise them strongly enough. I do not think that we can go into the way the words are used. I should not expect the judge-advocate necessarily to address the court-martial in the same way in a particular case as a judge exercising his discretion might direct a jury. It has not been even faintly suggested in this case that there was not evidence on which the court-martial could find this conspiracy, and therefore, again, whatever we may think of the evidence, it is impossible for us to interfere. E

The last point raised in the case is that it is said that, after the court-martial retired to consider their findings in closed court, as it is called, the deputy assistant adjutant-general, one Major Brough, was in communication with them, having been sent for by the president. We have had some rather interesting discussion about the position of the court-martial, and how far it is analogous to a jury. I do not think it is analogous to a jury, and there is no true analogy between a court-martial, a jury or a bench of magistrates. It is a court which is F

* By the Rules of Procedure (Army), 1956 (S.I. 1956 No. 162), r. 80 (3), which comes into force on Jan. 1, 1957, a military court-martial must accept the advice of the judge-advocate on all questions of law which may arise unless they have weighty reasons for not doing so. Identical provision in respect of air-force courts-martial is made by the Rules of Procedure (Air Force), 1956 (S.I. 1956 No. 163), r. 80 (3). G H I

A sui generis. It is a peculiar court of itself, but it is certainly not a court in which the old common law rule of jury closure and jury retirement would be applied unless there was statutory force to compel one to do so. The court-martial must consider their finding in private, and they must consider their finding without anybody being called in unless the rules of procedure enable them to do it. I certainly should not say that all their further proceedings would be disqualified or nullified because they separated. A jury is in an entirely different position. B Since the earliest days, as soon as a judge has finished his charge to the jury, they are given in charge of the bailiff, who is sworn to keep them in a private place and suffer no one to speak to them except to ask whether they have agreed on their verdict without the leave of the judge*.

C The court-martial is not in that position. They may always consider their finding and pronounce their finding without separating, and no doubt they generally do so, but if they want to separate and go to lunch, as far as I know there is no reason why they should not. There is no doubt, however, that they must not consult other people about the case. Here it was known, as it was getting late, that some message was sent by the president to the deputy assistant adjutant-general, who would be the staff officer of the convening authority, and D all we have before us is this note, which was put on the record of the proceedings:

“After the court had closed to deliberate on their findings and at 1700 hours on Apr. 7, 1956, the president not in open court and before he could be stopped told judge-advocate that he was proposing to adjourn the court until 0900 hours on Apr. 9, 1956”

E (that is certainly not a matter which this court would hold would interfere with the proceedings)

“that is, following Monday morning when the court would recommence their deliberations on the findings. He was told that this was improper and he must re-open the court where the matter could be fully discussed. Major Brough, D.A.A.G., H.Q., Cyprus, for whom the president had sent, subsequently took this message in to him and came back and reported that the president had withdrawn his proposal and the court would then resume their deliberations on the findings.” F

Whether Major Brough had gone into the room before he was sent in by the judge-advocate with that direction or whether he had been into the room on the occasion G when the judge-advocate told him to go in to tell the president he could not adjourn, I do not know. If it is suggested or thought that there had been any sort of suspicion that anything which might be unfair to the accused officers had been done, surely it should have been raised at the time and inquiry could have been made as to why Major Brough went into the room; and it is not to be left to an ambiguous note of this sort for this court to say that there was some H serious breach of the rules of procedure or something so irregular that this court would be obliged to find that it invalidated the whole proceedings. It seems to me on a fair reading of this note, it really means this: the president had sent for Major Brough, who was the deputy assistant adjutant-general in charge of all the arrangements for holding the court-martial. It appears from this note that I it was simply on this question, that is, whether the court-martial had to give their decision that night or whether it was proper for them to adjourn over the week-end. The judge-advocate found that this was going on, and he sent a message by Major Brough to the president to say that that was improper. The court cannot possibly say on anything in this note that they would be obliged to quash the conviction.

For the reasons which I have endeavoured to state, however lamentable this matter may be, and however much one may sympathise with these gallant

* See 10 HALSBURY'S LAWS (3rd Edn.) 431, para. 795.

officers who committed a serious crime of which their fellows take a serious view, A
this court can only dismiss the appeals.

Appeals dismissed.

Solicitors: *Lomer & Wheeler* (for the first appellant); *Registrar of the Courts-Martial Appeal Court* (for the second appellant); *Director of Army Legal Services* (for the Crown).

[Reported by T. J. KELLY, ESQ., Barrister-at-Law.] B

BOAKS v. REECE.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 26, 27, C
1956.]

Justices—Jurisdiction—Remand in custody for medical examination—Offence not punishable with imprisonment—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 14 (3).

A magistrates' court which has convicted an accused has jurisdiction to adjourn the case under s. 14 (3)* of the Magistrates' Courts Act, 1952, for the purpose of enabling inquiries to be made (including medical examination) or of determining the most suitable method of dealing with the case; and on such an adjournment there is jurisdiction to remand the accused in custody (or on bail) under s. 14 (4) and s. 105 (1) (a) of the Act, even though no offence of which the remanded person has been convicted is punishable with imprisonment.

Decision of PILCHER, J. ([1956] 2 All E.R. 750) affirmed. E

[**Editorial Note.** The jurisdiction which was exercised in the present case was a jurisdiction that is distinct from the jurisdiction, which is imposed in mandatory form by s. 26 (1) of the Magistrates' Courts Act, 1952, to remand for inquiry into physical or mental condition. The existence of that mandatory jurisdiction does not exclude the general jurisdiction under s. 14 (3), (4); see, particularly, p. 991, letter A, post. With regard to the superseding of former enactments by the Magistrates' Courts Act, 1952, it may be noted that that Act was an Act to consolidate prior statutes with corrections and improvements pursuant to the Consolidation of Enactments (Procedure) Act, 1949; cf. [1956] 2 All E.R. 750, 751. F

For the Magistrates' Courts Act, 1952, s. 14, s. 26, s. 105, see 32 HALSBURY'S G
STATUTES (2nd Edn.) 434, 445, 504.]

Appeal.

The plaintiff appealed against the decision of PILCHER, J., based on the verdict of a jury, given on June 13, 1956, and reported [1956] 2 All E.R. 750, that he was not entitled to damages for wrongful imprisonment from the defendant, a metropolitan magistrate who, after convicting the plaintiff of two offences neither of which was punishable with imprisonment, had remanded him in custody for one week, under s. 14 (3) and (4) and s. 105 (1) (a) of the Magistrates' Courts Act, 1952, to enable a doctor's report about his mental and physical condition to be obtained. The facts appear fully in the judgment of SINGLETON, L.J. H

The plaintiff appeared in person.

H. J. Phillimore, Q.C., and *Rodger Winn* for the defendant, the magistrate. I

SINGLETON, L.J.: The appellant is Lieutenant Commander Boaks, the plaintiff. He appeals against a judgment of PILCHER, J., given on the verdict of a jury on June 13 of this year. He claimed damages against the defendant for wrongful imprisonment. The claim came about in this way. Commander Boaks has a motor car on which there are a number of placards or notices which

* The text of s. 14 (1), (3) is printed at p. 989, letter G, post.

A direct attention to danger on the roads. For some time he has pursued a campaign with a view to lessening danger on the roads. Whether his way of doing that is right or wrong is neither here nor there, today. From time to time he had trouble with the police, and he paid quite a few visits to Bow Street Magistrates' Court. On Oct. 1 of last year he had his motor car in Wellington Street and he stopped at the corner of Wellington Street and the Strand. A police officer B wished him to proceed, as the lights were in his favour, but he did not do so: in the result a charge was preferred against him of wilfully obstructing the free passage of the highway by causing a crowd to assemble. Over and above the notices on the car there is a loudspeaker attached to it, though I do not know that that was used on the day in question.

The charges which were made against the plaintiff were twofold. He was C charged under the Highway Act, 1835, s. 72, with the offence of "wilfully obstructing the free passage of any such highway" which is punishable by a fine not exceeding 40s. He was also charged under the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 89 of which provides:

"No person in charge of a motor vehicle or trailer shall cause or permit the D motor vehicle or trailer to stand on a road so as to cause any unnecessary obstruction thereof";

and the penalty for breach of that regulation is a fine not exceeding £20. His case was heard before the magistrate, Mr. Bertram Reece, the defendant in this action, on Oct. 3. The defendant came to the conclusion that the charge was proved. He was a little concerned when he found how many times the plaintiff E had been before the court on a charge of that kind. He had been before the same magistrate (the defendant) on several occasions. The defendant, being satisfied that the case was established, had asked for the record of the plaintiff. He found that the plaintiff had a long list of previous convictions of a similar character. He was rather puzzled how to deal with the matter, having regard to his duty to the public and to the plaintiff. He was impressed by the fact F that the plaintiff claimed to be vested with some power to override the police in their control of the traffic on the highway and to disregard the automatic traffic lights whenever he pleased: his demeanour in the box showed that he did not intend to desist from his activities on the highway. As the defendant said, he had to consider what was the appropriate approach to a case of a man with that record and outlook; he decided to remand the plaintiff. He did not grant G bail. The result was that the plaintiff was taken to Her Majesty's Prison at Brixton, where he remained for seven days. He made application for release, either by the grant of bail or in some other way, on occasions, but he remained there for seven days. The medical officer had not found anything wrong in his mental condition: he had objected to being medically examined. He was then taken back to Bow Street and came before the same magistrate, the defendant. H He was determined not to desist from the course of conduct which he had pursued, whereupon the defendant ordered a conditional discharge for twelve months. That having been done, the plaintiff commenced this action against the defendant in which he claimed damages for false imprisonment. The defence admitted most of the facts alleged, and said in para. 4:

"The said remand of the plaintiff in custody was made by the defendant I pursuant to and was authorised and rendered lawful by the provisions of s. 14 (3) and (4) and s. 105 (1) (a) of the Magistrates' Courts Act, 1952."

The case was heard before PILCHER, J., and a jury last June. Certain questions were put to the jury, having been agreed between the plaintiff in the case and counsel for the defendant; and these questions, in so far as they are of importance, were answered in favour of the magistrate, the defendant in the action. The jury found that at the time the defendant signed the committal order the section under which the plaintiff was convicted was stated on the committal order as

s. 14 (3) of the Magistrates' Courts Act, 1952. They also found that the defendant was not vindictive. That question had been put to them, I assume, at the request of the plaintiff. After the verdict of the jury the learned judge had to determine the point of law whether or not the defendant had a right to remand the plaintiff in the circumstances and in the way in which he did. That depends now on three sections in the Magistrates' Courts Act, 1952. A

In order to appreciate the point, it is perhaps desirable to look a little further back into the history of this branch of the legislation. Under s. 14 of the Magistrates' Courts Act, 1952, a magistrate is given a general power to adjourn the trial of a case which is before him; under s. 14 (3) of that Act B

"A magistrates' court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so, the adjournment shall not be for more than three weeks at a time." C

It is under that section that the defendant claimed to have acted, and was found by the jury to have acted, in this case.

The plaintiff submitted to this court that the defendant's order was made for the purpose of having a medical inquiry, and that s. 14 of the Act of 1952 did not apply. He said that a remand for that purpose could only be made under s. 26 of the Act of 1952, and then only if the offence which was charged was an offence punishable on summary conviction with imprisonment, and that neither of the offences of which he was accused before the defendant was an offence punishable on summary conviction with imprisonment. Therefore it was claimed by the plaintiff that the defendant's order remanding him to Brixton Prison for a week was unlawful, and that his imprisonment in Brixton was false or wrongful imprisonment. Those are the matters that had to be considered. D

I cannot help thinking that there is a little misunderstanding on the part of the plaintiff on the law. I would not have him think that I do not appreciate what he has said in this court, nor the stand which he has taken up. In the course of yesterday afternoon I did go out of my way, perhaps, to indicate to him that he would have an easier life if he did not go about each day looking for trouble. That has nothing to do with the point of law raised. I wish, though, that I could persuade him, or that someone could, that life would be easier for him, and easier for the police, and for others, if he helped the police rather than if he took his own line on what should be done in regard to traffic lights. E

On the legal position, it is right that I should refer to the Summary Jurisdiction Act, 1848. Section 16 provided: F

"... Before or during such hearing of any such information or complaint it shall be lawful for any one justice, or for the justices, in their discretion, to adjourn the hearing of the same to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective attorneys or agents then present, and in the meantime the said justice or justices may suffer the defendant to go at large, or may commit him to the common gaol or house of correction, or other prison, lock-up house, or place of security . . ." G

That section of the Summary Jurisdiction Act, 1848, gave to the magistrates a general power to adjourn a case. H

A question arose over the years whether that covered a right to adjourn the hearing after the defendant in such a case had been proved to be guilty to the satisfaction of the magistrate; and to set that matter at rest there was included in the Criminal Justice Act, just one hundred years later, s. 25 of the Criminal Justice Act, 1948, which is headed: I

"Power of courts of summary jurisdiction to adjourn a case after conviction and before sentence."

A The section is declaratory of the law. Sub-section (1) is all that I need read:

"It is hereby declared that the powers of a court of summary jurisdiction under s. 16 of the Summary Jurisdiction Act, 1848, to adjourn the hearing of a case includes power, after a person has been convicted and before he has been sentenced or otherwise dealt with, to adjourn the case for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with his case: Provided that a court of summary jurisdiction shall not for the purpose aforesaid adjourn the hearing of a case under the said s. 16 for any single period exceeding three weeks."

B

Thus, s. 25 of the Act of 1948, read with s. 16 of the Act of 1848, makes it clear beyond measure that the justices had, either before or after conviction, a right to adjourn a case, and that right extended to a right to adjourn for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. There is no question so far.

C

The Criminal Justice Act, 1948, by s. 26 (1) enacted:

"Without prejudice to any powers exercisable by a court under the last foregoing section, where a person is charged before a court of summary jurisdiction with an offence punishable on summary conviction with imprisonment, and the court is satisfied that the offence has been committed by that person but is of opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, the court shall remand him in custody or on bail (with or without sureties) for such period or periods, no single period exceeding three weeks, as the court thinks necessary to enable a medical examination and report to be made."

D

E

It will be observed that the section puts a duty on the court—an imperative duty. If the court is of opinion that inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, "the court *shall* remand him". That is more than a power: it is a direction.

F

The commencing words of s. 26 are: "Without prejudice to any powers exercisable by a court". There was no need for those words, in my view. The direction in s. 26 of the Act of 1948 is something over and above the power given to the magistrates in the other section I have mentioned, and it does not take anything away from it.

G

Thereafter there came the Magistrates' Courts Act, 1952, which is a consolidating Act*. I have already referred to s. 14 of that Act, but it is right that I should read sub-ss. (1) and (3) to show what the state of the law is. Section 14 reads:

"(1) A magistrates' court may at any time, whether before or after beginning to try an information, adjourn the trial, and may do so, notwithstanding anything in this Act, when composed of a single justice.

H

"(3) A magistrates' court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so, the adjournment shall not be for more than three weeks at a time."

It is under that sub-section—that is, s. 14 (3)—that the defendant dealt with the case of Lieutenant Commander Boaks, the plaintiff.

I

The plaintiff in his address to the court this morning pointed out that this court owed a duty to the public to see that magisterial power was not abused. He said that that which had been done in his case was a monstrous power if it was used as it was in this case, and that he, the plaintiff, was wrongfully deprived

* The long title to that Act reads "An Act to consolidate certain enactments relating to the jurisdiction of, and the practice and procedure before, magistrates' courts and the functions of justices' clerks, and to matters connected therewith, with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949".

of his liberty. I cannot look on the case in that way, and I will state why I cannot in a few words. Section 14 of the Act of 1952, which is a combination of the powers given by s. 16 of the Summary Jurisdiction Act, 1848, and s. 25 of the Criminal Justice Act, 1948, gives the magistrate or a stipendiary or a metropolitan magistrate certain powers of adjournment. It is not to be assumed that a magistrate will exercise lightly a power to remand in custody for a week or for three weeks a person who comes before him. But there are cases (and the defendant seems to have thought this was one of them) where it is desirable, in the interests of the person before the court, as well as in the interests of the public, that proper inquiries should be made. Some instances were mentioned in argument yesterday: sometimes it occurs that a man is found guilty of insulting behaviour, but has led a perfectly good life in other respects; if he commits the same type of offence again and again the magistrate may well think—"What is the use of a small fine each time? Is there not something more that can be done to help the man?" It may be that the man himself will not take advice of a kind that he ought to take. The magistrate has power under s. 14 to remand him for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. He must not order a remand in custody for more than three weeks at a time. A magistrate who makes such an order realises that he is depriving the person before him of his liberty for a period. No magistrate wants to do that in such a case. But if he comes to the conclusion that it is best, in the interests of the man before him and of the public and of everyone, that time should be given for inquiries to be made to help him, the magistrate, as to the best way of dealing with the case, he has the right to exercise the power given to him by Parliament. It is not a power which is often exercised, I imagine; but sometimes a case arises. If a magistrate in such circumstances believes it his duty to take that course, I do not think that it can be described as an exercise of a "monstrous" power; it is a power given by Parliament.

The plaintiff disputes the right of the magistrate to make the order which he made under s. 14 (3) of the Act of 1952. He drew our attention to s. 26 (1) of the same Act:

"If, on the trial by a magistrates' court of an offence punishable on summary conviction with imprisonment, the court is satisfied that the offence has been committed by the accused, but is of opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined, the court shall adjourn the case to enable a medical examination and report to be made and shall remand him; but the adjournment shall not be for more than three weeks at a time."

It was submitted by the plaintiff that the power which was exercised by the defendant was a power given by s. 26 of the Act, but that it could only be exercised if the offence was one punishable on summary conviction with imprisonment, which was not this case. It was pointed out that s. 26 did not include at its commencement the words "Without prejudice to any powers exercisable by a court under the last foregoing section", as s. 26 of the Criminal Justice Act, 1948, did. So it was argued that the course which was taken could only be taken if the conditions of s. 26 were fulfilled, and they were not. In other words, the argument was that in view of s. 26 of the Act of 1952, s. 14 really had no bearing and could not be used. I do not accept that argument. Section 14 of the Act of 1952 preserves the right to adjourn which the magistrates had before the Act of 1952 was passed. Section 26 of the Act of 1952 is, as s. 26 of the Act of 1948 was, an imperative section: it places a duty on the magistrates to adjourn in a case punishable on summary conviction with imprisonment, if the magistrates are of opinion that an inquiry ought to be made into the physical or mental condition of the man. If they have formed the opinion that a physical and mental examination is necessary, they must not deal with the case until that examination is made.

A I have said already that the words which appear at the commencement of s. 26 of the Act of 1948—"Without prejudice",* etc.—were in my view unnecessary. They are omitted from s. 26 of the Act of 1952. The position is that there remains a general power to order an adjournment of a case for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case. That is what was done. Under s. 26 there is an imperative
B duty to adjourn a case in the events set out in that section. The one does not disturb or destroy the other.

In my opinion the learned judge was right, on the verdict of the jury to enter judgment for the defendant. He did so. The plaintiff appeals to this court. He has conducted his case with propriety in every way, but I am satisfied that this appeal fails and should be dismissed.

C **JENKINS, L.J.:** I agree. The findings of the jury on the five questions put to them dispose of the plaintiff's primary contention that the order remanding him in custody was made without jurisdiction, in that it was made under s. 26 (1) of the Magistrates' Courts Act, 1952, and that the jurisdiction under that provision only arose in the case of offences punishable on summary conviction with imprisonment. The offences with which the plaintiff was charged in this case
D did not answer that description; but it must now be taken, having regard to the jury's findings, that the plaintiff was in fact remanded in custody by an order made under s. 14 (3) of the Act of 1952. The appeal therefore resolves itself into the narrow point whether the defendant had jurisdiction to make that order under s. 14 (3) of the Act of 1952, read in conjunction with sub-s. (4) of the same section and s. 105 of the same Act.

E SINGLETON, L.J., has gone fully into the relevant legislation leading up to s. 14 (3); and for the reasons he has given (to which I cannot usefully add anything) I agree that the order complained of by the plaintiff was made with jurisdiction, and consequently that his claim that the order made was a nullity, with the result that he was committed to prison under an order which had not
F been validly made, must fail; and it follows that this appeal should be dismissed.

I should perhaps add that this court is in no way concerned with the merits or demerits of the plaintiff's views as to the management of traffic. The sole question before us is the pure question of law whether he was rightfully or wrongfully remanded in custody—that is to say, whether the order was made with jurisdiction or not. In my view it was made with jurisdiction, and the appeal
G fails for that reason.

PARKER, L.J.: I entirely agree, and I will only add a few words lest the plaintiff should feel that this court has not fully appreciated his points. So far as the main point is concerned, I entirely agree with what my Lords have said, and I would only add that it seems to me that s. 28 of the Magistrates' Courts
H Act, 1952, puts the matter beyond all doubt. That section is a section dealing with the power of magistrates to commit to quarter sessions with a view to a Borstal sentence. Sub-section (2) says:

"Before committing any person for sentence under this section, the court shall consider any report or representations made by or on behalf of the Prison Commissioners on the offender's physical and mental condition and his suitability for a sentence of Borstal training; and if the court has not
I received such a report or representations it shall after conviction adjourn the hearing in accordance with s. 14 (3) of this Act and remand the offender in custody to enable the report or representations to be made."

It seems clear, therefore, that that sub-section recognises that in certain cases a remand for a medical report may be made under s. 14 (3).

* See p. 989, letters C to F, ante.

So much for that point. As I understand it, the plaintiff takes two further points. The first one (which strictly, I think, is not covered by the grounds of appeal) is this, that, there being power under s. 14 (4) to remand a defendant when an adjournment is made under sub-s. (3), and there being power under s. 105 of the Act, when such a remand is made, to remand a man on bail, the magistrate ought in this case to have remanded him on bail on condition that he subjected himself to medical examination. The plaintiff puts it somewhat forcefully: he says: "Here is a case in which I could only be fined, and that to a maximum of £20, and here I was put in prison". The answer to that is clear, that the defendant had power to do what he did: it was within his discretion to remand the plaintiff in custody or on bail. If, of course, the defendant failed to give the plaintiff an opportunity to be put on bail because of some vindictive motive, that would be clearly an abuse of power, but the jury here have negatived any such view.

The other point which the plaintiff takes is this, that there was a misdirection by the learned judge in his summing-up to the jury. In his summing-up the learned judge said:

"However, when you are considering that, you have to bear this in mind, that when finally the plaintiff was released and taken back to Bow Street at the end of the seven days and brought up once again before the defendant, the defendant said to him: 'Well, now, will you give some form of undertaking that you will stop all this stupid nonsense?' and he (the plaintiff) said: 'Certainly not'. . . . So he had not got what he wanted because the plaintiff had been unwilling to submit himself to a medical examination, and then he asked the plaintiff: 'Will you give me an undertaking not to behave in this way?', and the plaintiff said 'Certainly not'."

In this court the plaintiff complains that he never used the words "Certainly not". He said (in effect) that he would not give up his right (as he felt it was) to stay in the road, even though the traffic lights are in his favour, until all pedestrians within range have passed. It is quite clear that when the learned judge was referring (and the defendant was referring) to an undertaking to "stop this stupid nonsense", he was referring to an undertaking not to hold himself out as the traffic controller and usurp the position of the police. I can see no misdirection by the learned judge, and, accordingly, that point also fails.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitor: *Treasury Solicitor* (for the defendant, the magistrate).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

[END OF VOLUME THREE.]



